BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 20-0973

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

Appellant/Petitioner below,

v.

BOBBY BEAVERS,

Appellee/Respondent below.

Appeal from the Circuit Court of Kanawha County, West Virginia

---

RESPONDENT'S BRIEF

Lonnie C. Simmons (W.Va. I.D. No. 3406)
DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC
P.O. Box 1631
Charleston, West Virginia 25326
(304) 342-0133
lonnie.simmons@dbdlawfirm.com

Counsel for Respondent Bobby Beavers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia cases:

Miscellaneous:

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 20-0973

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

Appellant/Petitioner below,

v.

BOBBY BEAVERS,

Appellee/Respondent below.

Appeal from the Circuit Court of Kanawha County, West Virginia

---

RESPONDENT'S BRIEF

> ***"She told me I tested positive for THC and, be honest with you, I started crying. I'm not going to lie because I was upset because I know how hard I worked. And me and her talked about the–I asked her, I said, I'm, you know, not around marijuana. I don't do anything wrong, and she said all I can tell you is you tested positive for THC. She said, you know, have you taken any CBD, anything like that; and that I told her, yes, I've taken CBD on 2/10 and I told her that I had quit taking it; the only day I took it because it's helping me sleep. I had took it no more and that's all, you know."*** (Testimony from Respondent Bobby Beavers regarding the conversation he had with Dr. Dana Carasig regarding the random drug test he took on 2/11, A P99-P100).

I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court:

Respondent Bobby Beavers is a hard working coal miner who has never smoked marijuana in his life and who has been involved in a drug treatment program for several years helping him deal

with his opioid addiction. (A P2). In this program, Mr. Beavers receives drug counseling and regularly is subjected to drug testing. For the entire time he has been involved in this ongoing program, Mr. Beavers has never abused any drugs not otherwise prescribed to him. (*Id.*).

On February 10, 2020, Mr. Beavers consulted with his pharmacist about having trouble sleeping and his pharmacist recommended that he try a legal nonprescription product containing cannabidiol (CBD) and he assured Mr. Beavers that this CBD product would not have any impact on his drug screens. Based upon this assurance, Mr. Beavers purchased the CBD product and consumed it after he returned home. The very next day when Mr. Beavers arrived at work, he was subjected to a random drug screening by providing a urine sample. The test results were positive for Carboxy-THC. (A P2-P3).

In this administrative appeal, it was undisputed that the particular testing performed could not distinguish between THC detected in the sample from a legal CBD product or THC from marijuana. Based upon the undisputed evidence presented, the Coal Mine Safety Board of Appeals (Board of Appeals) found that Mr. Beavers' appeal and challenge to the suspension of his mining certifications should be granted. (A P11). As a result of this decision, Mr. Beavers was able to return to work. Petitioner West Virginia Office of Miners' Health, Safety & Training timely appealed this ruling to the Circuit Court of Kanawha County, which affirmed the final order issued by the Board of Appeals in an order entered November 10, 2020. Petitioner now has appealed this ruling to this Court.

II. Statement of the case

The summary of the facts included in Petitioner's brief is very thorough and accurate. In the administrative hearing held before the Board of Appeals, Mr. Beavers represented himself without

counsel. From his perspective, Mr. Beavers knew he had not consumed any marijuana and that the only explanation for the positive Carboxy-THC finding was the fact that the night before, he had consumed a CBD product for the first time. (A P2-P3).

The administrative process followed in this case was consistent with the statutory scheme. Mr. Beavers was subjected to the random drug screen on February 11, 2020; his urine sample was sent to the Dr. Dana Carasig, the Medical Review Officer, on February 16, 2020; Dr. Carasig conducted the test, which was positive for Carboxy-THC; and on February 18, 2020, Dr. Carasig spoke with Mr. Beavers by telephone explaining the positive test result. Based upon this call, Dr. Carasig noted Mr. Beavers as telling her, "'I quit taking cbd.'" (A P150). On or about February 19, 2020, Petitioner sent a certified letter to Mr. Beavers advising him that his mining certificates were immediately temporarily suspended, due to the positive drug screen, and advising him of his right to challenge this decision. (A P168). On February 26, 2020, Mr. Beavers requested an appeal. (A P166).

