/s/ R. Steven Redding
Circuit Court Judge
Ref. Code: 21E6742H

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CC-02-2019-P-353
Berkeley County Circuit Clerk
Virginia Sine

In the Circuit Court of Berkeley County, West Virginia

Cheryl L. Yoder,
Plaintiff,

vs.)

Adam Holley Commr DMV,
Defendant

Case No. CC-02-2019-P-353

FINAL ORDER UPON REMAND

This matter comes on before the Court upon the papers and proceedings formerly read and had herein; upon the Final Order of the Office of Administrative Hearings (OAH) in case number 398133AB entered on September 6, 2019, affirming the decision of the Commissioner of the West Virginia Division of Motor Vehicles (DMV), dated July 29, 2017, revoking the Petitioner's drivers license for driving a motor vehicle in this State while under the influence of controlled substances or drugs to be effective September 1, 2017; upon the Petition for Judicial Review filed herein on October 5, 2019; upon this Court's Final Order entered March 25, 2020, reversing the Final Order of the OAH of September 6, 2019 and ordering the Petitioner's personal and commercial driver's licenses reinstated; upon the Memorandum Decision of the West Virginia Supreme Court of Appeals issued on February 19, 2021, reversing this Court's Order of March 25, 2020, and remanding the case for reconsideration pursuant to the rulings in *Frazier v. Fouch*, 853 S.E.2d 587 (W.Va. 2020); upon the Mandate issued by the West Virginia Supreme Court of Appeals on March 23, 2021; upon the appearance of the Petitioner, Cheryl Yoder, by counsel, B. Craig Manford, Esq.; and upon the appearance of the Respondent, Everett Frazier, Commissioner of the West Virginia Division of Motor vehicles by Janet E. James, Esq.

398133AB-JJ

Memorandum Decision of the Supreme Court of Appeals

1. In its decision to reverse and remand this matter, the Supreme Court of Appeals stated: "[c]onsistent with the *Fouch* decision, the circuit court's order was erroneous to the extent that it found that the officer's failure to testify at the OAH hearing implicated respondent's due process rights to a full and fair hearing." *Frazier v. Yoder*, No. 20-0336, 2021 Westlaw 653244 (Feb. 19, 2021) (Memorandum Decision), at page 3.

2. In *Frazier v. Fouch*, 853 S.E.2d 587 (W.Va. 2020), the Supreme Court of Appeals reversed the circuit court's decision reversing the final order of the OAH revoking the petitioner's driving privileges for DUI. The circuit court had ruled that the contents of the DMV's file, including the DUI information sheet should not have been admitted into evidence in the absence of the investigating officer at the hearing to properly authenticate the documentary evidence. The Supreme Court stated:

> We have previously stated that "[w]ithout a doubt, the Legislature enacted W.Va. Code § 29A-5-2(b) with the intent that it would operate to place into evidence in an administrative hearing ['a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself.[']" *Crouch*, 219 W.Va. [at] 76, 631 S.E.2d [at] 634. As evidenced by the use of the word "shall," admission of the evidence identified in the statute is mandatory. *Id.*

Fouch, 853 S.E.2d 587 at 592-593 (2020), quoting *Reed v. Lemley*, No. 17-0797, 2018 WL 4944553, at 4 (W.Va. Oct. 12, 2018) (Memorandum Decision)).

3. In its remand in the instant matter, the Supreme Court of Appeals also stated regarding the failure of the investigating officers to appear at the administrative hearing that "[i]f the respondent had wanted to procure the appearance of the officers at the OAH evidentiary hearing, respondent should have subpoenaed the officers." Quoting *Fouch, Id.*, at 594, the Court noted:

> [t]he clear, unambiguous language of this statute provides that "the party" seeking to compel a witness to appear at an OAH hearing has the responsibility to request the subpoena, and the responsibility to petition the circuit court for enforcement of the subpoena when the witness fails to appear.
>
> *Yoder,* at page 3.

4. Because the Supreme Court of Appeals reversed this Court's decision on the above ground, the opinion did not reach this Court's prior ruling that the evidence was insufficient, or sufficiently rebutted by the evidence brought forth by the Petitioner at the OAH hearing, such that her personal and commercial driver's licenses should not have been revoked.

