IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0973

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

Petitioner Below, Petitioner,

v.

BOBBY BEAVERS,

Respondent Below, Respondent.

PETITIONER'S REPLY BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

JOHN H. BOOTHROYD,
W. Va. Bar No. 6769
ASSISTANT ATTORNEY GENERAL
7 Players Club Drive, Suite 2
Charleston, WV 25311
(304)-558-1425 (tel)
(304)-558-1282 (fax)
John.H.Boothroyd@wv.gov
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

OTHER

ASSIGNMENTS OF ERROR IN REPLY TO RESPONDENT'S BRIEF

1. Marijuana use is not an element of proof needed to show that a certified person tested positive for cannabinoids/THC.

2. The Board erred in as much as it found a SAMHSA certified laboratory's testing process to be unreliable and inaccurate where there was no supporting evidence for such a finding.

3. West Virginia Code § 22A-1A-1 does not provide a defense to a positive test for cannabinoids/THC based upon the lack of intent to consume or "abuse" THC or the hardship a suspension of certifications would impose on the certified person.

4. Substantive changes in the substance abuse screening policy and program are a legislative matter.

STATEMENT OF CASE IN REPLY TO RESPONDENT'S BRIEF

The West Virginia Office of Miners' Health, Safety and Training ("OMHST") agrees with the characterization made by Respondent in his Brief that the drug testing shows only whether Respondent's urine contained THC metabolites above the cutoff level/standard used in United States Department of Transportation ("USDOT") drug testing. (Respondent's Brief at p. 10). OMHST also agrees with Respondent that the drug testing, in and of itself, cannot show that the THC metabolites came from ingesting marijuana or another source. (Respondent's Brief at p. 10). OMHST, however, disagrees with Respondent that, as a matter of law, it has to prove actual marijuana use was the source of the THC, as opposed to prove that he tested positive for cannabinoids/THC, in order to suspend Respondent's mining certifications under W. Va. Code § 22A-1A-1.

It appears from Respondent's Brief that he does not contest that OMHST proved by a preponderance of the evidence that his urine sample did contain THC metabolites above the cutoff level set forth in 49 C.F.R. Part 40. (Respondent's Brief at p. 10, 12-13). Instead, the primary argument is that OMHST did not prove Respondent used marijuana. OMHST, however, is concerned that the circuit court order can be read that a SAMHSA[1] certified laboratory may not have been able to distinguish between THC and CBD, and could not be relied upon to prove a positive test for THC. The overbroad language used by the circuit court matters and the Board of Appeal's ("Board") procedural and evidentiary errors need to be addressed by this Court.

Finally, OMHST's disagrees with Respondent's invitation to ignore clear statutory language and find that Respondent did not test positive for cannabinoids/THC because he did not intend to ingest THC, he was not "abusing" THC, the source of THC was a legal CBD product, and the suspension will cause a substantial hardship. The current statutory scheme represents a number of policy choices and compromises made by the Legislature and should not be revised by the Board or a circuit court in order to reach the outcome desired by Respondent.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

OMHST requested oral argument under Rule 20. OMHST would also be agreeable with oral argument under Rule 19, if determined to be more appropriate.

[1] United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration.

ARGUMENT

1. "Marijuana use" is not an element of proof needed to show that a certified person tested positive for cannabinoids/THC.

Respondent contends that OMHST had to prove that he used marijuana and not just that he had THC in his urine. If this legal contention is true, then, certainly Respondent should not have his mining certifications suspended. However, W. Va. Code § 22A-1A-1 and W. Va. Code R. § 56-19-5.3.2 require that certified persons be tested for the substance "cannabinoids/THC" and, if positive for that substance, that the certified person shall have his certifications suspended for a minimum of 6 months.[2] W. Va. Code § 22A-1A-2(c). The Legislature could have required that certified persons in West Virginia be tested for the substance "marijuana," but it did not.

OMHST reasserts its legal arguments made in its Brief. Additionally, OMHST argues as follows:

THC is still an intoxicant whether from marijuana or CBD.

Marijuana consists of many different compounds, only one of which is an intoxicant – THC. West Virginia Code § 22A-1A-1 tests for that one critical compound. The fact that the intoxicating compound may have been taken through use of a CBD product does not make the THC any less intoxicating. THC is still an intoxicant whether in marijuana or in CBD. Indeed, West Virginia has limited the lawful amount of THC which can be contained in CBD to .03 percent, because THC at higher levels is an intoxicant despite the presence of CBD in the same product. W. Va. Code § 19-12E-3(g). If the CBD contains more than .03 percent THC, it is not legal. If the quantity of THC is sufficiently high, it does not matter that it was in a CBD product. Under W. Va. Code § 22A-1A-1, testing for THC looks for a minimum level of THC and not

[2] 49 C.F.R. § 40.85 requires that USDOT test for "marijuana metabolites." 49 C.F.R. § 40.87, however, sets forth that this "marijuana metabolite" is chemically THCA (Delta-9-tetrahydrocannabinol-carboxylic acid), which is the primary metabolite for THC and the substance tested for under W. Va. Code § 22A-1A-1(a)(1)(B).

whether the source is legal or illegal. This is similar to breath alcohol testing under W. Va. Code R. § 56-19-5.4, which looks for a minimum level of breath alcohol even though the source of the alcohol is most likely legal. This Court should decline Respondent's invitation to rewrite W. Va. Code § 22A-1A-1 so that certified persons are now allowed to ingest THC in any quantity and work in mines as long as the THC comes from CBD products.

The Legislature did not intend that testing for cannabinoids/THC to be a meaningless act.

If OMHST has to prove actual marijuana use as an element of its case, as argued by Respondent, it will never be able to prove such an element using the USDOT drug testing system mandated by W. Va. Code § 22A-1A-1 and W. Va. Code R. § 56-19-5.6. USDOT drug testing tests only for the THC metabolite. OMHST is unaware of any THC drug test which specifically proves marijuana use or disproves CBD use. Marijuana contains both THC and other cannabis plant materials/compounds, including CBD. If marijuana has been used, test results will always show the presence of CBD metabolites along with THC metabolites. If CBD has been used, test results will also always show the presence of CBD metabolites along with THC metabolites. Any positive test results for THC will always be consistent with the possibility of CBD use causing the THC to be present in the urine. In order to prove actual marijuana use, OMHST would need the certified person to gratuitously admit marijuana use or for witnesses to come forward with knowledge of the certified person having used marijuana right before the drug test.[3] Even then, OMHST would be unable to prove that this admitted marijuana use was sufficient to

[3] The Board of Appeals has taken the position that a certified person has a right to not testify in these matters. Any testimony or evidentiary deposition would require the certified person's consent to testify or be deposed. Even if the Board would require the certified person to testify or be deposed, he or she can easily lie and deny marijuana use. As a matter of reality, if the certified person lies, OMHST does not have resources to investigate a person's private life to gather evidence of and prove suspected marijuana use.

cause the certified person's urine to be over the cutoff level for THC, unless the certified person also denies ever using CBD products or any other product that could contain THC.

If OMHST has to prove actual marijuana use, the current required testing for cannabinoids/THC would have little or no evidentiary value. If a positive test for THC under USDOT drug testing standards is not proof of a positive test for THC, the statute would be requiring employers to conduct a meaningless drug test for THC. It is presumed, however, that the Legislature does not pass meaningless legislation. Syl. Pt. 4, *State ex rel. Hardesty v. Aracoma – Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc.*, 147 W. Va. 645, 129 S.E.2d 921 (1963). It is also presumed that the Legislature was familiar with the USDOT drug testing program, including its testing for THC metabolites when it enacted W. Va. Code § 22A-1A-1 and when it required testing for "cannabinoids/THC." *Repass v. Workers' Compensation Div.*, 212 W. Va. 86, 101, 569 S.E.2d 162, 177 (2002). The Legislature knew what USDOT testing was capable or incapable of demonstrating and crafted legislation which assigned legal consequences to such positive drug tests. When the Legislature required certified miners to be tested for cannabinoids/THC, it intended that such drug testing have meaning and be sufficient proof to trigger the suspension of mining certifications.

The Legislature did not intend that the drug testing program be vague and unenforceable.

"Marijuana use" is not cited or defined anywhere in W. Va. Code § 22A-1A-1 or in W. Va. Code R. § 56-19-1 *et seq*. If proof of "marijuana use" is not tethered to the current drug testing for THC, "marijuana use" as an element of proof becomes vague and unenforceable. Proof of such an element would leave many open questions as to what actually has to be shown to meet the burden of proof for "marijuana use." Does OMHST have to prove that a certified person used marijuana more than one time? Does the marijuana use have to be recent? Can

OMHST rely on an admission of marijuana use or witness testimony to prove marijuana use, even if testing does not show THC metabolites above the cutoff level? If a positive test is required, what type of marijuana metabolites have to be present in the urine and in what quantity? Does OMHST have to prove that these metabolites came partially or wholly from marijuana and not another source?