At the hearing, the Board of Appeals was obligated to consider all of the facts presented and to render a final decision on whether the suspension of Mr. Beavers' certifications should be extended. Ultimately, the Board of Appeals had to decide whether or not Petitioner had proven that Mr. Beavers had abused any of the substances identified in W.Va.Code §22A-1A-1. In making this decision, the Board of Appeals had to consider the testimony of Dr. Carasig, Mr. Beavers, and the exhibits admitted into evidence.

Mr. Beavers presented documents from his pharmacist, his credit card bill showing the CBD purchase made on February 10, a letter from Kenneth Trzil, who is the doctor at SWW.Va. Recovery, Inc., involved in supervising and monitoring Mr. Beavers' drug counseling program, and

who explained the test must be a false positive due to the use of CBD, and copies of several drug screens, beginning on February 9, 2020, showing that no THC was found. (A P139-P146). The February 9, 2020, drug screen, showing no illegal drugs or THC was in his system, is particularly significant because it was conducted the day before Mr. Beavers purchased the CBD product and two days before he was subjected to a random drug screen at work. Dr. Trzil also provided a letter affirming that Mr. Beavers had been compliant with all of the rules and regulations governing this drug treatment program. (A P146).

Keeping this coal mining job was of critical importance to Mr. Beavers. He explained that he had persuaded his wife to sell their home and for her to quit a job she had had for twenty years to move closer to the coal mine. (A P22). With two children and a third on the way, Mr. Beavers simply would not have taken any action that might jeopardize his ability to provide for his family.

At the hearing, other than the positive Carboxy-THC finding, Petitioner presented no evidence that Mr. Beavers actually had consumed marijuana nor was there any evidence that Mr. Beavers appeared to be impaired in any way on the morning he arrived at work and was selected for a random drug screen. Petitioner also did not dispute the testimony of Dr. Carasig, who is the person responsible for performing the drug screen test, that with the testing system used, she could not determine whether the Carboxy-THC detected was from a legal CBD product or from marijuana. (A P65, P70, P72-P73).

The United States Department of Transportation (DOT), whose regulations govern the random drug screening used in this case, issued a memorandum on or about February 18, 2020, after the testing conducted in this case, entitled "DOT OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE NOTICE." In this Compliance Notice, the DOT first asserts it requires

"testing for marijuana and not CBD." (A P154). Even this Compliance Notice makes it clear the focus of the testing is to detect marijuana and not CBD. It goes on to state any employees subject to random drug screens "should exercise caution when considering whether to use CBD products." (*Id.*). Thus, the DOT has not prohibited employees subject to this testing from using CBD products.

After considering all of the evidence presented, the Board of Appeals concluded Mr. Beavers had consumed a CBD product that is not a controlled substance and is sold as an over-the-counter product. (A P11). Furthermore, the Board of Appeals found that Dr. Carasig "was not able to testify that the testing mechanism or methodology used by the testing laboratory could distinguish between THC and CBD." (*Id.*). As a result, the Board of Appeals granted Mr. Beavers' appeal and denied the relief sought by Petitioner. (A P12).

In its final order affirming the Board of Appeals, the trial court concluded:

> The most critical finding made by the Board, which is supported by substantial evidence, is that Dr. Dana Carasig testified several times that the testing conducted in this case cannot distinguish between CBD, which is a legal over-the-counter product, and THC, which is found in marijuana, an illegal product. Thus, a test result that is positive for THC may actually mean CBD was detected, but due to the limitations of the testing system, this distinction cannot be made. **A coal miner who consumes a legal product containing CBD should not lose his or her job simply because the drug testing performed is incapable of distinguishing between CBD and THC. The Board found this to be a fundamental flaw in the testing conducted and, consequently, found Appellant had failed to meet its burden of proving that Appellee Beavers' coal miner certifications should be suspended based upon the evidence presented.** (Emphasis added). (A P8).