5. With these rulings, analysis and directives of the Supreme Court's Memorandum Decision of February 19, 2021, in mind, and the Court having carefully reconsidered the entire administrative record filed herein including the Petition, the respective briefs of the parties, the Court hereby makes the following findings of fact and conclusions of law:

Proceedings Before the Office of Administrative Hearings

6. Petitioner is a CDL license holder and drives commercial trucks as part of her profession. On July 28, 2017, the Commissioner of the DMV issued two Orders revoking the Petitioner's personal driving privileges and her commercial driver's license for the alleged offense of Driving Under the Influence of Controlled Substances or Drugs stemming from a traffic stop occurring on July 3, 2017.

7. The hearing was scheduled but then continued several times. In granting the final continuance on June 26, 2018, after which the October 4, 2018 hearing was scheduled and proceeded, Hearing Examiner Andrew Myers noted that ". . . Petitioner's Counsel has indicated it has recently come to his attention that exculpatory evidence exist[s] that is necessary for a full and fair determination of

this case. Counsel for Petitioner has indicated medical paperwork exists showing Petitioner was not under the influence of controlled substances or drugs during the time of her arrest."

8. On October 4, 2018, an Administrative Hearing was had at Martinsburg DMV Regional Office before Hearing Examiner Myers. At the start of the hearing, Hearing Examiner Myers asked Harley Wagner, counsel for the Petitioner: "Has there been a guilty plea in the criminal case or not?" To which Mr. Wagner responded: "No sir, Your Honor. It was dismissed by the City [of Martinsburg] Attorney in full. Not an agreement. Just outright dismissed." Next, the Respondent moved to continue the proceedings due to the failure of both Patrolmen Jarvis [the officer who processed Petitioner's arrest] and Williamson to appear pursuant to the Respondent's subpoenas. The Petitioner objected and the Hearing Examiner denied the continuance request.

9. The Respondent then presented for admission into evidence the following documents contained in the West Virginia DMV File pursuant to W.Va. Code § 29A-5-2(b): the West Virginia DMV Form 314, DUI Information Sheet; the Implied Consent Statement; and the narrative criminal complaint of the arresting officer, all marked Respondent's Exhibit No. 1. The Respondent then rested his case.

10. The criminal complaint was prepared by Patrolman First Class (PFC) C. R. Williamson of the Martinsburg Police Department ("the officer"). It recites that on Monday, July 3, 2017, the officer was traveling south on Queen Street behind the Petitioner's vehicle. The complaint further recites that the officer observed the vehicle driving slowly and weaving in the traffic lane. It then recites that the vehicle made a wide slow right turn onto King Street and then suddenly pulled off

the road and into a parking spot around the 200 block of West King Street. The complaint next recites that the officer passed the vehicle and watched it immediately pull in behind him. The officer then proceeded through the intersection of King Street and Maple Avenue and pulled into a parking spot and waited for the vehicle which was stopped at a red traffic light. The complaint next recites that as the light turned green, the officer observed the vehicle come within inches of his front bumper and attempt to park directly in front of his squad car. The complaint next recites that the vehicle then over corrected, pulled out of the spot and attempted to back up. The complaint then recites that the vehicle ended up crossways in the middle of the road. The complaint next recites that the vehicle then drove away when [the driver] could not park properly. The officer then initiated a vehicle stop one block farther down the street, in the 300 block of West King Street.

11. Next the complaint recites that the Petitioner stumbled out of the vehicle and started walking back to the officer's cruiser. The Court notes that this recitation in the Complaint is in conflict with a portion of the West Virginia DUI Information Sheet ("DMV Form 314") offered into evidence by the Respondent, which noted under the Personal Contact section of the form, wherein the three boxes "Normal" are each checked by the officer, in qualifying how the Petitioner exited the vehicle, walked to the roadside and stood.

12. The complaint then states that the officer ordered the Petitioner back into her vehicle, several times, and that she complied. The officer observed that the Petitioner's eyes were red and she had slightly slurred speech. The complaint next recites that the officer continued to speak to the Petitioner, while she was in her car, until he was "sure" she was under the influence of prescription drugs.

