**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**



**JAMES ATKINSON**
**Plaintiff Below, Petitioner,**

**v.**

**Docket No.: 22-ICA-233**
**Harrison Civil Action No.: 22-C-130-2**

**MEDTOX LABORATORIES, INC,**
**and NCI NURSING CORPS.**
**Defendants Below, Respondents.**

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

# PETITIONER'S BRIEF

Filed by,

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**II. The Circuit Court Erred by Disregarding Count 27, Count 31, Count 35, Count 36, Count 37, Count 41 and Numerous Other Counts and Paragraphs of Petitioner's Complaint.**

**III. The Circuit Court Erred In Finding That The Actions and Services Performed By Defendant NCI Nursing Corps. Constitute Health Care As Defined By The MPLA.**

## STATEMENT OF THE CASE

The parties are identified herein as James Atkinson, Petitioner, by and through counsel, Jeffrey M. Strange, and the law firm of Booth & Strange, against MedTox Laboratories, Inc. and NCI Nursing Corps., Respondents. On or about July 14, 2020, the Petitioner, James Atkinson ("Petitioner" or "Mr. Atkinson") had been an employee of the Harrison County Coal Company, working in its Harrison County coal mine, for more than eighteen years. Mr. Atkinson had built a stellar reputation and had been promoted many times to the point that Mr. Atkinson was a mine belt supervisor earning over one hundred thousand dollars ($100,000) per year.

Mr. Atkinson had never had a safety violation and had never been accused of violating any mine rules or regulations in the eighteen years he had been working for the Harrison County Coal Company. On or about July 14, 2020, Mr. Atkinson was randomly selected to submit to a urinalysis drug screening. On or about July 16, 2020, Mr. Atkinson was informed that his urinalysis results included a positive finding for "marijuana (THC) metabolite" in the amount of 32 ng/ml (nanograms per milliliter).

Mr. Atkinson was immediately suspended from his job without pay, and shortly thereafter Mr. Atkinson was terminated from his job and all his miner's certifications were suspended by the West Virginia Office of Miners' Health, Safety and Training ("WVOMHST"). Mr. Atkinson demanded that the split sample of his urine be tested, as allowed under West Virginia law and the rules and regulations applicable to miners in West Virginia, as promulgated and overseen by the WVOMHST. Mr. Atkinson's split sample was sent to Alere laboratory; it was received and tested by said laboratory on or about August 10, 2020 and returned a positive result for "THCA 24 NG/ML."

In the meantime, because Mr. Atkinson was certain he had not ingested or otherwise used any illegal drugs or anything else that violated the rules and regulations of the United States Department of Transportation ("DOT"), WVOMHST or any other laws or rules or regulations applicable to coal miners, Mr. Atkinson voluntarily submitted to, and paid for, a hair follicle drug test.

On August 3, 2020, Mr. Atkinson went to the MedExpress location in Clarksburg, West Virginia, and had 1.5 inches (3.81 centimeters) of his hair harvested for the purpose of being laboratory tested for the presence of any illegal drugs in Mr. Atkinson's blood stream during the approximately thirty (30) days prior to August 3, 2020 (which date range would approximate to July 4, 2020 through August 3, 2020). Said hair follicle test was paid for by Mr. Atkinson, but was conducted following all appropriate laboratory protocols, including documentation of chain of custody, and said test showed negative for all tested drugs, which included "Marijuana, Cocaine, Amphetamines, Methamphetamines, Opiates and PCP."

Mr. Atkinson later learned that a longer sample of hair could be tested to provide an approximately one year look back for the presence of drugs in Mr. Atkinson's blood stream, so Mr. Atkinson chose to pay for and submit himself to another hair follicle drug test.