III. Summary of argument

Because the decisions of the Board of Appeals and the trial court are supported by the evidence presented, the trial court's final order should be affirmed by this Court. When the final

decision of an administrative agency is appealed, the standard of judicial review applied is a deferential one. Absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal.

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

Petitioner had the burden of showing that Mr. Beavers had abused substances banned by the applicable statutes and regulations. Petitioner presented no evidence that Mr. Beavers had ever consumed marijuana and there was never any suggestion Mr. Beavers was impaired on February 11, 2020, the day he supplied a urine sample. Mr. Beavers testified he had never consumed marijuana in his life and further presented evidence of his regular drug screenings conducted in connection with his ongoing treatment for opioid addiction. Maintaining good health and avoiding opioids and any other drugs was Mr. Beavers' main focus, who knew he had to stay clean in order to keep his job.

Mr. Beavers regularly was tested for drugs in his ongoing opioid addiction program, he was fully compliant in this program, the drug test performed two days before the random drug screening was clean, as were all of his other drug screens in this more than six year program, and Mr. Beavers, for the first time in his life, just happened to have consumed a CBD product the night before the drug screen. Thus, the finding by the Board of Appeals, which was affirmed by the trial court, that Mr. Beavers had consumed a CBD product the night before the test is supported by more than substantial evidence and is not contradicted by Petitioner.

This drug screening procedure is designed to identify whether or not coal miners have been abusing either alcohol or the other substances listed, which may impact the miners' ability to perform

their jobs in what often can be a very dangerous work environment. This substance abuse drug screening system is not designed to suspend or revoke the certifications earned by a coal miner who has consumed a legal over-the-counter product, but rather is seeking to identify a coal miner abusing alcohol or drugs that may impact the safety of the miner as well as the miner's coworkers.

While Mr. Beavers did not need or have a prescription for the CBD product he consumed on the night before the test, the evidence he presented regarding the purchase and use of this product was relevant for the Board of Appeals to consider as a legitimate explanation for the positive Carboxy-THC finding. Petitioner's evidentiary problem was that it could not refute the conclusion that the positive Carboxy-THC finding resulted from the use of this legal over-the-counter CBD product.

What is an employee supposed to do if a physician or, in this case, a pharmacist suggests that the employee may benefit from consuming a CBD product? Employers should not be placed in the position where they are advising their employees not to use CBD products, particularly where the employees' health care professionals have recommended the use of such products.

Coal miners and other employees should not lose their livelihoods because the drug screening used cannot distinguish between THC obtained from CBD or from marijuana. Instead of unfairly ruining the lives of employees, who are subject to random drug screens and who use a CBD product, the real solution is a scientific one–implement a testing program that can tell the difference between CBD and marijuana.

IV. Statement of oral argument and decision

Petitioner has requested Rule 20 oral argument. Counsel for Mr. Beavers always believes oral argument can help fill in any blanks or answer any questions the Court may have. Mr. Beavers

respectfully submits that Rule 19 argument would be sufficient and further believes a final opinion authored by one of the Justices would be appropriate, due to the impact this decision may have on employees who are subjected to random drug screens.

V. Argument

A. The trial court correctly affirmed the Board of Appeals' findings of fact, which were supported by substantial evidence, and the conclusions of law

In this administrative appeal, both the Board of Appeals and the trial court concluded that Petitioner had failed to meet its burden of proof in seeking to extend the temporary suspension of Mr. Beavers' certifications. Because the decisions of the Board of Appeals and the trial court are supported by the evidence presented, the trial court's final order should be affirmed by this Court. When the final decision of an administrative agency is appealed, the standard of judicial review applied is a deferential one. In Syllabus Point 1 of *Modi v. West Virginia Board of Medicine*, 195 W.Va. 230, 465 S.E.2d 230 (1995), this Court explains the circumstances that must be present before an agency's final ruling may be reversed:

> " 'Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law, or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." ' Syllabus point 2, *Shepherdstown Volunteer Fire Department v. West Virginia Human*

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

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

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

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

> 3. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.
>
> 4. "Substantial evidence" requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive.

