

Nos. ~~3543~~ and 35648
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE *ex rel.* RONALD L. WOOTEN, Director,
and the WEST VIRGINIA OFFICE OF MINERS'
HEALTH, SAFETY, AND TRAINING,

Appellants,

v.

THE COAL MINE SAFETY BOARD OF APPEALS
and WILLIAM A. COULSON,

Appellees.

and

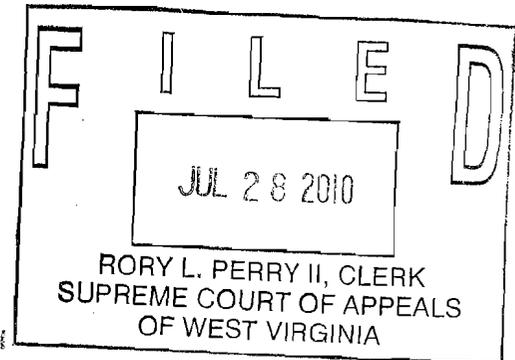
WEST VIRGINIA OFFICE OF MINERS'
HEALTH, SAFETY, AND TRAINING,

Appellant,

v.

WILLIAM A. COULSON,

Appellee.



BRIEF OF APPELLANTS

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I. KIND OF PROCEEDING AND NATURE OF THE RULINGS BELOW

The Appellants, Ronald L. Wooten, Director, and the West Virginia Office of Miners' Health, Safety and Training (hereinafter collectively "OMHST"), sought a writ of prohibition and a preliminary injunction against the Board of Appeals ("the Board"), and William A. Coulson, the party in interest the underlying proceeding. Specifically, OMHST sought to prohibit the Board from reinstating the underground coal miner certification of Mr. Coulson prior to the final evidentiary hearing scheduled in the underlying decertification matter before the Board. Such action before the Board was styled *In the Matter of William A. Coulson*, Docket No. 08-DEC-11.

After issuing a temporary injunction and permitting OMHST to temporarily suspend Mr. Coulson's miner certification pending final hearing on the underlying permanent decertification matter, the Circuit Court of Kanawha County granted the Board's Motion to Dismiss.

In addition to the administrative issue regarding OMHST's authority to temporarily suspend a certification pending a final evidentiary hearing, there is included here a consolidated second appeal regarding the merits of the underlying decertification matter. At the administrative level below, OMHST petitioned the Board to permanently withdraw Mr. Coulson's coal miner certification after the underground locomotive that he was operating struck and killed a fellow coal miner. The Board upheld Charge 1 of the Petition for Withdrawal but found that OMHST had not proven Charge 2. The Board decertified Mr. Coulson for a period of 90 days, including and counting the period that he had already been temporarily decertified. OMHST appealed the Board's decision to the Circuit Court of Kanawha County. The circuit court affirmed the decision of the Board.

II. STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

At approximately 12:15 p.m. on October 19, 2008, at McElroy Coal Company's McElroy Mine in Marshall County, West Virginia, there was a fatal underground mine accident inside the mine on the Fish Creek Portal Bottom area. The accident occurred when Mr. Coulson, who was operating a 27 ton underground mine locomotive, struck and killed Mr. Victor Goudy.

After the accident, McElroy Mine required Mr. Coulson to submit to a drug test. That drug test showed that, at almost four hours after the accident, Mr. Coulson still had positive levels of Hydrocodone and Oxycodone in his system. Mr. Coulson did have a prescription for Hydrocodone but did not have a prescription for Oxycodone.

After learning of the results of the drug test, OMHST filed a Petition with the Board seeking to permanently revoke all miner certifications possessed by Mr. Coulson. Authority for such a Petition is found in W. Va. Code § 22A-1-31. Mr. Coulson was charged as follows:

CHARGE 1

At approximately 12:15 p.m. on October 19, 2008, at McElroy Coal Company's McElroy Mine in Marshall County, West Virginia, a fatal mine accident occurred inside the mine on the Fish Creek Portal Bottom area. Inspectors from the West Virginia Office of Miners' Health, Safety and Training conducted an investigation and during that investigation found that William A. Coulson violated the following duties:

West Virginia Code § 22A-2-43(g) states in pertinent part:
Operation of mining machines. – Machine runners and helpers shall use care while operating mining machines.

West Virginia Code of State Regulations § 36-34-3.2 states:
Mining equipment shall be operated safely, taking into consideration the condition of the haulage road, limit of visibility, height of the coal seam, and the size of the equipment.

West Virginia Code of State Regulations § 36-18-4.1 states in pertinent:

Equipment operators shall exercise reasonable care in the operation of the equipment entrusted to them.

During the investigation, it was determined that William A. Coulson violated W. Va. Code § 22A-2-43(g), 36 CSR 34-3.2 and 36 CSR 18-4.1 when the No. 47 locomotive that he was unsafely operating collided with a trip of dollies. Mr. Victor Goudy was caught between the locomotive and another rail car causing his death.

CHARGE 2

At approximately 12:15 p.m. on October 19, 2008, at McElroy Coal Company's McElroy Mine in Marshall County, West Virginia, a fatal mine accident occurred inside the mine on the Fish Creek Portal Bottom area. Inspectors from the West Virginia Office of Miners' Health, Safety and Training conducted an investigation and during that investigation found that William A. Coulson violated the following duties:

West Virginia Code § 22A-2-57(c) states:

No person shall at any time carry into any mine any intoxicants or enter any mine while under the influence of intoxicants.

West Virginia Code of State Regulations § 36-22-4.3 states in pertinent part:

No person shall at any time carry into any mine or work area of any mine any intoxicant or enter any mine or work area of any mine while under the influence of intoxicants.

During the investigation, it was determined that William A. Coulson violated West Virginia Code § 22A-2-57(c) and 36 CSR 22-4.3 when he was performing his assigned duties as a motorman while under the influence of a controlled substance as defined in West Virginia Code Chapter 60A, