IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner Below, Petitioner,

v.

DOCKET NO. 20-0973
(Kanawha County Circuit Court Civil Action No. 20-AA-62)

BOBBY BEAVERS,

Respondent Below, Respondent.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Board erred when it did not find that Respondent had tested positive for cannabinoids/THC.

   a. OMHST proved that a Substance Abuse and Mental Health Services Administration/SAMHSA-certified laboratory had tested Respondent's urine sample and found THC metabolites in excess of cutoff levels.

   b. Respondent did not have any explanation for the THC in his urine sample that would constitute a defense to a positive drug test for THC under West Virginia statute or legislative rule.

2. The Board erred when it concluded that the laboratory testing could not distinguish between THC and CBD and, thus, was unreliable.

   a. Respondent did not have his remaining split specimen tested by a second laboratory, which was the only procedural method to challenge the accuracy and reliability of the original laboratory's test results.

   b. The Board erroneously gave legal significance to the Medical Review Officer's lack of knowledge as to whether the laboratory's testing mechanism and methodologies could distinguish between THC and CBD, when the Medical Review Officer was not an expert on drug testing and was not called to testify on the laboratory's methodologies.

   c. The Board should have deemed the underlying test results as accurate, when no rebuttal evidence was presented at the hearing to show that the laboratory's testing was inaccurate or unreliable.

3. The Board does not have the authority to treat the consumption of a CBD product as a legal defense to a positive test for cannabinoids/THC, when neither West Virginia Code (W. Va. Code § 22A-1A-1 *et seq.*), West Virginia State Rules (W. Va. Code R. § 56-19-1 *et seq.*) nor United States Department of Transportation Rules (49 C.F.R. Part 40) provide for such a defense to an otherwise positive test.

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

STATEMENT OF CASE

Procedural History

Respondent, Bobby Beavers, tested positive for cannabinoids/THC[1] at a random substance abuse drug test while working in the West Virginia mining industry. As required by W. Va. Code § 22A-1A-1(d)(4), the West Virginia Office of Miners' Health, Safety and Training ("OMHST") suspended Respondent's mining certifications based upon the positive drug test. Respondent challenged the suspension on the ground that the positive test for THC was due to his use of a CBD product and not marijuana. CBD use, however, is not a defense to a positive test for cannabinoids/THC under W. Va. Code § 22A-1A-1 *et seq.*, OMHST's legislative rules, W. Va. Code R. § 56-19-1 *et seq.*, or the rules and standards of the United States Department of Transportation's ("USDOT") Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 49 C.F.R. Part 40.

The Board of Appeals ("Board") heard Respondent's appeal and granted it, finding that Respondent had used CBD, that CBD is a legal product, that Respondent had been assured by a pharmacist that the CBD product would not cause a positive drug test, and that the Medical Review Officer was unable to testify whether the laboratory testing mechanisms and methodologies could distinguish between THC and CBD.[2]

On appeal, the Kanawha County Circuit Court upheld the Board's decision. The Circuit Court stated that the "most critical finding made by the Board" in support of the Board's decision

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[1] West Virginia Code § 22A-1A-1(a)(1) tests for "Cannabinoids/THC." It does not test for "marijuana."

[2] The Medical Review Officer was not a certifying scientist or a laboratory technician with the drug testing laboratory and was, by her own admission, not knowledgeable about the laboratory's methodology and testing mechanisms.

was that the Medical Review Officer testified several times that the testing in the case could not distinguish between THC and CBD and that "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" and that "the drug testing performed is incapable of distinguishing between CBD and THC." (Appendix at p8). The Circuit Court did not address in its decision whether CBD use is a defense to a positive test for THC and its decision did not reference any standards in W. Va. Code § 22A-1A-1 *et seq.*, W. Va. Code R. § 56-19-1 *et seq*, or USDOT rules, 49 C.F.R. Part 40.

Introduction

In 2012, the West Virginia Legislature enacted W. Va. Code § 22A-1A-1 *et seq.*, which requires employers in the coal mining industry to test its certified employees and prospective certified employees for certain drugs and alcohol. Under the required substance abuse screening policy and program, the employer of certified persons in the coal mining industry shall conduct, at a minimum, pre-employment drug and alcohol testing of its potential employees and random drug and alcohol testing of its existing employees. If a certified person tests positive for drugs or alcohol, submits or possesses a substituted or adulterated urine sample, or refuses to submit a urine sample, the employer must report the certified person to OMHST and the certified person is subject to have all of his or her mining certifications suspended.[3]

The drug and alcohol testing program under W. Va. Code § 22A-1A-1 is modeled after the USDOT drug and alcohol testing program, 49 C.F.R. Part 40. USDOT's standards and

[3] A certified person is someone who is certified by OMHST to perform mining work or safety sensitive work on mine property. A person who is not certified or is suspended by OMHST cannot lawfully perform certified work on mine property. Respondent faced a minimum six-month suspension. W. Va. Code § 22A-1A-2(c).

procedures for drug testing are to be followed by the collector, medical review officer, and laboratory. W. Va. Code R. § 56-19-5.6.

