IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 22-0223
(Circuit Court Civil Action No. 19-AA-3)

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

JAD H. RAMADAN,

Respondent.

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

EVERETT J. FRAZIER, Commissioner,
Division of Motor Vehicles,

By Counsel,

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Now comes Everett J. Frazier, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), by and through his undersigned counsel, and hereby submits the *Brief of the Division of Motor Vehicles* pursuant to the *Scheduling Order* entered by this Court on March 28, 2022.

ASSIGNMENT OF ERROR

1. **The circuit court erred as a matter of law by extending the presumptions contained in W. Va. Code § 17C-5-8(b)(1) (2013), a statute which applies solely to impairment by alcohol, to impairment by controlled substances and/or drugs.**

2. **The circuit court abused its discretion by substituting its judgment for that of the fact finder below regarding the weight given to the results of the standardized field sobriety tests.**

3. **The circuit court abused its discretion by substituting its judgment for that of the fact finder below regarding the credibility of the Respondent's expert witness.**

STATEMENT OF THE CASE

At approximately 8:03 p.m. on July 9, 2015, Trooper C. M. Griffith ("Investigating Officer") and Senior Trooper S. W. Schlobohm ("Assisting Officer"), both of whom were members of the West Virginia State Police at the time the instant matter was initiated, responded to Stewartstown Road near Route 705 in Monongalia County, West Virginia, to investigate a motor vehicle crash. (App[1]. at PP. 542, 555, 652, 654-655, 718.) Approximately one minute later, Detective John Wilhelm, an off-duty member of the Monongalia County Sheriff's Department, was traveling north on Stewartstown Road on his way home when he came upon the crash site. (App. at PP. 544, 555, 559, 706.)

Detective Wilhelm stopped behind the two motor vehicles involved in the crash and activated

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[1] "App." refers to the Appendix record filed by the Petitioner contemporaneously with the *Brief of the Division of Motor Vehicles*.

the emergency lights on his police vehicle. (App. at PP. 544, 559, 706.) He determined that a Jeep Grand Cherokee had struck the rear of a Toyota RAV 4. (App. at PP. 542, 555, 559, 712.) Detective Wilhelm also observed that Jad H. Ramadan, the Respondent herein, who had been driving the Jeep when the crash occurred, was staggering in the roadway and had mud on his clothing. (App. at PP. 544, 559, 706.) While speaking with the Respondent, Detective Wilhelm noted that the Respondent's speech was slurred. (App. at PP. 559, 706.) In response to questioning, the Respondent said that he had gotten mud on his clothing when he had fallen down more than once earlier. (App. at PP. 559, 706, 710.) Detective Wilhelm directed the Respondent to sit on the detective's vehicle so that the Respondent would not fall and injure himself. (App. at PP. 559, 706.) The Respondent had difficulty following the officer's instructions and would often move away from the car and sway and stumble in the middle of the road. (App. at P. 559.) Detective Wilhelm noted that the Respondent swayed from side to side while leaning against the police vehicle. (App. at P. 559.) The victim of the crash, Rebecca Williams, observed that the Respondent appeared intoxicated and did not want her to contact the police. (App. at P. 560.)

At approximately 8:32 p.m., the Investigating and Assisting Officers arrived at the crash scene (App. at P. 542) and observed the Respondent with Detective Wilhelm at his police vehicle. (App. at PP. 555, 655) The Investigating Officer identified the Respondent via his driver's license (App. at P. 656) and observed that the Respondent had difficulty standing and acted nervous and fidgety; observed that the Respondent's pupils were dilated and his eyelids droopy; noted that he blinked slowly; noted that the Respondent's speech was slow, slurred, and incoherent; observed that the Respondent had difficulty keeping a conversation and eye contact; and noted that the Respondent was trying to talk his way out of involvement by law enforcement. (App. at PP. 543, 555, 656-657.)

The Assistant Officer observed that the Respondent was unsteady on his feet, noted that the Respondent's speech was slurred and incoherent, observed that the Respondent exhibited droopy eyelids, and observed that the Respondent had mud on his clothing. (App. at PP. 555, 719.) In response to questioning, the Respondent initially advised the officers that he had ingested suboxone[2] the previous evening but subsequently said that he had also ingested Xanax[3] and Ambien[4] earlier. (App. at PP. 543, 555, 662-663, 720.) Because a heavy rain began to fall, the officers transported the Respondent from the crash site to a nearby bank drive-through, which had a roof, so that they could administer standardized field sobriety tests to the Respondent. (App. at PP. 556, 658, 686, 720.)