On October 6, 2020, Mr. Atkinson, after making arrangements with a laboratory, again presented to MedExpress in Clarksburg, West Virginia, and had an approximately six-inch (6") sample of his hair harvested and submitted for a drug screen. This hair sample was submitted to Expertox laboratory in Winter Park, Florida, and said sample, which states thereon represents an "(a)approximately 1 year timeframe" showed negative for all twelve drugs tested… marijuana, amphetamine/MDA, methamphetamine/MDMA, opiates, cocaine, benzodiazepines, barbiturates, methadone, propoxyphene, phencyclidine, meperidine and

tramadol.

Mr. Atkinson protested the WVOMHST suspension of his miner's certifications. In the process of litigating Mr. Atkinson's protest of the suspensions of his WVOMHST certifications, the nurse/technician who conducted the random drug screening testified that he did not conduct the drug screening in accordance with 49 CFR § 40 and West Virginia Code § 22A-1A-1. 49 CFR § 40 and West Virginia Code § 22A-1A-1, the applicable laws, rules and regulations for parties collecting urine samples for miners, require that said parties subscribe to a mandated list-serve and receive refresher training no less frequently than every five years. The nurse/technician who collected the urine samples on July 14, 2020, at the Harrison County Mine, testified that he did not subscribe to any list-serve, and that he had not received refresher training in the previous five years. The nurse/technician further testified that he did not have any documentation showing that he met the requirements of 49 CFR § 40. 49 CFR § 40.33, expressly states "(t)o be permitted to act as a collector in the DOT drug testing program, **you must meet each of the requirements of this section**." 49 CFR § 40, emphasis added. The nurse/technician's failure to subscribe to the USDOT Office of Drug and Alcohol Policy and Compliance ("ODAPC") list-serve, failure to have received refresher training in the five years prior to July 14, 2020, and failure to have documentation with him establishing his compliance with adhere to 49 CFR § 40 and West Virginia Code § 22A-1A-1 automatically render any testing he conducted null and void because he could not act as a collector pursuant to those code sections. Despite the technician's failures, the Respondents did not void or otherwise disqualify the drug screen.

As a result of Respondents' failures and lack of oversight, Mr. Atkinson was unable to work for more than a year and was forced to use his personal savings to support his family as

Mr. Atkinson is the sole provider in his home (his wife is a stay-at-home mother). Mr. Atkinson also suffered permanent and irreparable damage to his reputation and was forced to take a lower ranking and less paying job to get back to work in the coal mines. Mr. Atkinson has been emotionally injured and still fears unknown negative actions against him resulting from Respondents' failures.

## SUMMARY OF ARGUMENT

### I. The Circuit Court Erred In Finding That The Claims in Petitioner James Atkinson's ("Petitioner") Complaint Fall Under The West Virginia Medical Professional Liability Act, West Virginia Code § 55-7B-1, et seq. ("MPLA").

Petitioner's Complaint is solely based on the Respondents' failure to adhere to Federal and State laws, rules and regulations applicable to parties administering urine tests to coal miners, specifically 49 CFR § 40 and West Virginia Code § 22A-1A-1. The Court, and the Respondents, are misapplying the term "professional malpractice" as used by the Petitioner in his underlying Complaint. The Respondent used the term "professional malpractice" as a catchall to explain that Respondents and their employee or agent committed professional malpractice by failing to meet the requirements of 49 CFR § 40 and West Virginia Code § 22A-1A-1. Specifically, Respondents' employee or agent failed to subscribe to the USDOT ODAPC list-serve, failed to have received refresher training in the five years prior to July 14, 2020, and failure to have documentation with him establishing his compliance with adhere to 49 CFR § 40 and West Virginia Code § 22A-1A-1.

As alleged herein, Respondent's violations of West Virginia and Federal law caused James Atkinson to be wrongfully terminated, to lose his miner's certifications, to lose more than a year of employment, to spend his life savings and all of the other damages that befell Mr. Atkinson as a result of the July 14, 2020, drug screen. None of these things involves or

otherwise implicates the West Virginia MPLA. Mr. Atkinson was never a patient of either respondent, as defined by the MPLA, and neither Respondent performed health care for Mr. Atkinson as defined by the MPLA. See 49 CFR § 40 and West Virginia Code § 22A-1A-1. See also West Virginia Code § 55-7B-1, et seq.