Statement of Facts

On February 11, 2020, Respondent underwent a random substance abuse drug and alcohol test while working for Onyx Energy, LLC. (A. at p147). Respondent provided a urine sample to the designated collector and this urine sample was sent to Medtox Laboratories ("Medtox") for testing. (A. at p147). Medtox was certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration ("SAMHSA") to conduct drug testing of urine. W. Va. Code § 22A-1A-1(a)(1); (A. at p161 - p162). Respondent's urine sample tested positive for "cannabinoids/THC." (A. at p66, p148). More specifically, the laboratory confirmation test showed the presence of marijuana (THC) metabolites, Carboxy-THC (THCA), above the 15 nanogram cutoff level in Respondent's urine sample. (A. at p148). Under USDOT standards, the presence of 15 nanograms or more per milliliter of the metabolites for marijuana/THC, Carboxy-THC (THCA), in a person's urine sample is a positive test for marijuana. 49 C.F.R. §§ 40.3 and 40.87. This test result is also considered a positive test for cannabinoids/THC under W. Va. Code § 22A-1A-1(a)(1).

OMHST temporarily suspended Respondent's mining certifications due to Respondent's February 11, 2020, positive test for cannabinoids/THC. (A. at p167 - p172). In its letter to Respondent on February 19, 2020, OMHST informed Respondent of his right to appeal this suspension to the Board and provided "contested case hearing instructions." These instructions informed Respondent that he must notify the Director of OMHST of his intent to challenge the collection methods, the laboratory test results, or the medical review officer's verification of the

laboratory test result. The instructions also informed Respondent that if he intends to challenge the laboratory test results he "shall have the split sample tested, at his/her expense, at a SAMHSA-certified laboratory and those results verified by a medical review officer" and that "[n]o other form of evidence shall be admissible to challenge the laboratory test result." (A. at p171 - p172).

Respondent did not get his split urine specimen sample tested by another SAMHSA-certified laboratory.

On or about February 26, 2020, pursuant to W. Va. Code § 22A-1A-2 and W. Va. Code R. § 56-19-6.5, Respondent appealed to the Board and challenged the temporary suspension of his mining certifications. (A. at p166). Respondent's written letter of appeal did not set forth any specific legal or factual grounds which he intended to raise at his appeal. (A. at p166).

On April 16, 2020, the Board held a hearing on Respondent's appeal. At this hearing Respondent represented that CBD use had caused the positive test and that he did not have an issue with the testing itself. (A. at p21 – p24, p25). The hearing was then continued to April 23, 2020, so that Respondent could obtain and submit documentary evidence in support of his CBD use claim. (A. at p43).

At the April 23, 2020 hearing, Respondent stipulated that he was engaging in certified employment subject to drug and alcohol testing under W. Va. Code § 22A-1A-1(a), that he was properly subjected to a random drug test, and that the collection process for his urine sample was done properly. (A. at p50, p52, p53). OMHST, as such, did not present the testimony of the employer or the collector. OMHST also did not call a certifying scientist or laboratory technician or witness from Medtox because legislative rules require that Respondent challenge

the laboratory results by having the urine sample retested by another laboratory and Respondent had not given any notice or verbal indication that he was challenging the accuracy of the laboratory test results. Respondent indicated again that he was not contesting the testing procedures or the test review. (A. at p45). Respondent, however, indicated that he had had several negative drug screens done outside the workplace and was confused about whether he should stipulate to the February 11, 2020, test. (A. at p50 – p52). As such, OMHST presented the testimony of Dr. Dana Carasig, the Medical Review Officer who had reviewed and verified Respondent's positive result for marijuana/THC. (A. at p56 - p83).[4]

Under W. Va. Code R. §§ 56-19-3.13 and 7.1.4, a Medical Review Officer is a licensed physician who possesses "the ability and medical training necessary to verify positive confirmed test results and evaluate those results in relation to a certified person's medical history." Dr. Carasig testified that the laboratory results provided to her from Medtox were positive for marijuana/THC. (A. at p60, p148). Dr. Carasig reviewed the collection paperwork to verify that there were no issues with the collection and chain of custody prior to the laboratory's receipt of the urine sample. (A. at p58 – p60); 49 C.F.R. § 40.129/A. at p157. Dr. Carasig testified that her office contacted Respondent in order to review whether there was a legitimate medical explanation for Respondent's positive test. (A. at p60); 49 C.F.R. §§ 40.129, 40.137 and 40.141/A. at p157 – p159. Dr. Carasig testified that she was presented with Respondent's claim that he used CBD. (A. at p58, p62). Dr. Carasig testified that based upon USDOT rules, 49 C.F.R., Part 40, and published guidance, Respondent's use of a CBD product was not considered recognized grounds to excuse Respondent's positive test result. (A. at p62, p63, p74 - p76).

[4] The verification by the Medical Review Officer is the last step before a drug test is deemed a positive drug test subject to suspension. W. Va. Code R. § 56-19-6.4.1

On examination by the Board, Dr. Carasig was asked whether she reviewed the laboratory's methodology. (A. at p68). Under USDOT procedures, 49 C.F.R. § 40.129, the Medical Review Officer does not review or verify the laboratory's methodology used in the test. (A. at p157). Dr. Carasig answered that she knew about Medtox's methodology to the extent that the test results were based upon a confirmatory test using GCMS [gas chromatography/mass spectrometry] which ruled out false positives. (A. at p68). The Board then asked several questions as to whether the testing process, GCMS in particular, could differentiate between CBD and THC.[5] (A. at p68 - p73). Dr. Carasig testified that she was not a scientist or expert on drug testing methodologies and that she had not been part of the actual drug testing process. (A. at p69). Dr. Carasig did not know what specific testing mechanisms and methodologies were used by Medtox and was unable to affirmatively testify that Medtox's testing mechanisms and methodologies could distinguish between THC and CBD. (A. at p70 – p71). Respondent did not ask any questions of Dr. Carasig. (A. at p79).

In his defense, Respondent argued and presented evidence that he had bought and consumed a CBD product on February 10, 2020, and that he did not know or think that the CBD product would contain enough THC to cause a positive test on February 11, 2020.[6] Respondent testified that prior to purchasing the CBD product, he had asked the pharmacist whether the particular CBD product would cause him to test positive and was assured that it would not cause

[5] CBD may legally consist of up to 0.3 percent THC under W. Va. Code § 19-12E-3(g). CBD can simultaneously contain plant parts with THC and plant parts without THC.

[6] CBD products are not regulated or tested for THC content and it is understood that some CBD products do contain far more THC than 0.3 percent. The USDOT's CBD notice warns that CBD products could lead to a positive test for marijuana or THC. (A. at p154 – p155). Respondent apparently knew enough of this possibility to question the pharmacist as to whether the CBD product he was going to use would cause him to test positive for marijuana or THC.

him to test positive. (A. at p87 – p89, p139). Respondent denied he had used marijuana and presented evidence of drug tests taken on February 9, 2020; February 22, 2020; March 8, 2020; and March 22, 2020, which were all negative for tetrahydrocannabinol/marijuana.[7] (A. at p91 – p95, p141 - p146).

Respondent also testified that he had been told by the collector that he could not have his split specimen urine sample retested by another laboratory. (A. at p100 – p103). When this testimony was highlighted by the Board, OMHST stated that Respondent should have been able to have his urine sample retested and that the opportunity to test the split specimen was still available and, if the second laboratory's testing did not confirm the original positive result, the matter would be dismissed. (A. at p122 – p124). The Board then asked Respondent several times about whether he wanted this second test done. (A. at p129 – p134). Ultimately, Respondent did not want to continue the hearing to get the second test of his split specimen and waived his right to have his split specimen tested. (A. at p134).

After hearing both parties' evidence and argument, the Board granted, by a two to one vote, Respondent's appeal and challenge to the suspension of his mining certifications. (A. at p136). On June 8, 2020, the Board entered a Final Order reflecting its decision and made the following written findings:

> 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.

[7] There are no findings of fact by the Board regarding the accuracy, reliability or probative value of these drug tests introduced by Respondent. These tests appear to be preliminary or "instant" tests, subject to false positives and negatives.

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.

(A. at p10 - p12). Other than state that the appeal was granted, the Board's Order did not discuss its findings or draw legal conclusions from its findings. On appeal, the Circuit Court made 31 findings of fact. (A. at P1-P6). The Circuit Court concluded that Respondent did not intend to ingest THC and that testing could not distinguish between THC and CBD and, as such, did not support the suspension of Respondent's mining certifications. (A. at p8).

SUMMARY OF ARGUMENT

The Board erred when it excused Respondent's positive drug test for THC. Respondent stipulated that the collection of his urine sample was done properly. This urine sample was tested by a SAMHSA certified laboratory and the test results showed THC metabolites above the cutoff level. This was a positive test for THC. There was no requirement that OMHST prove Respondent "intentionally consumed" THC.

While he did not stipulate to the test results, Respondent did not substantively contest the test results. Respondent did not provide any testimony or documents showing testing was not done properly. More importantly, Respondent did not have his remaining split sample of urine tested by a second laboratory. West Virginia Code R. § 56-19-8.3 requires that Respondent notify OMHST of his intent to challenge the laboratory test results and, if Respondent wishes to contest the accuracy of the laboratory test results, he must have his remaining split specimen

tested by a second laboratory. No other evidence is admissible to challenge the accuracy of the first laboratory test result. W. Va. Code R. § 56-19-8.3. If the Respondent does not have the split specimen tested, the original laboratory results are to be accepted as if stipulated. W. Va. Code R. § 56-19-8.4. Because Respondent did not raise any substantive challenge, the laboratory test results should have been accepted by the Board as valid, accurate and inexcusable.