Based upon these well established legal principles, the trial court affirmed the Board of Appeals order. Mr. Beavers respectfully submit the trial court properly applied the decisions from this Court in concluding that the Board of Appeals' ruling was supported by substantial evidence and was correct legally.

B. Petitioner's arguments that the Board of Appeals and the trial court somehow have expanded the defenses available to a coal miner subjected to a random drug screening should be rejected because Petitioner simply failed to prove that Mr. Beavers had abused any substances

This case did reveal a technical flaw in the random drug screens conducted of coal miners with respect to detecting Carboxy-THC–unlike as suggested in the Policy Guideline cited above, the testing cannot distinguish THC resulting from the consumption of CBD or marijuana. In its brief, Petitioner freely admits that, "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 any other substance.**" (Emphasis added). (**PETITIONER'S BRIEF** at 29). Nevertheless, it is Petitioner's position that a positive test for Carboxy-THC is all that is required to trigger the procedure for suspending any certifications earned by a coal miner, regardless of whether the positive test was from the consumption of a legal CBD product or an illegal marijuana product. In other words, this case was over from the time the test revealed the presence of Carboxy-THC.

Petitioner and the amicus also insist the Board of Appeals' decision affirmed by the trial court represents the recognition of a new defense–the use of a legally obtained CBD product–that somehow will destroy the health and safety of all coal miners and will defeat the random drug screening program. Mr. Beavers respectfully submits these concerns misrepresent what actually occurred in this case, where Petitioner simply failed to prove its case.

Petitioner had the burden of showing that Mr. Beavers had abused substances banned by the applicable statutes and regulations. Petitioner presented no evidence that Mr. Beavers had ever consumed marijuana and there was never any suggestion Mr. Beavers was impaired on February 11,

2020, the day he supplied a urine sample. Mr. Beavers testified he had never consumed marijuana in his life and further presented evidence of his regular drug screenings conducted in connection with his ongoing treatment for opioid addiction. Maintaining good health and avoiding opioids and any other drugs was Mr. Beavers' main focus, who knew he had to stay clean in order to keep his job. The trial court specifically noted, "The fact that Appellee Beavers has not failed any drug screen during the six years he has participated in this rehabilitation program demonstrates he was taking this process very seriously and he was very diligent about avoiding any substance that might impact his drug screens." (A P8).

While Petitioner may not want to afford these facts much weight, the Board of Appeals had every right to consider these facts in light of all of the circumstances presented. These facts support the conclusion that Mr. Beavers regularly was tested for drugs in his ongoing opioid addiction program, he was fully compliant in this program, the drug test performed two days before the random drug screening was clean, as were all of his other drug screens in this more than six year program, and Mr. Beavers, for the first time in his life, just happened to have consumed a CBD product the night before the drug screen. Thus, the finding by the Board of Appeals, which was affirmed by the trial court, that Mr. Beavers had consumed a CBD product the night before the test is supported by more than substantial evidence and is not contradicted by Petitioner.

Because coal mining is such a potentially dangerous industry, the Legislature has enacted statutes and approved regulations requiring coal miners to be subjected to random drug screenings to detect whether the coal miner tested may be impaired by substance abuse. In this context, substance abuse is an all encompassing phrase intended to cover alcohol as well as the ten specific drug-related substances set out in W.Va.Code §22A-1A-1. This statute is entitled "**Substance abuse**

screening; minimum requirements; standards and procedures for screening." (Emphasis added). The regulations enacted to carry out the mandates of this statute, W.Va.C.S.R. §56-19-1, *et seq.*, are entitled "**Substance Abuse** Screening, Standards and Procedures." (Emphasis added). Pursuant to W.Va.C.S.R. §56-19-3.21, "The term '**substance abuse policy and testing program**' shall include, at a minimum, a chemical test of breath to determine the presence of alcohol and the ten-panel urine test required by W. Va. Code §22A-1A-1(a)(1)." (Emphasis added). Thus, this drug screening procedure is designed to identify whether or not coal miners have been abusing either alcohol or the other substances listed, which may impact the miners' ability to perform their jobs in what often can be a very dangerous work environment.