**II. The Circuit Court Erred by Disregarding Count 27, Count 31, Count 35, Count 36, Count 37, Count 41 and Numerous Other Counts and Paragraphs of Petitioner's Complaint.**

As previously stated, the Petitioner's Complaint is solely based on the Respondents' failure to adhere to Federal and State laws, rules and regulations applicable to parties administering urine tests to coal miners, specifically 49 CFR § 40 and West Virginia Code § 22A-1A-1. Counts 27, 31, 35, 36, 37 and 41, as well as numerous other paragraphs and sections of Petitioner's underlying Complaint clearly refer to Federal and State laws applicable to parties conducting urine tests for coal miners, an action that clearly falls outside the definitions of health care and patient in the MPLA. See 49 CFR § 40 and West Virginia Code § 22A-1A-1. See also West Virginia Code § 55-7B-1, et seq.

**III. The Circuit Court Erred In Finding That The Actions and Services Performed By Defendant NCI Nursing Corps. Constitute Health Care As Defined By The MPLA.**

Urine Testing for miners is not health care as defined by the MPLA, West Virginia Code § 55-7B-2(e). The MPLA defines health care as follows:

> "'Health care' means:
> (1) Any act, service, or treatment provided under, pursuant to, or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment;,
> (2) Any act, service, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement, including, but not limited to, staffing medical transport, custodial care, or basic care, infection control, positioning,. hydration, nutrition, and similar patient services; and

> (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging, and supervision of health care providers." W. Va. Code § 55-7B-2(e).

Random drug testing of miners is not "provided under, pursuant to, or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment" it is testing performed pursuant to rules and regulations promulgated and controlled by the United States Department of Transportation and the West Virginia Office of Miners Health, Safety and Training to ensure, or at least enhance, the safety of miners. See 49 CFR § 40 and West Virginia Code § 22A-1A-1.

The DOT and WVOMHST rules and regulations also control and provide rules and requirements for parties or entities performing the collection of specimens and the drug testing for those coal miners, which means that those activities do not fall within the definition of "health care" or otherwise fall under the auspices of the MPLA. See W.Va. Code § 55-7B-1, et seq. See also See 49 CFR § 40 and West Virginia Code § 22A-1A-1.

West Virginia Code§ 55-7B-2(m) further illustrates the flaw in NCI's arguments, as it defines a patient as follows:

> "'patient' means a natural person who receives or should have received health care from a licensed health care provider under a contract, expressed or implied." W. Va. Code§ 55-7B-2(m).

Neither Mr. Atkinson, nor any of the other miners tested on July 14, 2020, at the Harrison County Mine, was ever a patient of NCI Nursing Corps or Medtox Laboratories. NCI's arguments directly contradicts its Motion to Dismiss; in addition to the fact that the allegations in the Complaint do not meet the MPLA's definitions of "Health Care" or "Patient," the Complaint makes no allegations that expressly or impliedly aver that NCI or Medtox are "Health Care Provider(s)," pursuant to West Virginia Code § 55-7B-2(g):

> "'Health care provider' means a person, partnership, corporation, professional limited liability company, health care facility, entity, or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech- language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medic!]l diagnosis or treatment; or an officer, employee, or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment." W.Va. Code § 55-7B-2(g).

Mr. Atkinson was never a patient of any sort, in relation to the random urine drug screen that was performed on location at his place of employment, the Harrison County Mine.

## ORAL ARGUMENT AND DECISION

The Petitioner requests oral argument. This case qualifies for oral argument under Rule 20(3) of the West Virginia Rules of Appellate Procedure, as the dispositive issue or issues have not been authoritatively decided.

## ARGUMENT

### Standard of Review

"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." *Lauderdale v. Neal*, 212 W.Va. 184, 569 S.E.2d 431 (2002), citing *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

## I. Circuit Court Erred In Finding That The Claims in Petitioner James Atkinson's ("Petitioner") Complaint Fall Under The West Virginia Medical Professional Liability Act, West Virginia Code § 55-7B-1, et seq. ("MPLA").