Notwithstanding Respondent's failure to challenge the laboratory test results, the Board's finding that the testing may have been inaccurate and, thus, excusable, was based solely upon the testimony from the Medical Review Officer, who was not a certifying scientist regarding Medtox's testing process. The Medical Review Officer testified several times that she did not know what testing mechanisms and methodologies the laboratory used. Her testimony regarding Medtox's methodologies was neither an expert opinion nor based upon personal observation. No substantive evidence was presented at the hearing to rebut the accuracy of laboratory test results admitted under W. Va. Code § 29A-5-2(b) and support the Board's disregard of the positive laboratory test results.

Once the laboratory test results are rightfully accepted as valid and accurate, Respondent's positive test for THC should have been upheld even if Respondent only used CBD. CBD use is not a recognized excuse or defense to a positive test for THC under the drug testing program for certified persons in the West Virginia mining industry. Neither West Virginia Code (W. Va. Code § 22A-1A-1 *et seq.*), West Virginia State Rules (W. Va. Code R. § 56-19-1 *et seq.*) nor USDOT Rules (49 C.F.R. Part 40) provide for such a legal defense to an otherwise positive test. USDOT Rules, in fact, affirmatively state that CBD use is not a defense or valid

justification for a positive drug test. 49 C.F.R. § 40.151(f). West Virginia Code § 22A-1A-1(a)(1), in fact, specifies that employers shall test for cannabinoids/THC, which would include testing for any THC deriving from CBD, a cannabinoid.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

OMHST requests oral argument under Rule 20. This appeal addresses whether CBD use can be used as a defense against a positive drug test for THC and is an issue of public interest to certified miners and the mining industry. This appeal also addresses specific evidentiary issues of proof which have not been resolved by this Court in the context of the substance abuse screening policy and program for the West Virginia coal mining industry.

ARGUMENT

Standard of Review

Pursuant to W. Va. Code § 22A-1A-2(d) "[a]ny party adversely affected by a final order or decision issued by the Board of Appeals hereunder is entitled to judicial review thereof pursuant to section four, article five, chapter twenty-nine-a of this code." Under W. Va. Code § 29A-5-4(g), this Court may affirm the order or decision of the Board, or remand the case for further proceedings. It is well settled law that this Court has the authority to reverse, vacate or modify the order or decision of the Board if the substantial rights of the Petitioner, including a petitioner state agency, have been prejudiced because the Board's findings, inferences, conclusions, decision, or order is:

(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.

W. Va. Code § 29A-5-4(g).

The Circuit Court's findings of facts and legal conclusions are reviewed *de novo* and receive no deference. *Tennant v. Callaghan*, 200 W.Va. 756, 761, 490 S.E.2d 845, 850 (1997). The West Virginia Supreme Court of Appeals reviews the Board's decision using the criteria in W. Va. Code § 29A-5-4(g).

1. The Board erred when it did not find that Respondent had tested positive for cannabinoids/THC.

As set forth below, all the statutory elements required to establish a positive test for cannabinoids/THC were met and proven.

a. OMHST established that Respondent's urine sample had been properly collected and that a SAMHSA-certified laboratory had tested Respondent's urine sample and found THC metabolites in excess of cutoff levels.

Respondent stipulated that he was properly subjected to a random test under W. Va. Code § 22A-1A-1(a)(2) and subject to having his mining certifications suspended upon a positive test for any of the 10 prohibited substances. (A. at p52, p53).

Respondent did not contest that the collector was certified as complying with the standards and procedures set forth by USDOT rules, 49 C.F.R. Part 40. (A. at p82, p83). Certification is required by W. Va. Code § 22A-1A-1(a)(1) to ensure that the collector is fully

qualified and is able to do a proper collection. Respondent affirmatively stipulated that the collection of his urine specimen was done properly. (A. at p50, p52).

Judicial notice was taken that Respondent's urine specimen was tested by a laboratory certified by SAMHSA. (A. at p79, p80). SAMHSA certification is required by W. Va. Code § 22A-1A-1(a)(1) and W. Va. Code R. § 56-19-7.1.2 to ensure that the laboratory conducts accurate and reliable drug tests.

Respondent's urine sample was collected and tested consistent with USDOT testing standards and procedures. W. Va. Code § 22A-1A-1(a) and W. Va. Code R. § 56-19-5.6 require the substance abuse drug screening program, including testing for cannabinoids/THC, follow the standards and procedures set forth in 49 C.F.R. Part 40. No affirmative evidence was raised at the hearing that the collector, the Medical Review Officer or the laboratory failed to follow a USDOT standard or procedure.

Medtox's testing found that Respondent's urine sample contained metabolites for THC in excess of 15 nanograms per milliliter. The standards set forth in 49 C.F.R. §§ 40.3 and 40.87, require the presence of 15 nanograms or more per milliliter of the metabolite for marijuana/THC, Carboxy-THC (THCA), in a person's urine sample in order for it to be considered a positive test for marijuana/THC. Respondent's urine sample was positive for THC under USDOT standards. Respondent's urine sample was correspondingly determined to be positive for "cannabinoids/THC" under W. Va. Code § 22A-1A-1. Respondent did not substantively contest the accuracy of the laboratory testing process and reported results.

West Virginia requires suspension of Respondent's mining certifications after a positive test for cannabinoids/THC. W. Va. Code § 22A-1A-1(d)(4); W. Va. Code § 22A-1A-2(c) ("For

all miners determined to have a positive drug or alcohol test as determined pursuant to the provisions of this article, the board shall suspend the miner's certification cards..."); W. Va. Code R. § 56-19-6.4.1; W. Va. Code § 56-19-8.1. The Board, instead, made no finding stating whether Respondent tested positive for THC and it did not suspend Respondent's mining certifications as was required by statute and legislative rules. This was clear error.

b. Respondent did not have any explanation for the THC in his urine sample which would constitute a defense to a positive drug test for THC under West Virginia statute or legislative rule.

Respondent's defense was that he had taken a CBD product and had unintentionally or unwillingly ingested THC thereby causing him to test positive for cannabinoids/THC. West Virginia law, however, does not require that OMHST prove that Respondent intentionally ingested marijuana or THC. West Virginia law only requires that OMHST prove that Respondent tested positive for cannabinoids/THC.

In a similar case involving a certified person who mistakenly and unintentionally ingested marijuana or THC,[8] this Court found:

> West Virginia Code of State Rules § 56-19-6.4.1 provides that if 'a person tests positive on a urine test for any of the ten substances identified in Subsection 5.3. of this rule then he or she is deemed to have failed the test by the medical review officer.' 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.

Dean v. W. Va. Ofc. of Miners' Health, Safety, and Training, 2016 WL 3463465 (2016)[9]

[8] In *Dean*, the Board found that the certified person had unknowingly eaten marijuana laced brownies causing him to test positive for marijuana and dismissed OMHST's petition to revoke Dean's mining certifications because he had not intended to ingest marijuana. The Circuit Court had reversed the Board ruling. On appeal, the West Virginia Supreme Court of Appeals affirmed the Circuit Court's reversal of the Board.

Since *Dean* was decided, the West Virginia Code and Code of State Rules have not changed regarding drug testing for cannabinoids/THC nor have the rules been amended to make the lack of intent to consume marijuana or THC a defense to a positive test. Similarly, USDOT standards and procedures, 49 C.F.R. Part 40, have not changed regarding marijuana/THC testing and CBD products. USDOT rules and USDOT's published "CBD" notice make clear that a positive test for marijuana/THC due to use of a CBD product remains a positive test. *See* 49 C.F.R. § 40.151(f) ("You [the Medical Review Officer] must not accept an assertion of consumption or other use of a hemp or other non-prescription marijuana-related product as a basis for verifying a marijuana test negative."); (A. at p154 - p155).

The only plausible, relevant statutory provision for excusing the use of a prohibited substance is W. Va. Code § 22A-1A-1(d)(1)(A) which modifies the statutory requirement for an employer to report positive drug tests and states "However, for purposes of determining whether a drug test is positive the certified employee may not rely on a prescription dated more than one year prior to the date of the drug test result." This provision modifies and limits the authority of the Medical Review Officer to excuse a positive test result when a certified person provides a medical prescription for the substance he or she tested positive for and establishes a "legitimate medical explanation" for the positive result even though the prescription is older than one year. *See* 49 C.F.R. §§ 40.137 and 40.139. The provision for medical prescriptions in W. Va. Code §

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[9] The Board's decision in the present matter is contrary to a relevant administrative decision by the West Virginia Public Employees Grievance Board regarding a workplace suspension where the employee tested positive for marijuana under USDOT rules and, similar to Respondent, claimed the result was due to CBD. See *Spears v. Division of Highways*, Docket No. 2019-0649-DOT, W. Va. Pub. Empl. Griev. Bd. (2019 WL 5873565). The Grievance Board upheld the suspension and found that "[w]hether Grievant's positive drug screen was as a result of marijuana use or CBD-oil use is immaterial. It is the substance THC that is prohibited."

22A-1A-1(d)(1)(A), however, does not apply to Respondent's situation. Respondent did not have a prescription (or equivalent under W. Va. Code § 16A-1-1 *et seq.* "Medical Cannabis Act") for either CBD or medical marijuana. Dr. Carasig also did not find that Respondent had a legitimate medical explanation under USDOT rules and guidance.

2. The Board erred when it concluded that the laboratory testing could not distinguish between THC and CBD and, thus, was unreliable.

The Board's finding 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" was cryptic.

In its "Conclusions of Law," the Circuit Court addressed this finding and stated:

> 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 p8).

The Circuit Court's factual conclusions were well outside of the evidence and the Board's limited finding. These conclusions are entitled to no deference. *Tennant*, 200 W.Va. at 761, 490 S.E.2d at 850.

Dr. Carasig's actual testimony on the matter was:

> Q: Isn't it true, though, that if you use the GCMS machine and then you use TFAA as a derivative that it can test positive for THC when the actual substance is CBD:

A: I guess, sir. I'm not a certified scientist. I don't work for the lab, so I don't do any testing. That's not something that we do as medical review officers.

(A. at p68, p69)

...

Q: My question is you cannot testify that the lab used a process or methodology that would distinguish between THC and CBD.

A: I don't know of anything like that. All I can tell you is that it's a confirmed result used for Delta-9 THC which is the active THC constant.

Q: But you don't know whether - -

A: (inaudible) You - -

Q: Doctor, let me ask you a question. You don't know what methodology or process the lab used to come to that result; is that correct?

A: To the extent that it's part of our training, they tell us that they use GCMS for confirmatory results. That's what we received, and that's what I can attest to that's what was provided to us.

(A. at p70, p71).

The Board's limited finding was an accurate summarization of Dr. Carasig's testimony. The Board's limited finding, however, did not support a factual or legal conclusion that Medtox's testing was not accurate and reliable or that OMHST failed to prove Respondent's urine sample tested positive for THC.

a. Respondent did not have his remaining split specimen tested by a second laboratory, which was the only procedural method to challenge the accuracy and reliability of the original laboratory's test results.

Under W. Va. Code R. § 56-19-1 *et seq.*, the laboratory test results are only challengeable by having the remaining split specimen urine sample tested by a different SAMHSA-certified laboratory. No other evidence is admissible to challenge the laboratory test results.

More specifically, W. Va. Code R. § 56-19-8.3 sets forth that:

> If the person submits notification in writing to the Director that he/she intends to challenge the laboratory test results or the medical review officer's verification of the laboratory test result, **that person shall have the split sample tested, at his/her expense, at a SAMHSA-certified laboratory and those results verified by a medical review officer**. The split sample results and the results of the split sample verification by a medical review officer shall be provided to the Director and the original medical review officer. **No other form of evidence shall be admissible to challenge the laboratory test result** of [sic] the medical review officer's verification of the test result.
> (Bold added).

W. Va. Code R. § 56-19-8.4 sets forth that:

> **If a person fails to comply with the notification requirements of this section**, then the sample collection methods, **the laboratory test results**, the medical review officer's verification of the laboratory test result, or the chemical test of breath **shall be admissible as though the person and the Director had stipulated to their admissibility**.
> (Bold added).

Respondent did not have his remaining split specimen urine sample tested by a second laboratory to find out if the original confirmation test results were correct.[10] As such, the laboratory's test results of a positive result for THC metabolites should have been accepted by the Board as accurate and reliable and proof of a positive drug test. [11]

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[10] If the second laboratory's test does not confirm the first laboratory's results, the first laboratory's drug test is considered invalid and no longer a positive drug test. See 49 C.F.R. § 40.187(b); (A. at p123). If a second test of the remaining split specimen is not done or if the second laboratory's test confirms the first laboratory's results, the first laboratory's drug test results are to be accepted by the Board as if stipulated.

[11] If the ultimate goal of due process and the contested hearing is to prevent the erroneous deprivation of a property interest by the government, here, the deprivation of mining certifications, the above procedural rules were more than sufficient safeguards. See Syl. Pt. 5, *Major v. DeFrench*, 169 W. Va. 241, 286 S.E.2d 688 (1982). An independent SAMHSA-certified laboratory testing the same urine specimen is far more likely to catch any error, if it existed, in the substantive test results. In contrast, if an expert witness testifies as to testing methodologies and issues, such as the potential for interfering substances or for carryover during the testing process, it is unlikely that the Board has sufficient scientific expertise to meaningfully assess such testimony and correctly guess whether the testing was accurate or reliable.

b. The Board erroneously gave legal significance to the Medical Review Officer's lack of knowledge as to whether the laboratory's testing mechanism and methodologies could distinguish between THC and CBD, when the Medical Review Officer was not an expert on drug testing and was not called to testify on the laboratory's methodologies.

The legislative rules under W. Va. Code R. § 56-19-1 *et seq.,* specifically W. Va. Code R. § 56-19-8.3, do not provide for the laboratory test results to be challenged by "any other form of evidence," including calling a certified scientist, laboratory technician or an expert unaffiliated with the laboratory to testify. These legislative rules applied to the Board. Absent a second test of Respondent's split specimen urine sample, the Board did not have the authority under applicable legislative rules to disregard the results of Medtox's laboratory test or to rely on witness testimony in finding that the confirmation test was unreliable or incorrect. OMHST itself was not required to call a certifying scientist or laboratory technician to affirm that the test results were true and accurate.

The Board, however, took it upon itself to challenge the test results and used Dr. Carasig's testimony to evaluate Medtox's testing process. Dr. Carasig had not been called by OMHST as a certifying scientist for Medtox. She had not reviewed Medtox's methodologies as part of her review as a Medical Review Officer. She had not participated in or witnessed Medtox's testing. Her testimony would not have met the evidentiary standard required for her to provide an expert opinion regarding Medtox's drug testing methodologies. W. Va. R. E. 702(a). Her testimony also would not have been based upon direct personal knowledge of the testing. W. Va. R. E. 401(a). The Board's use of unscientific and non-probative evidence to find a SAMHSA certified laboratory test to be inaccurate or unreliable was clear error.

c. The Board should have deemed the underlying test results as accurate, when no rebuttal evidence was presented to show that the laboratory testing was inaccurate or unreliable.

Contested case hearings under W. Va. Code § 22A-1A-1 *et seq.* are subject to the provisions of the State Administrative Procedures Act, W. Va. Code § 29A-1-1 *et seq.* West Virginia Code § 29A-5-2 governs regarding the admission of evidence and the Board's hearings have not been exempted from these rules of evidence by W. Va. Code § 29A-1-3(c).

In a contested administrative hearing, a document in possession of the state agency and offered into evidence is admissible pursuant to W. Va. Code § 29A-5-2(b).[12] *See* Syl. Pt. 3, *Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006); Syl. Pt. 3, *Frazier v. Fouch*, -- W. Va. --, 853 S.E.2d 587 (2020); *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2014). The offered document not only is admissible, but there is a rebuttable presumption as to the factual accuracy of its contents. *See* Fn. 12, *Crouch*, supra; *Fouch*, 853 S.E.2d at 594, *Lowe*, 223 W. Va. at 181, 672 S.E. 2d at 317. This rebuttable presumption of factual accuracy applies to the contents of all documents, including documents which are key and indispensable parts of the state agency's case. This rebuttable presumption exists even though the underlying witness for the document or information does not appear and testify at the hearing. See *Fouch,* 853 S.E.2d at 593-594 (statement of the arresting officer, even though the officer did not testify, was admissible at administrative hearing for revocation of driver's license and its contents could be taken as key or indispensable facts in the state agency's case supporting

[12] West Virginia Code § 29A-5-2(b) provides that "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."

the suspension of the driver's license); *Lowe,* 223 W. Va. at 180, 672 S.E.2d at 316 (Blood alcohol test results from the hospital were admissible and given factual weight, even though there was no chemist/technician who testified to the testing process or the results).

The laboratory test results contained in the Medical Review Officer's positive result report [OMHST's Exhibit 2] (A. at p148) were properly admitted under W. Va. Code § 29A-5-2(b). Moreover, the Board was required to presume its contents to be factually accurate in the absence of rebuttal evidence that the test results were not accurate or reliable. Fn. 12, *Crouch,* supra; *Fouch,* 853 S.E.2d at 594, *Lowe,* 223 W. Va. at 181, 672 S.E. 2d at 317.

This rebuttable presumption required Respondent to affirmatively put forward evidence or for there to be evidence that the test results were not accurate or reliable. The record, however, does not show the introduction of any rebuttal or affirmative evidence that the test results were not accurate or reliable. At best, the Medical Review Officer could not affirmatively testify as to the accuracy of Medtox's testing process because she did not know the answer. Her lack of knowledge was not probative evidence under either the West Virginia Rules of Evidence or W. Va. Code R. § 56-19-8.3. Her testimony did not rebut the presumption of accuracy regarding Medtox's drug test result. The laboratory test results, in the absence of affirmative rebuttal evidence, should have been accepted by the Board as accurate, reliable and proof of a positive test for THC.

3. The Board does not have the authority to treat the consumption of a CBD product as a legal defense to a positive test for cannabinoids/THC, when neither West Virginia Code (W. Va. Code § 22A-1A-1 *et seq.*), West Virginia State Rules (W. Va. Code R. § 56-19-1 *et seq.*) nor United States Department of Transportation Rules (49 C.F.R. Part 40) provide for such a defense to an otherwise positive test.

The Board's power consists of only that which is given to it by statute. In Syl pt. 1, *Francis O. Day Co., Inc. v. West Virginia Reclamation Bd. of Review*, 188 W. Va. 418, 424 S.E.2d 763 (1992), this Court stated:

> Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication. (Citations omitted).