The only way to prove "marijuana use" in a fair, consistent way is to use defined standards and procedures, such as the standards and procedures found in a drug test. This is what the Legislature did. This is the legislative intent behind the current drug testing program and the program's requirement that drug testing follow the standards and procedures in 49 C.F.R. Part 40.

W. Va. Code § 22A-1A-1 tests for "cannabinoids/THC" and requires that such testing follow the USDOT standards and procedures in 49 C.F.R. Part 40. It is a positive test for THC or more specifically THC metabolites consistent with the standards in 49 C.F.R. Part 40 that W. Va. Code § 22A-1A-1 and W. Va. Code R. § 56-19-1 *et seq.* reference and that OMHST has to prove. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *State v. Gen. Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959). This straightforward view that a positive test for cannabinoids/THC is all that is required as proof has already been confirmed in *Dean v. W. Va. Ofc. of Miners' Health, Safety, and Training*, 2016 WL 3463465 (2016) ("It is clear from the language of the rule that the only relevant inquiry is whether the certified individual tested positive for a prohibited substance. Neither the statute nor the rule require respondent to prove intentional consumption of marijuana.").

If Marijuana use as an "element" of proof, then evidence of CBD use does not have to be provided by a certified person.

If marijuana use is an element to be proven by OMHST,[4] then Respondent did not have to demonstrate CBD use. All a certified person needs to do is to demand OMHST prove to the Board that he or she did not use CBD. When OMHST is unable to rule out CBD use, the certified person wins even if he or she has never actually touched a CBD product. The Board's first 3 findings of fact regarding Respondent's CBD use are irrelevant to the case – all that matters was the Medical Review Officer's testimony that the USDOT testing only looks for THC and does not show whether the THC came from marijuana or a CBD product. Moreover, Respondent's policy argument that certified persons' use of CBD should be treated differently than certified persons' use of marijuana also is irrelevant. Respondent, here, invites this Court to create an additional element of proof, marijuana use, in order to avoid the "unjust" result of punishing CBD users, and at the same time effectively invites this Court to not place any evidentiary burden on the CBD user to demonstrate that he or she is a CBD user or that the result is "unjust." If the policy goal is to exempt only CBD users from the consequences of a positive test for THC, requiring "marijuana use" as an element of proof would not further such a goal.

No test exists which can prove marijuana use.

OMHST is aware of Labcorp's test (https://www.labcorp.com/assets/17241) which is cited by Respondent in footnote 5 of his Brief. While the test is offered by a SAMHSA certified laboratory, this particular test has not been endorsed or certified by SAMHSA or the USDOT. Labcorp's test provides a ratio of CBD metabolites to THC metabolites in the person's urine and

[4] "CBD use" as a legal defense, in contrast, requires that the certified person put on a prima facie case that he or she actually used CBD and not marijuana/other THC source. Once a prima facie case has been established, OMHST would be required to prove by a preponderance of the evidence that the positive test was not due to CBD use.

interprets whether that ratio is "consistent with the use of CBD products only," "indeterminant," or "consistent with use of either marijuana, THC products, or mixed use." It does not provide quantitative results as to whether THC metabolites or specifically THC metabolites from "marijuana" exceeded the USDOT cutoff levels. Labcorp's test, moreover, describes the above ratio categories as "interpretation" and warns that "[i]nterpretative ranges are provided as guidance and should not be considered definitive. Interpretation or results should include consideration of all relevant clinical and diagnostic information." Any test result interpretation of "consistent with use of either marijuana, THC products, or mixed use" would not be sufficient proof of marijuana use or that marijuana/THC levels are above any cutoff level.[5]

Even if testing existed, which accurately distinguishes between THC from marijuana and CBD and could be used to prove marijuana use, such testing is not procedurally available for OMHST. West Virginia Code § 22A-1A-1 *et seq.* and W. Va. Code R. § 56-19-1 *et seq.* do not require a certified person to have his or her remaining split urine specimen tested and do not authorize OMHST to seize the remaining split urine specimen and test it for CBD metabolites. USDOT rules, 49 C.F.R. Part 40, also do not provide for the testing of the remaining split urine specimen for CBD metabolites to rule out any CBD use. Neither West Virginia nor the USDOT contemplated the need for additional, mandatory testing in order to prove a positive test for cannabinoids/THC came from marijuana. In the absence of coercive rules, there is no reason for

[5] While the Labcorp's CBD to THC ratio test was not any part of the evidence at the Board hearing, OMHST has talked with Labcorp about what this test can do or does not do and has reviewed an underlying scientific study regarding this testing. When Labcorp was asked whether a person could use marijuana and take a sufficient amount of CBD product to mask the marijuana use, Labcorp could not rule out that possibility. Respondent's assertion that there is laboratory testing which will separate marijuana and CBD users and that West Virginia should rely on such a test is premature.

a certified person to authorize such testing if it is OMHST's burden to prove marijuana use or disprove CBD use as a possibility.