Petitioner, James Atkinson ("Mr. Atkinson" or "Petitioner"), objects to, and disagrees with Respondent's, NCI Nursing Corps.' ("NCI" or "Respondent NCI") claims that the allegations contained in the Complaint filed in the above styled matter fall under the auspices of the West Virginia Medical Professional Liability Act, West Virginia Code§ 55-7B-l, et seq. ("MPLA"), and the Circuit Court's ruling thereon.

NCI's Motion to Dismiss references the definition of "Health Care" as provided by West Virginia Code § 55-7B-2(e), but notably fails to provide the actual definition, which is:

> "'Health care' means:
> (1) Any act, service, or treatment provided under, pursuant to, or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment;,
> (2) Any act, service, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement, including, but not limited to, staffing medical transport, custodial care, or basic care, infection control, positioning,. hydration, nutrition, and similar patient services; and
> (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging, and supervision of health care providers." W. Va. Code § 55-7B-2(e).

As the Court can see, the collection and testing of a coal miner's urine does not fall within any of the definitions of health care provided by West Virginia Code§ 55-7B-2(e), supra. Random drug testing of miners is not "provided under, pursuant to, or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment/' it is testing performed pursuant to rules and regulations promulgated and controlled by the United States Department of Transportation ("DOT") and the West Virginia Office of Miners Health, Safety and Training ("WVOMHST") to ensure, or at least enhance, the safety of miners. Id.

The DOT and WVOMHST rules and regulations also control and provide rules and requirements for parties or entities performing the collection of specimens and the drug testing for those coal miners, which means that those activities do not fall within the definition of "health care" or otherwise fall under the auspices of the MPLA. W. Va. Code§ 55-7B-1, et seq.

West Virginia Code§ 55-7B-2(m) further illustrates the flaw in NCI's arguments, as it defines a patient as follows:

> "'patient' means a natural person who receives or should have received health care from a licensed health care provider under a contract, expressed or implied." W. Va. Code§ 55-7B-2(m).

Neither Mr. Atkinson, nor any of the other miners tested on July 14, 2020, at the Harrison County Mine, was ever a patient of NCI Nursing Corps or Medtox Laboratories. NCI's arguments directly contradict its Motion to Dismiss; in addition to the fact that the allegations in the Complaint do not meet the MPLA's definitions of "Health Care" or "Patient," the Complaint makes no allegations that expressly or impliedly aver that NCI or Medtox are "Health Care Provider(s)," pursuant to West Virginia Code § 55-7B-2(g):

> "'Health care provider' means a person, partnership, corporation, professional limited liability company, health care facility, entity, or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, **any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee, or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment**." W.Va. Code § 55-7B-2(g), emphasis added.

Mr. Atkinson was never a patient of any sort, in relation to the random urine drug screen

that was performed on location at his place of employment, the Harrison County Mine. The random urine drug screen in question was **ONLY** performed to adhere to the requirements set forth in 49 CFR § 40 and West Virginia Code § 22A-1A-1.

The Supreme Court of Appeals of West Virginia has provided clear guidance on this issue in its ruling in *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, wherein it ruled:

"(s)imply because a claim is contemporaneous to or related to health care does not mean that it falls under the West Virginia Medical Professional Liability Act; that is, you must have the anchor claim, fitting the definition of 'health care' under the act, and then make the showing that the ancillary claims are (1) contemporaneous with or related to that anchor claim, and (2) despite being ancillary, are still in the context of rendering health care." *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, 2021 WL 5446109 (2021).

As stated supra, none of the allegations in the Complaint in this matter fall within the definition of "health care" in the MPLA, and. Mr. Atkinson is not and has never been a patient of NCI Nursing Corps. or Medtox Laboratories, Inc. *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, 2021 WL 5446109 (2021), at pages 358-359; see also W.Va. Code § 55-7B-2(e), 2(g) and 2(m).

The Supreme Court of West Virginia's ruling in *State ex rel. West Virginia University Hospitals, Inc. v. Scott* provides further guidance to the instant situation in its finding that the West Virginia Legislature's intent when it amended the MPLA in 2015 was to "broadly apply to services encompassing patient care." *Id.* Mr. Atkinson's Complaint contains no allegations that can be construed to identify Mr. Atkinson as a patient. *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, 2021 WL 5446109 (2021), at page 359; see also W. Va. Code§ 55-7B- 2(m).

## II. The Circuit Court Erred by Disregarding Count 27, Count 31, Count 35, Count 36, Count 37, Count 41 and Numerous Other Counts and Paragraphs of Petitioner's Complaint.

Respondents are a professional laboratory and a professional nursing management

company, both of which are responsible for, and required to adhere to applicable laws, including having their respective employees and contractors maintain training and knowledge standards mandated by said applicable laws, rules and regulations, specifically, and at a minimum, 49 CFR § 40 and West Virginia Code § 22A-1A-1.

Respondents contracted with the Harrison County Coal Company to administer random drug screens of Harrison County Coal Company employees. Respondents' failure to send properly qualified personnel, as required by the USDOT, WVOMSHT and Federal and West Virginia law, immediately and automatically invalidates any drug screen performed by said personnel. As a direct and proximate result of the Respondent's failure, Petitioner James Atkinson was irreparably harmed emotionally, professionally and financially; his professional and public reputation was damaged, he lost seniority and his hard earned position with his employer, and he was forced to use his life savings and take lesser paying jobs outside of his field of expertise to provide for his family.

49 CFR §§ 40.31 and 40.33 expressly state:

49 CFR § 40.31: Who may collect urine specimens for DOT drug testing?

> (a) Collectors meeting the requirements of this subpart are the only persons authorized to collect urine specimens for DOT drug testing.
>
> (b) A collector must meet training requirements of § 40.33.
>
> (c) As the immediate supervisor of an employee being tested, you may not act as the collector when that employee is tested, unless no other collector is available and you are permitted to do so under DOT agency drug and alcohol regulations.
>
> (d) You must not act as the collector for the employee being tested if you work

for a HHS-certified laboratory (e.g., as a technician or accessioner) and could link the employee with a urine specimen, drug testing result, or laboratory report.

49 CFR § 40.33: What training requirements must a collector meet?

To be permitted to act as a collector in the DOT drug testing program, you must meet each of the requirements of this section:

(a) Basic information. You must be knowledgeable about this part, the current "DOT Urine Specimen Collection Procedures Guidelines," and DOT agency regulations applicable to the employers for whom you perform collections. DOT agency regulations, the DOT Urine Specimen Collection Procedures Guidelines, and other materials are available from ODAPC (Department of Transportation, 1200 New Jersey Avenue SE., Washington DC, 20590, 202-366-3784, or on the ODAPC Web site (https://www.transportation.gov/odapc). You must keep current on any changes to these materials. You must subscribe to the ODAPC list-serve at: https://www.transportation.gov/odapc/get-odapc-email-updates.

(b) Qualification training. You must receive qualification training meeting the requirements of this paragraph. Qualification training must provide instruction on the following subjects:

(1) All steps necessary to complete a collection correctly and the proper completion and transmission of the CCF;

(2) "Problem" collections (e.g., situations like "shy bladder" and attempts to tamper with a specimen);

(3) Fatal flaws, correctable flaws, and how to correct problems in collections; and

(4) The collector's responsibility for maintaining the integrity of the collection process, ensuring the privacy of employees being tested, ensuring the security of the specimen, and avoiding conduct or statements that could be viewed as offensive or inappropriate;

(c) Initial Proficiency Demonstration. Following your completion of qualification training under paragraph (b) of this section, you must demonstrate proficiency in collections under this part by completing five consecutive error-free mock collections.

(1) The five mock collections must include two uneventful collection scenarios, one insufficient quantity of urine scenario, one temperature out of range scenario, and one scenario in which the employee refuses to sign the CCF and initial the specimen bottle tamper-evident seal.