As an administrative tribunal, the Board is not a court, nor part of the judicial system and does not possess general judicial powers. 2 Am. Jur. 2d Administrative Law § 47. In the present matter, the Board's statutory authority extends only to its authority to hear appeals regarding the suspension of mining certifications. W. Va. Code § 22A-1A-2. Specifically, W. Va. Code § 22A-1A-2(c) requires the Board to suspend mining certifications if the certified person is "determined to have a positive drug or alcohol test as determined pursuant to the provisions of this article." The Board does not have the statutory authority to create or add substantive defenses in contested suspensions for failed drug and alcohol tests under either its own enabling statute W. Va. Code § 22A-5-1[13] or under the provisions of W. Va. Code § 22A-1A-1 *et seq.*

W. Va. Code §§ 22A-1A-1(a)(1) and 22A-1A-2(b) provide for the creation of legislative rules to establish and carry out disciplinary actions based upon violation of W. Va. Code § 22A-

[13] "The function and duty of the board is to hear appeals, make determinations on questions of miners' entitlements due to withdrawal orders and appeals from discharge or discrimination, and suspension of certification certificates." W. Va. Code § 22A-5-1, in part.

1A-1 *et seq.* These legislative rules, W. Va. Code R. § 56-19-1 *et seq.*, do not provide for a "CBD use" defense. These legislative rules, however, do require that drug testing be conducted in accordance with the standards and procedures set forth in the USDOT's rule, 49 C.F.R. Part 40. W. Va. Code R. § 56-19-5.6. It is clear that use of a CBD product is not a defense to a positive test for THC under the same USDOT standards. 49 C.F.R. § 40.151(f). There are no other relevant statutes or legislative rules which provide standards regarding the testing for cannabinoids/THC performed under W. Va. Code § 22A-1A-1 *et seq.*

The Board's belief that "CBD use" could be a defense is undermined by W. Va. Code § 22A-1A-1(a)(1), which specifies that the drug screening program test for "Cannabinoids/THC" and not marijuana. Undefined words used in statutes are generally given their ordinary plain meaning. Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin,* 175 W.Va. 525, 336 S.E.2d 171 (1984). Cannabinoids is defined at www.merriam-webster.com as "1: any of various naturally-occurring, biologically active, chemical constituents (such as cannabidiol or cannabidol) of hemp or cannabis including some (such as THC) that possess psychoactive properties." Cannabidiol is the same thing as CBD. W. Va. Code § 19-12E-3(a) ("Industrial Hemp Development Act: Definitions"). CBD is, thus, considered a cannabinoid. The express inclusion of the word cannabinoids by the Legislature as part of the substance being tested makes clear that THC coming from a CBD product is not exempt from testing or from being the source of the THC. Inasmuch as the Board has legally distinguished THC coming from marijuana and THC coming from CBD, such a distinction is contrary to the plain meaning and intent of the statute.

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

It is the sole province of the Legislature to enact laws regarding testing standards for the use of marijuana, THC, and cannabinoids, including outlining the use of affirmative defenses in the event of a positive result. It is not the province of the Board to adapt, ignore or supplement the relevant legislative provisions regarding a substance abuse screening policy and program whenever it believes these provisions will lead to a "wrong" substantive result.

From the perspective of those administering the substance abuse screening program, the Board's decision is troubling and may effectively gut the testing program for cannabinoids/THC in the coal mining industry. If the Board accepts "CBD use" as a defense, then any certified person wishing to use marijuana while working on mine property need only purchase CBD (and document that purchase) prior to his or her marijuana use and, if drug tested later, claim the positive test was due to CBD use. OMHST (or the employer) does not have the ability to surveil each and every certified person in the weeks prior to a substance abuse screening test and find out what prohibited substances are being used by each certified person, when such prohibited substances are being used, and in what quantities a prohibited substance is being used. Therefore, OMHST relies on testing. The tests used under the USDOT system, however, test only for the THC metabolite. Testing does not show whether the THC metabolite came from a certified person ingesting marijuana, CBD or another substance. (A. at p65). Absent an admission by the certified person, OMHST cannot prove that CBD use did not cause the positive test or that the certified person, in fact, had used marijuana. This opens the door to the possibility of certified persons being free to continue performing their job while using

marijuana/THC should this Court adopt the reasoning of the Board and circuit court. Such a substantive change to the testing program is the province of the Legislature to make.

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,

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CERTIFICATE OF SERVICE

I, John H. Boothroyd, Assistant Attorney General, do hereby certify that I have this 10th day of March 2021, served a true copy of the foregoing Appellant's Brief on the following by depositing the same in the United States Mail, certified mail, return receipt, postage prepaid, addressed as follows:

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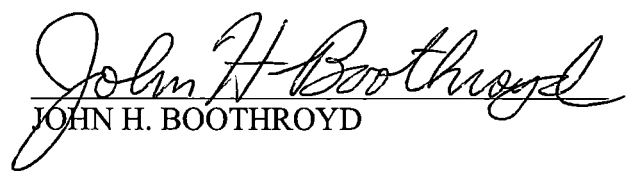

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