13. The Complaint then states that the officer had the Petitioner exit her vehicle. He then administered three standardized field sobriety tests ("SFSTs"). Williamson stated the Petitioner had difficulty following the instructions for the SFST's and that she failed all three. Details of the officer's markings on the SFST results are recorded on the form. The complaint then recites that the officer arrested the Petitioner for DUI for being under the influence of prescription drugs.

14. The Court notes that the DMV Form 314 contains a section denominated as "Additional Impairment Tests" wherein the Modified Romberg and Lack of Convergence Tests are listed with spaces for notations by the officer administering each test as to the subject's performance thereon. The Petitioner points out that the DMV Form 314 itself dictates that these tests are to be administered only by an A.R.I.D.E. certified officer. There is no information in the record as to whether or not PFC Williamson was A.R.I.D.E. certified. This portion of the DMV Form 314 also has a section for the officer to note normal, dilated or constricted pupils, which were in this instance left blank. Petitioner asserts that this section of the form does not require A.R.I.D.E. certification for the officer to complete it. The record does not contain information from the officer's observations as to the Petitioner's pupils being dilated or constricted or normal.

15. The criminal complaint next recites that the officer observed the Petitioner for twenty (20) minutes after having her sign the implied consent statement. The officer then administered the secondary chemical test which yielded a 0.00 result.

16. The criminal complaint next recites that the officer placed a call to the Petitioner's parents who "stated she was on a lot of prescription drugs." The evidence is devoid of any information as to the nature of the prescription drugs to which Petitioner's parents were referring and whether any of such prescription drugs

were impairing substances. The Court believes that little or no weight should have been given by the Hearing Examiner to this hearsay statement.

17. The WV DMV Form 314 indicates that PFC Williamson first made contact with the Petitioner at 12:39 a.m., on July 3, 2017; placed her under arrest at 12:53 a.m. and transported her to the station. According to the officer's DMV Form 314, the breath test reflecting 0.000% blood alcohol was administered at 1:44 a.m. The Petitioner was held for the remainder of the night at the Eastern Regional Jail until she she bonded out the next morning. Petitioner then attempted to get a drug test at Berkeley Medical Center but was informed that she needed a physician's order. Petitioner obtained a negative Non-DOT 11 panel urine drug screen from Valley Health Urgent Care, Martinsburg, dated July 3, 2017 and marked with the time "11:19 a.m."

18. The Petitioner then presented her case to the Hearing Examiner and testified on her own behalf. She stated that on February 28, 2017, she had lung surgery to remove a cancerous tumor. She further stated, however, that the only medications she was on at the time of stop, July 3, 2017, were an Anoro Inhaler and a nasal spray. The Petitioner denied using any narcotics and testified that she specifically asked Officer Williamson after the traffic stop to take her to the hospital for a blood draw but that he did not do so.

19. The Petitioner then authenticated and moved into evidence her Exhibit No. 1, which was the Non-DOT 11 panel urine drug screen taken by Valley Health Urgent Care on July 3, 2017, at 11:19 a.m., which was admitted without objection showing negative results for the substances for which it tested. The Petitioner also testified that she obtained additional eleven (11) panel drug screens on July 14, 2017 and on August 23, 2017, which were authenticated, marked Petitioner's

Exhibit Nos. 2 and 3 and again admitted without objection showing negative results. The Petitioner also testified that on the night of her arrest she had no impairing substance in her body whatsoever; no alcohol or any prescription medication.

20. On cross-examination, the Petitioner admitted she had received pain medication the first week after her surgery in February of 2017, but testified that thereafter she was told by her physician to take Tylenol for pain.

21. On cross-examination, the Petitioner did admit to driving in the manner described by PFC Williamson in his Complaint but denied positioning her vehicle only inches from his bumper.

22. On cross-examination, the Petitioner testified that she talks with a lisp and had recently had some dental work done when asked about the allegation that she had slurred speech. Regarding the results of the HGN test, the Petitioner stated that Officer Williamson attempted to administer the test for 6 to 10 minutes during which time she kept following his finger and telling him she wasn't impaired and to please take her to the hospital to get a blood test.

23. The Petitioner then rested and her Counsel argued that the July 3, 2017, drug screen clearly showed negative results, i.e., that no impairing drugs were in her system, as did the screens for July 14 and August 23. Counsel argued that the field sobriety tests are strictly for determining probable cause to arrest because non-impaired people may fail these tests and impaired people may pass and that is why field sobriety tests are only of limited value. Counsel also argued that due to the arresting officer's failure to appear, the Hearing Examiner would not have the opportunity to hear testimony as to how the SFST's were administered, i.e., if they were administered properly in conformity with the National Highway Traffic

and Safety Administration (NHTSA) guidelines. Counsel also pointed out that the paperwork relied upon by the Respondent was suspect as, even though the Petitioner held a commercial driver's license, nothing in the record indicates that the arresting officer read the CDL section to the Petitioner pertaining to enhanced revocation periods for her CDL. Also, the officer's failure to appear meant that there was no evidence in the record to explain why he refused to honor the Petitioner's request (as she alleges she made) to be taken to the hospital for a blood draw.

24. In rebuttal, Counsel for the Respondent argued that although he conceded that the admitted drug screens were "actually taken," there was nothing in the record to indicate what "drugs were and were not screened for," and suggested that the timing of the drug screens showed that they were of limited value.

25. In the Final Order of the OAH, the Hearing Examiner noted the following about the SFSTs administered by the Arresting Officer as set forth in the DMV Form 314:

A. On the Horizontal Gaze Nystagmus Test, after the Medical Assessment was performed, the Petitioner['s] eyes showed a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation and onset of nystagmus prior to forty-five degrees.

B. On the Walk-and-Turn Test the Petitioner could not keep her balance and started too soon in the instruction stage; that she then stopped while walking, stepped off the line, made an improper turn; missed heel to toe, raised [her] arms to balance; and took an incorrect number of steps.

C. On the One-Leg-Stand Test, the Petitioner used her arms for balance and put her foot down and the Officer noted he then stopped the test for the

Petitioner's safety.

26. The Hearing Examiner found that based upon the documents admitted into evidence, "[t]here is evidence of the use of alcohol, drugs, controlled substances or any combination of the aforementioned based on the following: the Petitioner's driving pattern, her physical appearance and her performance on the standard field sobriety tests."

27. Further the Hearing Examiner appears to have given little if any weight to the Petitioner's Exhibits 1 through 3 and stated in his decision:

"While I admitted the Petitioner's Exhibits 1 through 3 relating to her [blood] [sic] [urine] tests, no evidence was presented to explain the results to include what substances the tests were designed to discover and what substances the test would not discover. The results indicate "normal" but no information was presented as to what that means. As such, the relevance of those documents are [sic] minimal, only indicating that either the Petitioner believed she was not under the influence or that the Petitioner knew the tests would not reveal the substances she had taken."

28. The Hearing Examiner then stated the following regarding the Petitioner's testimony that she requested a blood draw but that the Investigating Officer refused such request:

"The Petitioner alleges she asked the Investigating Officer's to take her to get a blood test and claims that he did not. No other evidence was presented that clearly supports this claim. She did go to Valley Health and get a blood test that day, but this decision could have been made after her interactions with the Investigating Officer when she had a chance to talk to others. No clear evidence was presented that she requested the assistance of the Investigating Officer in obtaining a blood test; in any case, she was able to obtain a blood [sic: urine] test that day - even though she did not present evidence explaining the results of the blood [sic: urine] test."

29. The record does not reflect any questions by the Hearing Examiner to the

Petitioner or her counsel regarding what drugs would have been tested for by Valley Health's 11 panel urine drug screen performed on July 3, 2017 or the two subsequent dates.

30. The Hearing Examiner concluded as follows:

> "I find by a preponderance of the evidence, the Petitioner was under the influence of alcohol, controlled substances and/or drugs at the time [she] was driving [her] motor vehicle. Pursuant to *Crouch v. W.Va. Div. of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006), when Respondent's Exhibit No. 1 is admitted into evidence, a rebuttable presumption is created as to its accuracy. While the Investigating Officer did not testify, his account of his interactions with the Petitioner, as recounted in Respondent's Exhibit 1, are more credible and in line with common sense [than] the Petitioner's testimony. His narrative detailing the Petitioner's behavior and appearance is consistent with one who was impaired by a controlled substance or drugs. The Petitioner's testimony as to her driving pattern and the reasons why she drove this way, does not make sense, especially in light of the Investigating Officer's account that she almost hit his patrol car while trying to park in front of him - ending up crossways in the middle of the road. Furthermore, her decision to get out of her car and walk back to his patrol car is indicative of impaired judgment. Overall, the preponderance of the evidence supports that the Petitioner was under the influence of a controlled substance or drug that impeded her ability to split her attention and impaired her judgment."

Petitioner's Argument

31. The Petitioner argues in her Appeal that:

A. The Hearing Examiner committed a clear error of law by not taking judicial notice that an eleven (11) panel drug screen tests for eleven (11) of the most commonly recognized controlled substances causing impairment, to-wit: Amphetamines, Barbiturates, Benzodiazepines, Buprenorphine, Cocaine, Methamphetamines, Methadone, Opiates, Oxycodone, PCP and THC;

B. That the finding by the Hearing Examiner that there was no clear evidence presented that the Petitioner requested the assistance of the Investigating Officer in obtaining a blood test is clearly wrong in view of the reliable,

probative and substantial evidence on the whole record, which was not rebutted by the Respondent and was arbitrary and capricious and constitutes a clear abuse of discretion or a clear unwarranted exercise of discretion; and

C. That as a result, the Hearing Examiner's decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, arbitrary and capricious, and characterized by an unwarranted exercise of discretion.

Respondent's Argument

32. The Respondent argues in reply that:

A. The Hearing Examiner did in fact take into consideration the Petitioner's submission of the 11 panel drug screen on the same day as the arrest, however, this submission did not overcome the preponderance of evidence presented by the Respondent that the Petitioner was driving impaired by a controlled substance;

B. The Petitioner's contention that the Hearing Examiner should have taken judicial notice of the 11 panel drug screen is moot since the Hearing Examiner did in fact admit the screen and consider what weight to afford it in his final order; and

C. The requirements under the West Virginia Rules of Evidence regarding judicial notice were not met in the case at bar.

Standard of Review

33. A circuit court's review of an agency's administrative order is conducted pursuant to the West Virginia Administrative Procedures Act, W.Va. Code Section 29A-5-4, which provides:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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, decision 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.

34. "In reviewing the judgment of the lower court, this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus Point 4, *State ex rel. Miller v. Reed*, 203 W.Va. 673, 510 S.E.2d 507 (1988).

35. "On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code Section 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syllabus Point 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

The Court's Analysis on Remand

36. The Court finds that PFC Williams did have a reasonable articulable suspicion or probable cause to effect a traffic stop of the Petitioner from his descriptions of her

driving and her own admissions regarding the same.

37. The Court finds there is persuasive evidence that the Petitioner did in fact request the arresting officer to take her for a blood draw either during or at the conclusion of the traffic stop. The Petitioner's testimony that she requested a blood draw, at least twice during her encounter with Officer Williams, was not rebutted by the documentary evidence of record. Pursuant to the DMV 314, Respondent's Exhibit No. 1 at page 6 of the document, Officer Williamson, suspecting the Petitioner was impaired by drugs, did not request the Petitioner to submit to a blood draw, which would have been the next logical step in his investigation after his stated belief, in the complaint, (Respondent's Exhibit No. 1), that the Petitioner was under the influence of controlled substances or drugs.

38. Respondent's Exhibit No. 1, the DMV Form 314 at page 6 of the document under the heading of "BLOOD TEST," provides the investigating officer with the ability to document whether a blood test was done; the time it was requested; whether the request for a blood sample was made by the arresting officer or at the request of the suspected impaired driver; and whether or not it was refused. Officer Williamson checked the box noting no blood test was done on his DMV Form 314, and failed to mark either the "yes" or "no" box under the question "[w]as request for a blood sample directed by the arresting officer?" The Court notes that the form also contains a notation "did suspect request blood sample" which is a right provided for by W.Va. Code § 17C-5-6. The Court notes that W.Va. Code § 17C-5-6 provides in pertinent part: "The person tested may, at his or her own expense, have a doctor of medicine or osteopathy, or registered nurse, or trained medical technician at the place of his or her employment, of his or her own choosing, administer a chemical test in addition to the test

administered at the direction of the law-enforcement officer." This section was also left blank. Officer Williamson also did not note in his complaint that he requested the Petitioner to submit to a blood draw, despite his suspicion that she was impaired by drugs.

39. The most significant reason the Court believes the Petitioner did request a blood draw from officer Williamson is the fact that within ten (10) hours and twenty-six (26) minutes after her arrest, release from jail and the refusal of Berkeley Medical Center to draw her blood without a physician's order, the Petitioner obtained an 11 panel urine drug screen from Valley Health Urgent Care producing negative results for (according to the Petitioner): Amphetamines, Barbiturates, Benzodiazepines, Buprenorphine, Cocaine, Methamphetamines, Methadone, Opiates, Oxycodone, PCP and THC. To this Court, the negative urine screen bolsters the veracity of the Petitioner's testimony that she had requested a blood draw from Officer Williams at the time of her arrest. Because the Court reaches the conclusion that this matter must be remanded for a new evidentiary hearing on another basis, to properly consider the significance of the July 3, 2017 negative 11 panel urine drug screen, the Court makes no ruling on the issue of whether the determination of the Hearing Examiner that the Petitioner failed to prove that she requested a blood draw of the arresting officer should be revisited.

40. The Court finds that the Hearing Examiner's decision to afford the admitted drug screen evidence of the Petitioner no or only minimal weight to be clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The Court finds said decision to also be arbitrary and capricious and an unwarranted exercise of discretion.

41. The record is devoid of any inquiry by the Hearing Examiner to anyone at the

hearing as to what an 11 panel drug screen tested for. In his decision the Hearing Examiner in effect stated he didn't know what drugs were tested in an 11 Panel Drug Screen. If the Hearing Examiner did not know or was unsure what the evidence presented and admitted was, it was his duty to inquire and not simply ignore the significance of the evidence. Without such an inquiry by the Hearing Examiner, both the Petitioner and her counsel seem to have assumed that the Hearing Examiner would have known what an 11 panel drug screen was and the significance of the July 3 negative result especially having occurred inside 11 hours from the Petitioner's arrest. Instead the Hearing Examiner surmised that the Petitioner had somehow obtained a drug screen which would not detect the drugs she was actually on.

42. The Petitioner states on page 11 of her Brief:

> "At this time in our history, it is almost common knowledge within judicial circles that an eleven (11) panel drug screen detects usage of the eleven most common controlled substances including: Amphetamines, Barbiturates, Benzodiazepines, Buprenorphine, Cocaine, Methamphetamines, Methadone, Opiates, Oxycodone, PCP and THC. In fact "eleven panel drug screen" is a term of art within the medical/judicial/rehabilitation fields and carries with it the basic understanding that such test screens for all of the drugs of abuse or impairment seen daily by medical, judicial and psychological professionals. Within a minute of a simple Google or internet search of the term "eleven panel drug screen" anyone will readily and accurately find from multiple sources whose accuracy cannot reasonably be questioned based simply upon them all providing the same information, what drugs such a test will screen for, i.e., all of the aforementioned controlled substances.

43. The Court agrees with the Petitioner's argument as to the potential significance of the drug screen evidence. The Court does not go so far as to agree with Petitioner's argument that the Hearing Examiner should have exercised his discretion under Rule 201 of the West Virginia Rules of Evidence and taken judicial notice of what an Eleven Panel Non-Dot Urine Drug Screen tests for (although the undersigned judge, in light of his experience with drug screens,

would likely have done so.). The Court finds that the failure of the Hearing Examiner to develop the record as to what substances the July 3 screen tested for, as well as the opportunity for the Respondent to meet that evidence, was clearly wrong and an unwarranted exercise of discretion in view of the reliable, probative and substantial evidence on the whole record.

44. The Court also finds that while the Hearing Examiner did admit the Petitioner's drug screen evidence, he failed to give it the weight that it deserved. He also failed to inquire of the Petitioner or her counsel regarding its relevance if he did not know its significance and the drugs it tested for. If the drug screen evidence had been developed and considered properly, the Hearing Examiner may well have been compelled to conclude that a negative finding for the eleven drugs screened for, obtained inside eleven hours of arrest, rebutted any claim that she was driving while impaired under the preponderance of the evidence standard of proof.

45. The gist of the Catch 22 situation that the Hearing Examiner placed the Petitioner in is revealed in the Hearing Examiner's statement that: "in any case, she was able to obtain a blood [sic: urine] test that day - even though she did not present evidence explaining the results of the blood [sic: urine] test." The July 3 screen (the "medical paperwork" the Hearing Examiner had referred to in his continuance order) was admitted; it was negative for eleven substances; and nothing in the record explains it away. If the Hearing Examiner did not understand the significance of the test, then he should have made inquiry, in the Court's view. This Court handles abuse and neglect cases involving children where urine drug screens virtually identical to the one in the case at bar are routinely the basis for reuniting children with their parents when the parents

screen negative over a period of time.

46. Clearly, if the use of an 11 panel drug screen is a sufficient and reliable tool for gauging whether or not it is safe to return a child to a previously drug addicted parent, it most certainly should be sufficient to be utilized in a driving while impaired case. Similarly, circuit courts throughout the state routinely rely upon 11 panel drug screens as term and condition of both bond and probation in criminal cases. If relied upon to the detriment of a criminal defendant's liberty, it should be sufficient to defend against a driving impaired case. Conversely, if the test results were positive for an impairing substance, it would rightfully be used against one charged with driving impaired.

47. There are some permutations in the types of screens (for example most common are 5, 8 and 11 panel depending upon how comprehensive versus targeted a result is sought). However, they all screen for the most commonly used impairing and addicting substances and clearly, the 11 panel tests very broadly. Since the Petitioner blew a 0.0000% on the breath test, and screened negative for 11 substances on the urine test in such close temporal proximity to her arrest, this is clear evidence to this Court that she was negative for a dozen impairing and addicting substances at the time of her arrest. To admit this powerful evidence and then basically ignore it, in this Court's view, was clear error.

48. Admission of the documentary evidence contained in the DMV's file under W.Va. Code §29A-5-2(b), as noted by the Supreme Court of Appeals in *Crouch v. Commissioner*, 219 W.Va. 70, 76, n.12, 631 S.E.2d 628, 634, n.12 (2006), merely creates a rebuttable presumption of accuracy:

> "the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy."

49. Therefore, the Court finds that the Petitioner adequately, sufficiently and by a preponderance of the evidence, challenged and rebutted the presumption contained in the Respondent's admitted documentary evidence that she was driving her vehicle while under the influence of an Impairing substance in light of all of the evidence presented. The Court finds that the Hearing Examiner's finding to the contrary is clear error.

50. In light, however, of our Supreme Court of Appeal's admonitions that the reviewing Court in an APA cases appealing driver's license revocations should not reweigh the evidence, reassess the credibility of witnesses, substitute its judgment for that of the Hearing Examiner, *see Syl. Pt. 4, Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020), or indicate a preference for live testimony over documentary evidence, *see Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2008), the Court believes that this matter should be remanded to the OAH for a new evidentiary hearing to permit the record to be developed as to what substances the Valley Health Urgent Care 11 Panel Non-Dot Drug Screen tested for, what a negative screen would thus mean in the context of this case and in light of all the other evidence, and to provide the Respondent the opportunity to meet that evidence.

Accordingly it is ADJUDGED and ORDERED that the Final Order of the Office of Administrative Hearings entered on September 6, 2019, affirming the decision of the Commissioner of the West Virginia Division of Motor Vehicles dated July 29, 2017, revoking the Petitioner's personal driving privileges and her commercial drivers license for driving a motor vehicle in this State while under the influence be and is hereby REVERSED. This matter is REMANDED to the Office of Administrative Hearings for a new evidentiary hearing at which the Petitioner will be entitled to present evidence

(expert or otherwise) as to the meaning and import of the Valley Health Urgent Care Non-Dot 11 panel negative urine drug screen that she obtained on July 3, 2017 including identifying the substances for which it tested. Counsel for the DMV will then have the opportunity to rebut that evidence at said evidentiary hearing.

It is further ORDERED that the West Virginia Division of Motor Vehicles shall be taxed with the costs of these proceedings.

This is a Final Order. The Clerk shall transmit attested copies of this Order to Everett Frazier, Commissioner of the West Virginia Division of Motor Vehicles, 5707 MacCorkle Ave., S.E., Charleston, WV 25304; to the OAH, 1124 Smith St., B-100, Charleston, WV 25301; and to counsel of record for the parties electronically by filing on the WV E-File electronic filing system.

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: _____
Deputy Clerk

/s/ R. Steven Redding
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.