2. The Board erred in as much as it found a SAMHSA certified laboratory's testing process to be unreliable and inaccurate where there was no supporting evidence for such a finding.

The Board made only four findings of fact. As worded, OMHST does not argue that these finding of fact are clearly wrong. OMHST, however, would strongly disagree with the subsequent circuit court's decision, in as much as this decision takes the Board's limited finding of fact "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" and tranforms this finding into a legal conclusion that the SAMHSA certified laboratory's [Medtox's] testing may have been unable to distinguish between THC and CBD and was thus too unreliable to be sufficient proof that Respondent had THC metabolites in his urine in excess of the cutoff level.[6]

OMHST reasserts its legal arguments made in its Brief. Additionally, OMHST raises the following concerns:

The overbroad language matters because, given that marijuana contains both THC and CBD, a SAMHSA certified laboratory that mistakes CBD for THC and has no method to distinguish THC metabolites from CBD metabolites, will always have incorrect and invalid test

[6] "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... 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. (A. at p. 8).

results for THC.[7] If it is genuinely believed that SAMHSA certified laboratories may be making such fundamental and obvious mistakes and are still being certified, there should be no point in West Virginia requiring SAMHSA certified laboratories to test for THC. This belief, however, presumes that SAMHSA certified laboratories simply do not know how to test for THC[8] or that SAMHSA certification or split specimen testing would not catch such obvious mistakes. Such erroneous testing for THC, if it occurred, would quickly be discovered by any other laboratory doing a retest of the split urine specimens,[9] and the rogue laboratory would quickly lose SAMHSA certification.

The legislature required drug testing to be conducted by SAMHSA certified laboratories because these laboratories are considered the gold standard for drug testing. The SAMHSA certification is prima facie proof that the laboratory is able to conduct accurate and reliable testing for THC. The SAMHSA certified laboratory testing in the present case was deemed to have possibly committed a fundamental error based solely upon the testimony of a witness, Dr. Carasig, who was not part of Medtox's testing process, not an expert witness on GC-MS testing methods, and not given the task of reviewing Medtox's testing process under USDOT rules, 49 C.F.R. Part 40. Dr. Carasig testified several times that she did not know about Medtox's testing process used for GC-MS testing and could not answer the Board's questions, i.e., speculate as to

---

[7] Such a mistake could have devastating consequences. A certified person whose urine sample has 10 nanograms of the THC metabolite per milliliter and 10 nanograms of CBD metabolites per milliliter would be erroneously found to have 20 nanograms of the THC metabolite per milliliter and to be above the cutoff level for a positive test.

[8] The laboratory that tested Respondent's urine was Medtox. Medtox is a subsidiary of Labcorp and does CBD THC ratio testing for Labcorp, which has been cited by Respondent (https://www.labcorp.com/assets/17241). Such a test would necessarily require Medtox's testing processes to be able to distinguish between CBD and THC metabolites.

[9] W. Va. Code R. § 56-19-8.3 requirement that the split specimen be tested if the certified person is contesting the test results' accuracy, ensures that any "questioned" results are reviewed by another independent laboratory and serves as an important method to check on the first laboratory's testing.

whether the testing process could distinguish between THC and CBD metabolites. Nonetheless, this testimony was sufficient for two Board members, neither of whom are required to have a scientific background in GC-MS drug testing, to disregard legitimate test results from a SAMHSA certified laboratory. This testimony was sufficient despite Respondent not challenging the testing process and not having his split specimen retested by another SAMHSA certified laboratory of his own choice. If all that is required to disregard a SAMHSA certified laboratory's test is for the certified person or the Board to solicit any witness to testify that he or she does not know what testing process the laboratory used, statutorily requiring SAMHSA certification is meaningless.

3. West Virginia Code § 22A-1A-1 does not provide a defense to a positive test for cannabinoids/THC based upon the lack of intent to consume or "abuse" THC or the hardship a suspension of certifications would impose on the certified person.

OMHST does not have any evidence to disagree with Respondent's characterization of his circumstances in this matter. Outside of the test results, OMHST does not have evidence which contradicts the evidence that Respondent did not intend to take THC, used CBD for medical reasons, did not actively "abuse" marijuana and that a 6-month suspension would cause a serious hardship. None of these grounds, however, would statutorily defeat an otherwise positive test for THC.

