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.

REPLY 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 pursuant to W. Va. R. App. Pro. 10(g) submits the *Reply Brief of the Division of Motor Vehicles.*

ARGUMENT

1. The presumptions contained in W. Va. Code § 17C-5-8 (2013) only apply to cases involving impairment by alcohol.

In his responsive brief, Mr. Ramadan argues that the presumptions in W. Va. Code § 17C-5-8 (2013) for impairment by alcohol demonstrate the Legislature's confidence in the reliability of secondary chemical test evidence. (Resp. Br. at P. 9.) Mr. Ramadan further argues that the DMV offered "no evidence or argument that secondary chemical tests are somehow less reliable when measuring controlled substances as opposed to alcohol. In fact, the reliability is equivalent." *Id.* The Respondent further argues that the "Code does not yet have analogous provisions for controlled substances precisely because there is no legal limit for them, not because the Legislature questions the reliability of secondary chemical evidence with respect to drugs." *Id.* at P. 10.

The Respondent thoroughly ignores the circuit court's limitations for reviewing an administrative decision. This Court has long held that,

> 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 2, *Shepherdstown Vol. Fire Dep't v. State ex rel. State of W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983); Syl. Pt. 1, *Hinerman v. W. Va. Dep't of Motor Vehicles*, 189 W. Va. 353, 431 S.E.2d 692 (1993) (per curiam); *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 116, 705 S.E.2d 806, 813 (2010); *Dale v. Haynes*, No. 13-1327, 2014 WL 6676546, at *3 (W. Va. Nov. 21, 2014) (memorandum decision); Syl. Pt. 2, *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014) (per curiam); *Meadows v. Reed*, No. 14-0138, 2015 WL 1588462, at *3 (W. Va. Mar. 16, 2015) (memorandum decision); Syl. Pt. 3, *Reed v. Pompeo*, 240 W. Va. 255, 810 S.E.2d 66 (2018); *Reed v. Grillot,* No. 17-0691, 2019 WL 1012160, at *3 (W. Va. Mar. 4, 2019) (memorandum decision); Syl. Pt. 3, *Frazier v. S.P.*, 242 W. Va. 657, 838 S.E.2d 741 (2020); *Frazier v. Fouch*, 244 W. Va. 347, 354, n.9, 853 S.E.2d 587, 594, n. 9 (2020); *Frazier v. Braley*, No. 20-0726, 2022 WL 633848, at *2 (W. Va. Mar. 4, 2022) (memorandum decision).

The Circuit Court of Monongalia County was limited in its review of the *Final Order* of the Office of Administrative Hearings ("OAH"). Here, the circuit reversed, in part, because it determined that the presumptions in W. Va. Code § 17C-5-8(b)(1) (2013) ***"should*** apply to controlled substances and/or drugs (emphasis added)." (App. at P. 7.) The circuit court's authority under the Administrative Procedures Act was limited to determining if the OAH's order was 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. The circuit court lacked authority to create law by applying a statutory presumption for impairment by alcohol to the Respondent's impairment by controlled substances and/or drugs.

Mr. Ramadan altogether fails to address the circuit court's statutory authority and lack thereof, but instead, argues for this Court to sanction the circuit court's misapplication of the clear and unambiguous language of W. Va. Code § 17C-5-8(b)(1) (2013). The circuit court's clear error of law should not be endorsed.

2. The standardized blood draw does not and cannot test for every substances which causes impairment.

In his brief, the Respondent proffers that "[i]t is undisputed that Mr. Ramadan was given both a preliminary breath test, and then a Breathalyzer Test, and that both tests showed he had no alcohol in his blood. Mr. Ramadan was also subject to a blood draw that tested not only for Ambien and Xanax, but also tested for amphetamines, barbiturates, cannabinoids, opioids, and muscle relaxants. Inexplicably, the DMV did not test for Suboxone. All three tests were negative." (Resp. Br. at P. 12.) The Respondent further argued that, "a secondary chemical text (blood draw) was done, and no drugs were found in Mr. Ramadan's system. Yet, the Hearing Examiner relied on the field sobriety tests rather than the secondary chemical tests without adequate discussion." *Id.*