Prior to administering the Horizontal Gaze Nystagmus ("HGN") Test, the Assisting Officer conducted a medical assessment of the Respondent's eyes which indicated equal pupils, equal tracking, and no resting nystagmus thus rendering the Respondent a viable candidate for the test. (App. at PP. 543, 721-722.) During the HGN Test, the Respondent exhibited impairment because he lacked smooth pursuit in both eyes, exhibited sustained nystagmus at maximum deviation in both eyes, and displayed nystagmus prior to a forty-five degree angle in both eyes. (App. at PP. 543, 556, 665-666, 722-723.)

During the Walk-and-Turn Test, the Respondent exhibited impairment because he could not keep his balance while listening to the test instructions, started the test too soon, missed heel-to-toe,

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[2] Suboxone is a Schedule III controlled substance per W. Va. Code § 60A-2-208(e)(2) (2015). It can be used for pain management, but it is primarily used for opioid withdrawal. (App. at P. 774.)

[3] Alprazolam, the generic name for Xanax, is a Schedule IV controlled substance per W. Va. Code § 60A-2-210(c)(1) (2014).

[4] Zolpiedem, the generic name for Ambien, is a Schedule IV controlled substance per W. Va. Code § 60A-2-210(c)(52) (2014).

stepped off the line of walk, took an incorrect number of steps, and made an improper turn. (App. at PP.543, 556, 666-667, 724) During the One Leg Stand Test, the Respondent exhibited impairment because he swayed, used his arms for balance, and did not keep his raised foot off the ground. (App. at PP.544, 556, 669, 725.)

The Assisting Officer administered a preliminary breath test which indicated no evidence of alcohol use by the Respondent. (App. at PP. 544, 556, 670, 725-726.) The Investigating Officer lawfully arrested the Respondent for driving while under the influence of alcohol, controlled substances and/or drugs ("DUI") and transported him to Ruby Memorial Hospital for a blood test. (App. at PP. 545, 557, 670-671, 726-727.) The Investigating Officer sent the blood specimens to the West Virginia State Police Laboratory (App. at PP.545, 557, 672, 727) which, in turn, sent the specimens to NMS Laboratory, a subcontractor, in Pennsylvania for analysis. (App. at P. 268.) The blood analysis by NMS Laboratory indicated that alprazolam and zolpidem were not present in the Respondent's blood specimens at or above their reporting limits[5], and the laboratory did not test for suboxone. (App. at PP. 765, 767, 770, 772, 773.) NMS Laboratory also tested for "amphetamines, barbiturates, cannabinoids, some muscle relaxants, cocaine, and opiates", yet none of these were detected in the Respondent's blood sample. (App. at PP. 774-775.)

The Investigating and Assisting Officers transported the Respondent to the West Virginia State Police detachment in Morgantown for processing (App. at PP. 557, 672, 727-728) and the administration of a designated secondary chemical test of the breath which indicated that the Respondent had a 0.00% blood alcohol concentration. (App. at PP. 545, 557, 728.) The Investigating

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[5]The NMS reporting limit for alprazolam is 5.0 ng/mL, and for zolpidem the reporting limit is 4.0 ng/mL. *See*, Exhibit 1 attached to *Respondent's Motion to Correct the Designated Record* filed with this Court on June 29, 2022.

Officer completed an Intoximeter Ticket, the DUI Information Sheet, and a Uniform Citation (App. at PP. 541-548, 659) and submitted them to the DMV pursuant to W. Va. Code § 17C-5A-1(b) 2008). (App. at P. 549.) The Investigating Officer also sent the DMV a copy of her criminal narrative statement, a witness statement written by Detective Wilhelm, and a witness statement by the driver of the car into which the Respondent crashed. (App. at PP. 555-560.)

On July 21, 2015, the DMV sent the Respondent an *Order of Revocation* for DUI of controlled substances and/or drugs. (App. at P. 539.) Because this was the Respondent's second DUI offense within 10 years, his license revocation period is for five years accompanied by successful completion of the West Virginia Safety and Treatment Program. *Id.* On August 10, 2015, the Petitioner requested an administrative hearing with the Office of Administrative Hearings ("OAH.") (App. at P. 189.)