(2) Another person must monitor and evaluate your performance, in person or by a means that provides real-time observation and interaction between the instructor and trainee, and attest in writing that the mock collections are “error-free.” This person must be a qualified collector who has demonstrated necessary knowledge, skills, and abilities by -

(i) Regularly conducting DOT drug test collections for a period of at least a year;

(ii) Conducting collector training under this part for a year; or

(iii) Successfully completing a “train the trainer” course.

(d) You must meet the requirements of paragraphs (b) and (c) of this section before you begin to perform collector functions.

(e) Refresher training. No less frequently than every five years from the date on which you satisfactorily complete the requirements of paragraphs (b) and (c) of this section, you must complete refresher training that meets all the requirements of paragraphs (b) and (c) of this section.

(f) Error Correction Training. If you make a mistake in the collection process that causes a test to be cancelled (i.e., a fatal or uncorrected flaw), you must undergo error correction training. This training must occur within 30 days of the date you are notified of the error that led to the need for retraining.

(1) Error correction training must be provided and your proficiency documented in writing by a person who meets the requirements of paragraph (c)(2) of this section.

(2) Error correction training is required to cover only the subject matter area(s) in which the error that caused the test to be cancelled occurred.

(3) As part of the error correction training, you must demonstrate your proficiency in the collection procedures of this part by completing three consecutive error-free mock collections. The mock collections must include one uneventful scenario and two scenarios related to the area(s) in which your error(s) occurred. The person providing the training must monitor and evaluate your performance and attest in writing that the mock collections were “error-free.”

> (g) Documentation. You must maintain documentation showing that you currently meet all requirements of this section. You must provide this documentation on request to DOT agency representatives and to employers and C/TPAs who are using or negotiating to use your services.

West Virginia Code § 22A-1A-1 states, in pertinent part:

"Split samples shall be collected by providers who are certified as complying with standards and procedures set out in the United States Department of Transportation's rule, 49 C. F. R. Part 40, which may be amended, from time to time, by legislative rule of the Office of Miners' Health, Safety, and Training. Collected samples shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) for collection and testing." W.Va. Code § 22A-1A-1(a).

The plain language of 49 CFR § 40 and West Virginia Code § 22A-1A-1 makes it clear that these statues, and not the MPLA, govern Petitioner's underlying Complaint in this matter. The Respondents failed to adhere to 49 CFR § 40 and West Virginia Code § 22A-1A-1, and the testing performed was only for purposes of those code sections. Petitioner's underlying Complaint cited or referenced the aforementioned code sections in numerous paragraphs and sections, including, but not limited to paragraphs (or Counts as identified by Respondents) 27, 31, 35, 36, 37 and 41. The Circuit Court's failure to acknowledge these paragraphs, or the fact that the allegations in the Complaint address Respondent's failure to adhere to mine safety laws, rules and regulations that are promulgated and enforced by the US DOT and the WVOMHST constitutes clear error.

## III. The Circuit Court Erred In Finding That The Actions and Services Performed By Defendant NCI Nursing Corps. Constitute Health Care As Defined By The MPLA.

As previously detailed herein, urine drug testing for miners is not health care as defined by the MPLA, West Virginia Code § 55-7B-2(e), it is conducted pursuant to laws, rules and regulations of the US DOT and the WVOMHST. The MPLA defines health care as follows:

> "'Health care' means:
> (1) Any act, service, or treatment provided under, pursuant to, or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment;,
> (2) Any act, service, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement, including, but not limited to, staffing medical transport, custodial care, or basic care, infection control, positioning,. hydration, nutrition, and similar patient services; and
> (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging, and supervision of health care providers." W. Va. Code § 55-7B-2(e).