This substance abuse drug screening system is not designed to suspend or revoke the certifications earned by a coal miner who has consumed a legal over-the-counter product, but rather is seeking to identify a coal miner abusing alcohol or drugs that may impact the safety of the miner as well as the miner's coworkers. In making its decision, the Board of Appeals recognized this random drug screening process is focused on substance abuse rather than the use of a legally obtained product that does not impair the coal miner in any way.

One possible defense to a positive drug screen is whether the miner can provide evidence of a drug prescription that is dated less than one year from the date of the testing. W.Va.Code §22A-1A-1(d)(1)(A). Implicit in this provision is that a legitimate prescription that is less than one year old can be a defense to a positive drug screen under this statute. While Mr. Beavers did not need or have a prescription for the CBD product he consumed on the night before the test, the evidence he presented regarding the purchase and use of this product was relevant for the Board of Appeals to consider as a legitimate explanation for the positive Carboxy-THC finding. Petitioner's evidentiary

problem was that it could not refute the conclusion that the positive Carboxy-THC finding resulted from the use of this legal over-the-counter CBD product.

Petitioner cites two different decisions, one a memorandum decision from this Court and the other an administrative law judge's public employee grievance decision, as supporting its position. In *Dean v. West Virginia Office of Miners' Health, Safety, and Training*, ___ W.Va. __, ___ S.E.2d ___, 2016 WL 3463465 (6/21/2006)(memorandum decision), this Court issued a memorandum opinion involving the permanent revocation of a coal miner's certificates. The miner involved had failed a pre-employment drug screen that was positive for marijuana. This miner entered into a substance abuse treatment program and had his certifications reinstated. Several months later, this miner flunked another drug screen and Petitioner sought to have his certifications permanently revoked. There was no question that this particular miner had a history of using marijuana. His only argument was that he flunked the drug test after consuming some brownies, without knowing that the brownies contained any marijuana. This Court held that under these facts, Petitioner was not required to prove that the coal miner intentionally consumed marijuana and affirmed the trial court's decision permanently revoking the miner's certifications.

Obviously, *Dean* did not involve the knowing use of a legally obtained CBD product, but rather involves a miner with a proven history of abusing marijuana. Clearly, in *Dean*, Petitioner actually was able to prove that this miner had consumed an illegal product–marijuana–but in the present case, Petitioner has not presented any evidence that the Carboxy-THC detected in Mr. Beavers' sample came from any source other than the legally purchased CBD product. Mr. Beavers is not asking Petitioner to prove anything other than what the applicable statutes and regulations require: proof that Mr. Beavers has abused a prohibited substance, which in this case would be marijuana.

In *Spears v. Division of Highways*, 2019 WL 5873565 (10/25/2019, WVPEGB), the grievant was an employee of the Division of Highways, who was subjected to random drug screening. The test was positive for THC and this employee was suspended. In the grievance filed, this employee presented evidence that she had been advised by her medical provider to use CBD products to address her chronic pain issues. This particular administrative law judge concluded that whether the THC finding was from the CBD product or marijuana was immaterial.

First, to state the obvious, the *Spears* order reflects the opinion of one administrative law judge in this State and is not very persuasive authority. Also, there is no indication regarding what record was made in that case with respect to the testing performed or any inadequacies in the testing, such as the inability of that testing to distinguish between THC obtained from CBD or marijuana. It also is unknown whether or not this decision was ever appealed.

Whether the statutes and regulations governing the random drug screening of this particular Division of Highways employee are identical to the procedures applicable to Mr. Beavers is not made clear in the decision. If the Division of Highways employee is subject to random drug screenings to determine whether the employee has abused any of the substances listed, then the suggestion that there is no difference between a THC finding from the consumption of a legally purchased CBD product and marijuana is contrary to the statute and to common sense.

Petitioner spends some time addressing in its brief the decision by Mr. Beavers, who did not have counsel, to turn down the opportunity have a split sample, which Petitioner insists is the only method to challenge the accuracy of the test result. (**PETITIONER'S BRIEF** at 22). Ignoring for the moment how an uncounseled coal miner is supposed to know how and where to have such a split sample tested, not to mention to paying for it, for purposes of this case, Mr. Beavers does assume

the Carboxy-THC result came from the CBD product he consumed, rather than from marijuana. Therefore, it is not the accuracy of the testing that is at issue in this case, but rather the significance and relevance of the Carboxy-THC finding. Clearly, as admitted by Petitioner in its brief, this Carboxy-THC finding does not prove that Mr. Beavers had ever consumed marijuana. In fact, as found by the Board of Appeals and affirmed by the trial court, the only explanation proven in this record to explain this positive finding is the CBD product Mr. Beavers consumed the night before the test.

Employers, employees, society as a whole, and courts in particular will be dealing with many different issues arising from the prevalent consumption of CBD products for many years to come. CBD products claim to address a lot of different symptoms and often physicians are advising their patients to try a CBD product. In some instances, consuming a CBD product is deemed to be a better alternative than taking a prescribed an opioid.[1] What is an employee supposed to do if a physician or, in this case, a pharmacist suggests that the employee may benefit from consuming a CBD product? Employers should not be placed in the position where they are advising their employees not to use CBD products, particularly where the employees' health care professionals have recommended the use of such products.

It has been projected that the sales of CBD products will reach about two billion dollars by the year 2022.[2] Because CBD products are not regulated, there is no way of knowing how much THC may be contained in any CBD product. Studies have shown that up to 70% of CBD products

---

[1]*See* https://www.psychiatrictimes.com/view/cannabinoids-chronic-pain-opioid-alternative.

[2]*See* https://www.statista.com/statistics/760498/total-us-cbd-sales.

are mislabeled and contain significantly more THC than listed on the label.[3] It is well established that a person who consumes a perfectly legal CBD product may fail a drug screen designed only to detect THC.[4] Thankfully, through the application of the scientific method and experimentation, tests do exist that can distinguish between THC obtained from the consumption of a CBD product and from marijuana.[5]

Ultimately, Petitioner's suggestion that the positive THC result is all it had to prove to extend the suspension of Mr. Beavers' certifications should be rejected by this Court, as it was by the Board of Appeals and the trial court. Coal miners and other employees should not lose their livelihoods because the drug screening used cannot distinguish between THC obtained from CBD or from marijuana. Instead of unfairly ruining the lives of employees, who are subject to random drug screens and who use a CBD product, the real solution is a scientific one–implement a testing program that can tell the difference between CBD and marijuana. Fundamentally, coal miners and other employees subject to random drug screens should not be fired because they used a legal over-the-counter CBD product, often based upon the recommendation of a health care professional.

---

[3]*See* https://www.verywellmind.com/cbd-vs-thc-differences-benefits-side-effects-legality-5071416.

[4]*See,* https://www.sciencedaily.com/releases/2019/11/191104141650.htm; https://www.medicalnewstoday.com/articles/does-cbd-show-up-on-a-drug-test#cbd-and-drug-testing;

[5]*See* https://www.labcorp.com/assets/1724; https://www.detectachem.com/products/cbd-thc-test.

VI. Conclusion

For the forgoing reasons, Respondent Bobby Beavers respectfully asks this Court to affirm the final order issued by the Circuit Court of Kanawha County.

BOBBY BEAVERS, Respondent,

–By Counsel–

Lonnie C. Simmons (W.Va. I.D. No. 3406)
DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC
P.O. Box 1631
Charleston, West Virginia 25326
(304) 342-0133
lonnie.simmons@dbdlawfirm.com

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 20-0973

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

Appellant/Petitioner below,

v.

BOBBY BEAVERS,

Appellee/Respondent below.

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **RESPONDENT'S BRIEF** was served on counsel of record by email and mail on the 26th day of April, 2021, to the following:

John H. Boothroyd
Assistant Attorney General
7 Players Club Drive, Suite 2
Charleston, West Virginia 25311
(304) 558-1425
John.H.Boothroyd@wv.gov

Christopher D. Pence
HARDY PENCE, PLLC
10 Hale Street, 4th Floor
Charleston, West Virginia 25301
(304) 720-4214
cpence@hardypence.com

Lonnie C. Simmons (W.Va. I.D. No. 3406)