OMHST does recognize that the 6-month minimum suspension of mining certifications under W. Va. Code § 22A-1A-2(c) is a hardship. The Legislature could have given the Board the discretion to impose a lesser penalty or suspend the penalty, but it did not. The Legislature intended such a hardship as a penalty and deterrent.

Neither the employer, OMHST nor the Board have any discretion to ignore clear statutory directives because they do not like the resulting suspension of mining certifications

based upon the certified person's circumstances. The employer is required to report any positive drug tests to OMHST. W. Va. Code §§ 22A-1A-1(d)(1) and (2). OMHST is required to suspend the mining certifications upon notice of a positive drug test. W. Va. Code § 22A-1A-1(d)(4). The Board is required to suspend the mining certifications if it determines there is a positive drug or alcohol test. W. Va. Code § 22A-1A-2(c). The statutes eliminate any discretion to not suspend a certified person because it is deemed that he or she has "compelling" grounds against suspension even though the drug test was positive. The employer cannot choose to not report those employees who are deemed good workers or essential to their business. OMHST cannot ignore a report of a positive test because the suspension would cause a hardship or because the circumstances do not indicate that the certified person has a drug or alcohol problem warranting his or her suspension from mine work. The Board cannot ignore a positive test because it believes the certified person did not intend to use the prohibited substance. See *Dean*, supra. The Legislature could have given the employer, OMHST and the Board the discretion or authority to consider all of the circumstances surrounding Respondent's positive test and disregard a positive test result because the penalty is deemed "unjust," but it did not do so.

OMHST is ill equipped to investigate and determine whether a certified person's claimed circumstances or compelling grounds are true or not. OMHST is similarly ill equipped to determine without statutory guidance issues regarding whether the certified person was "abusing" the substance, whether the certified person had a good or legitimate excuse for the substance being present in the certified person's system, or whether a minimum 6 month suspension is a substantial hardship. Reading into the statute that OMHST has discretion to prosecute or the Board has discretion to dismiss a case based upon whether it deems a particular suspension is just or unjust or whether a certified person is "abusing" the substance or not serves

an open invitation for OMHST and the Board to make arbitrary and capricious decisions and to apply the substance abuse program in an unequal manner.

4. Substantive changes in the substance abuse screening policy and program are a legislative matter.

Respondent's argument that a certified miner should not lose his mining certifications because testing cannot distinguish between the THC in marijuana and the THC in CBD, is a substantive policy argument. Similarly, the Legislature's decisions to require drug testing, to follow USDOT standards and procedures, and to suspend mining certifications if the certified person tests positive for certain substances, were all substantive policy decisions. The overall statutory scheme represents the Legislature's consideration of all of the competing policy issues and of what is needed to best promote the safety of the miners. W. Va. Code § 22A-6-1(a)(1). A requirement that OMHST prove marijuana use when the statute requires only a positive test for cannabinoids/THC would fundamentally change and torpedo the existing statutory scheme regarding THC use. It is not the province of the Board or Courts to impose their own policy preferences or ideas when it will substantively alter the existing legislative schemes.

CONCLUSION

For all the foregoing reasons, the OMHST respectfully requests that this Court reverse the circuit court and the Final Order of the Board of Appeals, find that OMHST proved Respondent tested positive for "Cannabinoids/THC" and grant relief as deemed appropriate in this matter.

Respectfully submitted,

WEST VIRGINIA OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING,
By counsel

PATRICK MORRISEY
ATTORNEY GENERAL

JOHN H. BOOTHROYD
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar ID. No. 6769
7 Players Club Drive, Suite 2
Charleston, WV 25311
PH: (304) 558-1425
FAX: (304) 558-1282
Attorney for OMHST

CERTIFICATE OF SERVICE

I, John H. Boothroyd, Assistant Attorney General, do hereby certify that I have this 14th day of May 2021, served a true copy of the foregoing Reply Brief on the following by depositing the same in the United States Mail, certified mail, return receipt, postage prepaid, addressed as follows:

Lonnie Simmons
DiPiero, Simmons, McGinley & Bastress, PLLC
P.O. Box 1631
Charleston, WV 25326
Counsel for Appellee

Christopher D. Pence
Hardy Pence, PLLC
10 Hale Street, 4th Floor
Charleston, WV 25301

West Virginia Board of Appeals
7 Players Club Drive, Suite 2
Charleston, WV 25311

JOHN H. BOOTHROYD, Bar ID 6769