On December 14, 2017, the OAH conducted an administrative hearing. (App. at PP. 642-799.) At the hearing, all three officers involved with the incident testified as well as the Respondent and his expert witness, Rodney Richmond, a pharmacist from Arkansas.

On September 19, 2019, the OAH entered its *Final Order* affirming the DMV's *Order of Revocation*. (App. at PP. 623-632.) The OAH found as fact that the Respondent failed to dispute that on July 9, 2015, he drove a motor vehicle in this State. (App. at P. 626, FOF 22.) The OAH found as fact that the Respondent failed to successfully dispute that he had consumed controlled substances prior to operating a motor vehicle. (App. at P. 626, FOF 23.) The OAH found as fact that the Respondent failed to dispute that he exhibited indicia of intoxication and that he was unable to adequately perform standardized field sobriety tests. (App. at P. 626, FOF 24.)

On October 21, 2019, the Respondent appealed the OAH's order to the Circuit Court of

Monongalia County. (App. at PP. 1, 157-182.) The Respondent did not file a designation of record at the time that he filed his petition. *Id.* In contravention to W. Va. Code § 17C-5A-2(s) (2015) and this Court's opinion in *State ex rel. Miller v. Karl*, 231 W. Va. 65, 743 S.E.2d 876 (2013), the circuit court entered an *ex parte* order granting a stay of the DMV's revocation order. (App. at PP. 151-152.) On January 22, 2020 (App. at P. 148), the circuit court conducted a hearing on the Respondent's motion for a stay of the DMV's revocation order. The circuit court vacated its previous *ex parte* order granting a stay, but after a hearing in which the court heard evidence, the court granted a stay of the DMV's revocation order. (App. at PP. 148-150.)

On January 24, 2020, the Respondent filed a *Designation of Record* but failed to serve the same upon the OAH, the keeper of the administrative record below. (App. at PP. 145-147.) On July 1, 2021, the OAH was terminated pursuant to W. Va. Code § 17C-5C-1a (2020). On July 6, 2021, the DMV filed a *Motion to Dismiss for Lack of Prosecution.* (App. at PP. 138-144.) On September 22, 2021, the circuit court heard the DMV's motion and denied the same. (App. at PP. 107-109.) More than a year and a half after the Respondent filed his appeal with the circuit court, he filed a brief. (App. at PP. 95-106.) The circuit court held a final hearing on the merits on February 1, 2022 (App. at PP. 10-36), and on March 1, 2022, the court entered its *Final Order* which reversed the OAH's *Final Order*. (App. at PP. 2-9.)

SUMMARY OF ARGUMENT

This Court has made plain that to uphold a license revocation for DUI, the DMV must submit sufficient evidence of driving, of consumption of an impairing substance, and of symptoms of intoxication. *See*, Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984). *See also*, Syl. Pt. 1, *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995); Syl. Pt. 1, *Dean v. W. Va. Dep't of*

Motor Vehicles, 195 W. Va. 70, 464 S.E.2d 589 (1995); Syl. Pt. 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997); *Coll v. Cline*, 202 W. Va. 599, 605, 505 S.E.2d 662, 668 (1998); Syl. Pt. 4, *Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004); Syl. Pt. 4, *Lilly v. Stump*, 217 W. Va. 313, 617 S.E.2d 860 (2005); *Carpenter v. Cicchirillo*, 222 W. Va. 66, 68, 662 S.E.2d 508, 510 (2008); Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008); Syl. Pt. 3, *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010); FN. 11, *Ullom v. Miller*, 227 W. Va. 1, 14, 705 S.E.2d 111, 124 (2010); *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012); Syl. Pt. 4, *Dale v. McCormick*, 231 W. Va. 628, 749 S.E.2d 227 (2013); Syl. Pt. 6, *Dale v. Dingess*, 232 W. Va. 13, 750 S.E.2d 128 (2013); Syl. Pt. 8, *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014); Syl. Pt. 5, *Reed v. Hill*, 235 W. Va. 1, 770 S.E.2d 501 (2015); Syl. Pt. 6, *Reed v. Winesburg*, 241 W. Va. 325, 825 S.E.2d 85 (2019); Syl. Pt. 5, *Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020); Syl. Pt. 6, *Frazier v. Bragg*, 244 W. Va. 40, 851 S.E.2d 486 (2020); Syl. Pt. 4, *Frazier v. Talbert*, 245 W. Va. 293, 858 S.E.2d 918 (2021).

This Court also consistently has held for almost 40 years that "[t]here are no provisions in either W. Va. Code, 17C-5-1 (1981) *et seq.*, or W. Va. Code, 17C-5A-1 (1981) *et seq.*, that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol or drugs for purposes of making an administrative revocation of his driver's license." Syllabus Point 1, *Albrecht v. State*, *supra*; Syl. Pt. 7, *Dale v. Ciccone*, *supra*.

Despite the panoptic case law regarding administrative license revocations for DUI which this Court has promulgated, the Circuit Court of Monongalia County committed error of law by

concluding that although W. Va. Code § 17C-5-8(b)(1) (2013)[6] "is silent with response to controlled substances and/or drugs, the Court finds that the same reasoning should apply to situations involving such substances to afford more weight to the results of secondary chemical tests of blood than subjective field sobriety tests." (App. at P. 7.) In subsection (d) of W. Va. Code § 17C-5-8 (2013), the West Virginia Legislature addressed chemical analysis of blood for the purpose of determining controlled substances and/or drugs in a person's blood, yet it did not apply the presumptions for alcohol concentrations from subsection (b) to controlled substances and/or drugs. The circuit court lacked authority to legislate from the bench by applying the presumptions for alcohol in W. Va. Code § 17C-5-8(b)(1) (2013) to the Respondent's drug only case.

The circuit court also abused its discretion by substituting its judgment for the fact finder below when it concluded that "the hearing examiner improperly weighed the results of the field sobriety tests against the negative findings of the secondary chemical tests as well as the aforesaid explanations for [Respondent]'s performance during the field sobriety tests." (App. at P. 8.) This Court has made clear that a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge and is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Syl. Pt. 1, *Cahill v. Mercer Cty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000).

Finally, the circuit court abused its discretion by substituting its judgment for that of the fact finder when it concluded that "the hearing examiner erroneously failed to properly credit the

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[6] "The evidence of the concentration of alcohol in the person's blood at the time of the arrest or the acts alleged gives rise to the following presumptions or has the following effect: (1) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his or her blood, is prima facie evidence that the person was not under the influence of alcohol[.]"

substance of [the expert witness]'s testimony, which supports the negative findings of the secondary chemical test of the blood." (App. at P. 9.) Again, this Court has made clear that a reviewing court is obligated to give deference to factual findings and is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Syl. Pt. 1, *Cahill v. Mercer Cty. Bd. of Educ.*, *supra*. It is also well-settled that credibility determinations made by an administrative law judge are similarly entitled to deference. *Id.*

Based on this Court's extensive catalog of case law regarding judicial review of administrative orders, the Circuit Court of Monongalia County committed clear error, and its order must be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The DMV requests oral argument pursuant to Rule 19 of the Rules of Appellate Procedure (2010) because this case involves assignments of error in the application of settled law and a narrow issue of law.

ARGUMENT

A. Standard of Review

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam.)

> 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 orders 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.

Syl. Pt. 3, *Reed v. Pompeo*, 240 W. Va. 255, 810 S.E.2d 66 (2018).

Findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong, and conclusions of law are reviewed *de novo*. *Groves v. Cicchirillo,* 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

B. The circuit court erred as a matter of law by extending the presumptions contained in W. Va. Code § 17C-5-8(b)(1) (2013), a statute which applies solely to impairment by alcohol, to impairment by controlled substances and/or drugs.

In its *Final Order*, the circuit court improperly concluded that "although [W. Va. Code § 17C-5-8(b)(1) (2013)[7]], is silent with respect to controlled substances and/or drugs, the Court finds that the same reasoning should apply to situations involving such substances to afford more weight to the results of secondary chemical tests of blood than subjective field sobriety tests." (App. at P. 7.) The circuit court also opined that, "[a]ccordingly, the Legislature offers protection to an individual who may not correctly perform the subjective field sobriety tests by providing a presumption that an individual was not under the influence of alcohol if the secondary chemical test is negative." *Id.*

The circuit court's finding that the presumptions for alcohol impairment in subsection (b) of W. Va. Code § 17C-5-8 should apply to drug impairment is comparing apples to oranges. The

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[7] "The evidence of the concentration of alcohol in the person's blood at the time of the arrest or the acts alleged gives rise to the following presumptions or has the following effect: (1) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his or her blood, is prima facie evidence that the person was not under the influence of alcohol[.]"

preliminary breath test and the designated secondary chemical test of the breath examine for only alcohol in the subject's system. W. Va. Code § 17C-5-8(b) (2013). These testing instruments can only test for alcohol. A chemical analysis of blood for the purpose of determining the controlled substance or drugs concentration of a person's blood, must include, but is not limited to, the following drugs or classes of drugs: marijuana metabolites, cocaine metabolites, amphetamines, opiate metabolites, phencyclidine (PCP), benzodiazepines, propoxyphene, methadone, barbiturates, and synthetic narcotics. W. Va. Code § 17C-5-8(d) (2013). However, unlike subsection (b) which outlines the presumptions for the levels of alcohol concentration, the West Virginia Code contains no such presumptions for drug levels in the blood. Simply put, there is no "legal limit" for drugs as there is for alcohol.

Here, the fact finder below discussed the blood test results[8] and other documentary and testimonial evidence presented at the administrative hearing as well as the credibility of the witnesses and determined that, "the [Respondent]'s blood specimens were withdrawn approximately one hour, fifty minutes after the accident occurred, within the required time period set forth in West Virginia Code § 17C-5-8 but hardly contemporaneous with the accident itself. It will again be noted here that the analysis of the [Respondent]'s blood specimens did not include any testing for suboxone." (App. at P. 627.) Thus giving the test results limited weight and citing *Albrecht, supra,* the OAH Hearing Examiner concluded, "[t]here is no requirement for the administration of a chemical sobriety test to

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[8] It is important to note that while Respondent's expert witness and both attorneys discussed the Respondent's blood test results below, the transcript of the hearing (App. at PP. 642-799) is devoid of any mention that the blood test results were offered or admitted into evidence below. Regardless of this procedural error, the blood test results are irrelevant to the instant matter because OAH hearing examiner's decision is based upon the testimonial evidence and remaining documentary evidence of record.

prove that a motorist was driving under the influence of alcohol or drugs for the purpose of making an administrative revocation of a driver's license." (App. at P. 628.)

The statutory and case law is clear: for DUI matters involving alcohol, there is a presumption in the law when the driver's blood alcohol concentration is known. When the driver's blood alcohol concentration is unknown (e.g., in matters involving a driver's refusal to submit to the designated secondary chemical test) or when a driver is suspected of being under the influence of controlled substances or drugs, there is no requirement for any chemical test of the blood, breath, or urine for the administrative license revocation to be upheld. Therefore, the hearing examiner's findings of fact and conclusions of law are supported by law, and the circuit court's interpretation of the statute is not.

This Court has outlined the process for interpreting a Code section.

> [W]e must first establish the intent of the Legislature in promulgating the statute. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Then we must examine the language used by the Legislature in promulgating its intent. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). *Accord* Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."); Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). Even if a statutory section is plainly written, it is still possible for it to contain one or more undefined words. In such a situation, this Court has directed that, "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 1, *Miners in*

Gen. Group v. Hix, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee–Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982).

Frymier v. Higher Educ. Pol'y Comm'n, 221 W. Va. 306, 311–12, 655 S.E.2d 52, 57–58 (2007).

Here, the plain language of W. Va. Code § 17C-5-8(b) (2013) addresses the legal presumptions or effect of the concentration of ***alcohol*** in a person's blood. The Legislature separately addresses chemical analysis for controlled substances or drugs in a person's blood in W. Va. Code § 17C-5-8(d) (2013): " A chemical analysis of blood for the purpose of determining the controlled substance or drug concentration of a person's blood, must include, but is not limited to, the following drugs or classes of drugs: (1) Marijuana metabolites; (2) Cocaine metabolites; (3) Amphetamines; (4) Opiate metabolites; (5) Phencyclidine (PCP); (6) Benzodiazepines; (7) Propoxyphene; (8) Methadone; (9) Barbiturates; and (10) Synthetic narcotics."

In subsection (d), the Legislature did not include the presumptions regarding concentrations as it had for alcohol in subsection (b). The plain language of W. Va. Code § 17C-5-8 (2013) applies the legal presumptions only to alcohol concentrations in the blood, not to controlled substance and/or drug concentrations. The statute is clear and unambiguous; therefore, it was clear error for the circuit court to interpret the same.

C. The circuit court abused its discretion by substituting its judgment for that of the fact finder below regarding the weight given to the results of the standardized field sobriety tests.

In its *Final Order*, the circuit court opined that the "only evidence of drug consumption was [Respondent]'s admission that he ingested Suboxone, as prescribed, on the evening of July 8, 2015; however the State failed to test for Suboxone and [Respondent] testified that he does not experience dizziness or fatigue while taking the same." (App. at P. 7.) Next, the circuit court systematically discounted and dismissed the evidence of impairment by giving undue weight to the "numerous

explanations for [Respondent]'s performance during the field sobriety tests . . . including but not limited to: (1) he was suffering from acute anxiety; (2) he was involved in a traffic incident; (3) traffic was passing him on both sides of the intersection; (4) he was transported to a different location due to heavy rain; (5) at least three officers were involved, one of whom was in training; and (6) there was no baseline to compare his performance." (App. at P. 7.)

The circuit court further opined, "[t]he secondary chemical tests essentially ruled out alcohol, controlled substances, and or drugs as a reason for [Respondent]'s performance during the field sobriety tests. It is not [Respondent]'s burden to show why he failed certain field sobriety tests. It is the OAH's burden to show that [Respondent] was under the influence of alcohol, controlled substances, and/or drugs, and that burden has not been met here." (App. at P. 8.) Finally, the circuit court found "that the hearing examiner improperly weighed the results of the field sobriety tests against the negative findings of the secondary chemical tests as well as the aforesaid explanations for [Respondent]'s performance during the field sobriety tests. *Id.*

In the OAH *Final Order*, the hearing examiner considered the evidence of ingestion and impairment at the administrative hearing and determined, "[w]hile the [Respondent] denied having ingested any alprazolam or zolpidem and sought to attribute the manifestations of impairment he exhibited to insomnia, anxiety, lack of focus, racing thoughts, irritability, stress, fatigue, nervousness, and confusion, it is most difficult, under any line of reasoning, to accept the assertion that the myriad of indicia of impairment the [Respondent] exhibited contemporaneous with the motor vehicle accident were completely unrelated to ingestion of controlled substances and/or drugs." (App. at P. 626.) The hearing examiner also found as fact that there was evidence of the use of controlled substances based on the following: "[t]he [Respondent] exhibited several indicia of the

use and impairment by controlled substances, including being the driver at fault in a motor vehicle accident, his slurred speech, his droope eyelids, his loss of coordination while walking and standing, his failure of each of the three field sobriety tests administered to him, and his admissions to ingesting suboxone, Xanax (alprazolam), and Ambien (zolpidem) earlier." (App. at P. 625, FOF 9.)

This Court has held that "[s]ince a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo. Syl. pt. 1, in part, *Cahill v. Mercer Cty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000)." *Frazier v. S.P.*, 242 W. Va. 657, 664, 838 S.E.2d 741, 748 (2020).

Further, this Court has determined that "[w]e must uphold any of the [Administrative Law Judge's] ALJ's factual findings that are supported by substantial evidence, and we owe substantial deference to inferences drawn from these facts. Further, the ALJ's credibility determinations are binding unless patently without basis in the record. *Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)." *Frazier v. S.P.*, at 664, 838 S.E.2d 748. In addition, this Court has held that

> [w]e cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact. We must defer to the ALJ's credibility determinations and inferences from the evidence, despite our perception of other, more reasonable conclusions from the evidence. ... Whether or not the ALJ came to the best conclusion, however, she was the right person to make the decision. An appellate court may not set aside the factfinder's resolution of a swearing match unless one of the witnesses testified to something physically impossible or inconsistent with contemporary documents. ... The ALJ is entitled to credit the testimony of those it finds more likely to be correct.

Id.

Here, it is clear from the record that the hearing examiner considered the Respondent's admission to consuming Suboxone, Ambien, and Xanax in conjunction with the Respondent's excuses for his indicia of impairment and made a credibility determination regarding the same. While the parties disagreed on how certain evidence should have been weighed, it was the OAH that was tasked with being the finder of fact, not the circuit court. "It is not our domain to replace the administrative law judge's factual findings with the conclusions this Court might have reached had it served as a fact-finding body and an evaluator of the credibility of the witnesses. *Graham v. Putnam Cty. Bd. of Educ.*, 212 W. Va. 524, 531, 575 S.E.2d 134, 141 (2002)." *Frazier v. S.P.*,at 664, 838 S.E.2d 748.

The OAH hearing examiner was in the best position to hear the testimony of the witnesses and made findings of fact regarding the Respondent's consumption of Suboxone and other controlled substances as well as indicia of impairment on the standardized field sobriety tests. "A reviewing court must evaluate the record of an administrative agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts. Syl. Pt. 1, *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997)." Syl. Pt. 4, *W. Va. State Police v. Walker*, 246 W. Va. 77, 866 S.E.2d 142 (2021). "[A] reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the [lower tribunal's] account of the evidence is plausible in light of the record viewed in its entirety. Syl. Pt. 1, in part, *In Re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 5, *W. Va. State Police v. Walker, supra.*

The amount of weight which the fact finder gives to the evidence is an issue solely for the hearing examiner to decide. "We have stated repeatedly that the weight given to the evidence as well as the inferences and conclusions drawn therefrom, are matters for the factfinder. Once a decision has been reached below, we interpret the evidence from a coign of vantage most favorable to the winning side, in this case the Commissioner. *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)." *Muscatell v. Cline*, 196 W. Va. 588, 601, 474 S.E.2d 518, 531 (1996). Again, the hearing examiner's decision was not clearly wrong and was not affected by an error of law; therefore, this Court owes deference to the amount of weight the hearing examiner gave to the results of the blood test and to the evidence of impairment exhibited by the Respondent.

Arguendo, even if the hearing examiner had discounted the officer's administration of the standardized field sobriety tests, which he did not, there was sufficient evidence of impairment to uphold the DMV's *Order of Revocation* for DUI. First, the Respondent caused a motor vehicle crash. He was staggering in the roadway and had mud on his clothing. His speech was slurred. He admitted that he had gotten mud on his clothing when he fell down more than once earlier. He had to sit on a police car so that he would not fall and injure himself. In addition, the Respondent had difficulty following the officer's instructions and would often move away from the car and sway and stumble in the middle of the road. Further, the Respondent swayed from side to side while leaning against the police vehicle. The DMV met its burden of proving that the Respondent was DUI.

D. The circuit court abused its discretion by substituting its judgment for that of the fact finder below regarding the credibility of the Respondent's expert witness.

In its *Final Order*, the circuit court addressed the testimony of the Respondent's expert witness, a pharmacist named Rodney G. Richmond, and failed to give deference to the weight given to this testimony by the hearing examiner.

> Mr. Richmond testified that the secondary chemical test of blood determined that the substances tested for were either not present in [Respondent]'s system or the concentration of such substances was undetectable. Although the OAH characterized Mr. Richmond's testimony about half-lives of drugs as "ambiguous," his testimony was thorough, succinct, and merely explained his overall opinion – if the drugs were not detected by the blood analysis, it is unlikely that such substances had any effect on [Respondent]. Mr. Richmond also debunked the results of the HGN Test by testifying that Suboxone does not cause nystagmus, which the OAH failed to mention in its Final Order.

(App. at P. 8.) The circuit court then found "that the hearing examiner erroneously failed to properly credit the substance of Mr. Richmond's testimony, which supports the negative findings of the secondary chemical test of blood." (App. at P. 9.) The circuit court's re-weighing of this evidence is absolutely unsupported in law.

It is well settled in West Virginia that in a case tried without the aid of a jury, the trial court, and not the appellate court, is the judge of the weight of the evidence. *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). In a nonjury trial, the trial judge has usually been regarded as a surrogate for the jury, and his or her findings are accorded corresponding weight. *Id.* This standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently. *Id.* It is clear that the burden on an appellant attempting to show clear error is especially strong when the findings are primarily based upon oral testimony and the factfinder has viewed the demeanor and judged the credibility of the witnesses. *Id.* This Court has made plain that a reviewing court is "not the appropriate forum for a resolution of the persuasive quality of evidence." *Id.* In plain terms, a reviewing court should not overrule a factfinder's "finding or conclusion as to whether the burden of persuasion has been met unless the evidence is so one-sided that it may be said that a reasonable factfinder could not have gone the way of the" OAH. *Id.*

Moreover, this Court has found that "the standard of review for judging a sufficiency of evidence claim is not appellant friendly." *Brown v. Gobble, supra*, at 563, 474 S.E.2d 493. "Following an evidentiary hearing, the tribunal's findings, based on oral or documentary evidence, shall not be overturned unless clearly erroneous, and due regard shall be given to the opportunity of the trier of fact to evaluate the credibility of the witnesses." *Id.* "[A] reviewing court may not reverse it, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id. See also, State v. Blatt*, 235 W. Va. 489, 510, 774 S.E.2d 570, 591 (2015); *Holley v. Crook*, No. 18-0637, 2019 WL 4257299, at *5 (W. Va. Sept. 9, 2019) (memorandum decision).