Random drug testing of miners is not "provided under, pursuant to, or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment" it is testing performed pursuant to rules and regulations promulgated and controlled by the United States Department of Transportation and the West Virginia Office of Miners Health, Safety and Training to ensure, or at least enhance, the safety of miners. See 49 CFR § 40 and West Virginia Code § 22A-1A-1. There is no plan of care, and no testing is performed on the urine obtained pursuant to the test, other than for illicit drugs. If a miner tested pursuant to 49 CFR § 40 and West Virginia Code § 22A-1A-1 were to become ill or die after submitting to a urine drug screen pursuant to 49 CFR § 40 and West Virginia Code § 22A-1A-1, that miner or his heirs would have no cause of action against the mine or the Respondents, because there was no medical service provided and no medical testing performed.

The DOT and WVOMHST rules and regulations control the purpose and parameters of the urine drug testing of miners, and provide rules and requirements for parties or entities performing the collection of specimens and the drug testing for those coal miners, which means that those activities do not fall within the definition of "health care" or otherwise fall under the auspices of the MPLA. See W.Va. Code § 55-7B-1, et seq. See also 49 CFR § 40 and West Virginia Code § 22A-1A-1.

West Virginia Code § 55-7B-2(m) further illustrates the flaw in Respondent's arguments and the Circuit Court's ruling, as West Virginia Code § 55-7B-2(m) defines a patient as follows:

> "'patient' means a natural person who receives or should have received health care from a licensed health care provider under a contract, expressed or implied." W. Va. Code§ 55-7B-2(m).

Neither Mr. Atkinson, nor any of the other miners tested on July 14, 2020, at the Harrison County Mine, was ever a patient of NCI Nursing Corps or Medtox Laboratories, nor did they receive health care from a license health care provider pursuant to the testing. In fact, neither Mr. Atkinson nor any of the other miners tested pursuant to 49 CFR § 40 and West Virginia Code § 22A-1A-1 have the ability to obtain medical care, or become a patient, as a result of the testing performed. The miners do not even have the ability to obtain custody of the remainder of the urine sample tested, should they want to use same to have their medical provider test it for another purpose. NCI's arguments directly contradicts its Motion to Dismiss; in addition to the fact that the allegations in the Complaint do not meet the MPLA's definitions of "Health Care" or "Patient," the Complaint makes no allegations that expressly or impliedly aver that NCI or Medtox are "Health Care Provider(s)," pursuant to West Virginia Code § 55-7B-2(g):

> "'Health care provider' means a person, partnership, corporation, professional limited liability company, health care facility, entity, or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech- language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee, or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment." W.Va. Code § 55-7B-2(g).

Mr. Atkinson was never a "patient" of any party, in any way, as defined by the MPLA pursuant to the random urine drug screen that was performed on location at his place of employment, the Harrison County Mine. The urine drug screen was performed for the sole purpose of miner safety pursuant to 49 CFR § 40 and West Virginia Code § 22A-1A-1. The drug screen does not constitute "health care" under the MPLA, and no "health care provider" as defined by the MPLA was involved in the process.

The Circuit Court's finding that the urine drug screen falls under the auspices of the MPLA is clear error, and must be reversed by remanding this matter to the Circuit Court for adjudication under the tort theories propounded by the Petitioner in his Complaint.

## CONCLUSION

WHEREFORE, the Petitioner prays that this Honorable Court vacate the Circuit Court's Order and remand the action such that it can be decided on its merits under all applicable statutes other than the West Virginia MPLA; and that the Court award the Petitioner any such further relief as the Court deems reasonable and just.

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**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

**JAMES ATKINSON,**
**Petitioner,**

**v.** **Docket No. 22-ICA-233**
**Harrison Case No.: 22-C-130-2**

**NCI NURSING CORPS and**
**MEDTOX LABORATORIES, INC.,**
**Respondents.**

## CERTIFICATE OF SERVICE

I, Jeffrey M. Strange, do hereby certify that I have served the foregoing "Petitioner's Brief" and accompanying certificate of service by transmitting a true and correct copy of same into the File & ServeXpress system, this 28th day of February, 2023, which system will serve counsel of record, which includes the following parties:

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