West Virginia Code § 17C-5-8(d) (2013) provides that 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: marijuana, cocaine metabolites, amphetamines, opiate metabolites, phencyclidine (PCP), benzodiazepines, propoxyphene, methadone, barbiturates, and synthetic narcotics. 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 indicated that alprazolam and zolpidem were not present in the

Respondent's blood specimens at or above their reporting limits[1], and the laboratory did not test for suboxone. (App. at PP. 765, 767, 770, 772, 773.) NMS 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 Respondent's statement that "all three tests were negative" does not mean that he was not impaired by an intoxicating substance – it merely means that for the substances for which the laboratory tested, there was no result which exceeded the reporting limit. Because it was not mandated by statute and was not part of the contract between NMS and the State Police Laboratory, NMS did not test for Suboxone. However, that does not mean that Mr. Ramadan was not impaired by Suboxone or any other substance for which the laboratory did not test (e.g., inhalants such as spray paint, whippets, glue, etc. and synthetic marijuana.) Moreover, the OAH Hearing Examiner found as fact that the Respondent admitted to ingesting suboxone (App. at P. 625, FOF 9) and failed to successfully dispute that he had consumed controlled substances prior to operating a motor vehicle. *Id.* at P. 626, FOF, 23. The circuit court was obligated to give deference to factual findings rendered by the fact finder and was 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, Mr. Ramadan argues that the DMV cited a "long line of cases" which apply the test set forth in Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984), yet "*none* of these cases concerned secondary chemical evidence that showed the complete absence of alcohol or

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[1]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.

controlled substance (original emphasis)." (Resp. Br. at P. 13.) Indeed, the facts of the Respondent's case are novel in that the blood test results did not show the presence of two of the three impairing substances which Mr. Ramadan admitted to the Investigating Officer that he had consumed and did not test for the third. However, the case law promulgated by this Court still applies to the Respondent.

"There are no provisions in either W. Va. Code, 17C–5–1, et seq., or W. Va. Code, 17C–5A–1, 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, controlled substances or drugs for purposes of making an administrative revocation of his or her driver's license. Syl. Pt. 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998)." Syl. Pt. 2, *Frazier v. Null*, 874 S.E.2d 252 (W. Va. 2022). Further, " ' "[w]here there is evidence reflecting that [1] a driver was operating a motor vehicle upon a public street or highway, [2] exhibited symptoms of intoxication, and [3] had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol. Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984).' Syl. Pt. 5, *Reed v. Hill*, 235 W. Va. 1, 770 S.E.2d 501 (2015). Syl. Pt. 6, *Frazier v. Bragg*, 244 W. Va. 40, 851 S.E.2d 486 (2020)." Syl. Pt. 3, *Frazier v. Null*, 874 S.E.2d 252 (W. Va. 2022).

In *Dale v. Oakland*, 234 W. Va. 106, 763 S.E.2d 434 (2014) (per curiam), this Court upheld an administrative license revocation for driving while under the influence ("DUI") of controlled substances and/or drugs when there were no blood test results showing the presence of the impairing substance which the driver had admitted to consuming. There, Mr. Oakland admitted to the Investigating Officer that he had "a joint" and that he smoked marijuana in the car while driving around Moundsville. *Id.* at 108, 763 S.E.2d 434, 436. Mr. Oakland passed the horizontal gaze

nystagmus ("HGN") test. *Id.* However, he failed the Walk-and-Turn test and the One Leg stand test. *Id.* The officer transported Mr. Oakland to the hospital for the administration of a blood test. *Id.* At the time of the administrative hearing, the officer had not received the results of the blood test but the hearing examiner found that they were not necessary pursuant to Syl. Pt. 4, *Coll v. Cline*, 202 W. Va. 599, 505 S.E.2d 662 (1998). 234 W. Va. 106, 109, 763 S.E.2d 434, 437.