Further, the circuit court can disturb only those factual findings that strike it wrong with the "force of a five-week-old, unrefrigerated dead fish." *Brown v. Gobble, supra,* at 563, 474 S.E.2d 493. Finally, the OAH hearing examiner's "credibility determinations are binding unless patently without basis in the record." *Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). *See also, Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741, 748 (2020); *Reed v. Grillot*, No. 17-0691, 2019 WL 1012160, at *4 (W. Va. Mar. 4, 2019) (memorandum decision).

Here, the hearing examiner was in the best position to assess the credibility of the witnesses, and the hearing examiner's credibility determination is supported by the record. The hearing examiner opined,

> [w]ith respect to the testimony of Rodney G. Richmond, he testified that alprazolam and zolpidem each have a half-life in being eliminated from the body that can be used in conjunction with blood analysis to estimate when someone has last ingested either controlled substance. He also testified that every drug has a pharmacokinetic profile, which dictates how long the drug lasts. It inherently involves the rate of absorption, degree of distribution, what the onset of the effect is, how quickly it is eliminated, is it metabolized, and its route of elimination.

> However, Mr. Richmond was unable to identify any specific testing and research that has been conducted to establish the validity or accuracy of the half-life and elimination rates that he reported for alprazolem and zolpidem, nor did he make any reference to any authoritative source of information relating to their half-life and elimination rates. Rather, he based this ambiguous testimony on a "huge body of knowledge of which he has trained and has maintained his knowledge over the last thirty-some years."
>
> In addition, Mr. Richmond's testimony was based upon specific prescribed dosages of these controlled substances, whereas there is nothing in the record to verify that the [Respondent] ingested any of the specific dosages that he mentioned. To the contrary, from the [Respondent]'s statements that the Investigating Officer documented, he advised them that he had ingested suboxone about 10:00 p.m. the previous night, had also ingested some unknown but relatively small amounts of alprazolam and zolpidem earlier, and did not understand why they would be affecting him.

(App. at PP. 626-627.)

While the fact finder did not discuss Mr. Richmond's testimony regarding suboxone not causing HGN, the Hearing Examiner did consider the Respondent's documentary evidence contained in "Petitioner's Exhibit 3" (App. at PP. 571-617). Namely, the Hearing Examiner opined, "in the Appendix to Validation of the Standardized Field Sobriety Test Battery at BAC's [*sic*] Below 0.10 Percent (Petitioner's Exhibit 3) at page 33, the authors acknowledge that horizontal gaze nystagmus '...may also indicate consumption of seizure medication, phencyclidine, a variety of inhalants, barbiturates, and other depressants....', which establishes that horizontal gaze nystagmus is not only a phenomenon of alcohol use, but controlled substances and drugs as well." (App. at P. 627.) The Respondent admitted to taking Xanax, the brand name for alprazolem, is a central nervous system depressant, one of three drug categories which cause horizontal gaze nystagmus. *See*, *Armstrong v. State*, No. 05-10-01214-CR, 2012 WL 864778, at *3 (Tex. App. Mar. 15, 2012).

Based upon this Court's case law, it was not clearly wrong for the hearing examiner to consider the totality of the admitted evidence, both documentary and testimonial, and to assign the

weight he thought it deserved to the same.

CONCLUSION

For the reasons outlined above, the DMV respectfully requests that this Court reverse the circuit court's order and uphold the DMV's *Order of Revocation* for DUI.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 22-0223
(Circuit Court Civil Action No. 19-AA-3)

EVERETT J. FRAZIER, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

JAD H. RAMADAN,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing *Brief of the Division of Motor Vehicles* on this 30th day of June, 2022, by depositing it in the United States Mail, first-class postage prepaid addressed to the following:

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