The OAH upheld the driver's license revocation due to DUI of controlled substances, and Mr. Oakland appealed to the Circuit Court of Marshall County which reversed the decision of the OAH finding that "the material findings of fact upon which the adverse legal conclusions are based are without any basic foundational support." *Id.* The circuit court found the hearing examiner's findings "so fatally flawed that the [c]ourt is at a loss to adequately describe same other than to say that such were arbitrary, capricious, an abuse of discretion, and a clearly unwarranted exercise of discretion." *Id.* The DMV appealed to this Court which held,

> "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." Syllabus Point 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). We find that the hearing examiner's decision was supported by the substantial evidence presented, and the circuit court abused its discretion in substituting its judgment for that of the fact finder below. It is unrebutted that Mr. Oakland, who was operating his motor vehicle on the streets of Moundsville, West Virginia, admitted to Officer Wilhelm that he had smoked marijuana while driving around town. Further, it is unrebutted that Mr. Oakland ignored stopping at a stop sign and had glassy eyes. The circuit court failed to address this other indicia of impairment in its order reversing the OAH's order upholding Mr. Oakland's license revocation. Even if we assumed for the sake of argument that the results of the field sobriety tests were inadmissible to prove that Mr. Oakland was under the influence of marijuana, sufficient evidence exists in this case to substantiate that Respondent was under the influence, as he admitted to smoking marijuana, had glassy eyes, and he roll-stopped through a stop sign.

Dale v. Oakland, 234 W. Va. 106, 112–13, 763 S.E.2d 434, 440–41 (2014).

In sum, the circuit court below erred in not giving deference to the OAH's findings of fact, and *Albrecht, Coll,* and *Oakland* are still good law which the circuit court ignored.

3. The credibility determinations of the trier of fact are entitled to deference.

In his responsive brief, Mr. Ramadan attempts to re-litigate his expert's evidence which was presented to the OAH at the administrative hearing below. The OAH 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.)

The hearing examiner did not discuss Mr. Richmond's testimony regarding suboxone not causing HGN; however, the fact finder did consider the Respondent's documentary evidence

contained in "Petitioner's Exhibit 3" (App. at PP. 571-617). 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.)

It is clear from the record that the OAH Hearing Examiner reviewed the documentary evidence as well as the testimonial evidence of the law enforcement officers, Mr. Ramadan, and Mr. Ramadan's expert witness and made a credibility determination regarding the evidence. The circuit court below erred in substituting its judgment for that of the fact finder regarding these credibility assessments. "A reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations." *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997). *See also*, *In re E.G.*, No. 21-0632, 2022 WL 3931422, at *3 (W. Va. Aug. 31, 2022) (memorandum decision). "Credibility determinations are for a jury and not an appellate court." Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). *See also*, *State of W. Va, v. Terry G.*, No. 21-0388, 2022 WL 3935366, at *4 (W. Va. Aug. 31, 2022) (memorandum decision). 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).

CONCLUSION

In sum, 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. In subsection (d), the Legislature did not include the presumptions regarding concentrations as it had for alcohol in subsection (b). The statute is clear and unambiguous; therefore, it was clear error for the circuit court to interpret the same.

Further, the OAH 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 droopy 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.) The hearing examiner's decision was not clearly wrong and was not affected by an error of law; therefore, the circuit court owed 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 and erred in substituting its judgment for that of the fact finder.

Finally, the hearing examiner was in the best position to assess the credibility of the witnesses and those determinations are supported by the record. The circuit court erred in not giving deference to the hearing examiner's credibility assessments.

For the reasons set forth in the *Brief of the Division of Motor Vehicles* and for the foregoing reasons, the *Final Order* of the Circuit Court of Monongalia County must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General and counsel for Everett J. Frazier, certify that on the 6th day of September 2022, I served the foregoing *Reply Brief of the Division of Motor Vehicles* upon the following by depositing true and correct copies via U.S. Mail, first-class postage prepaid to:

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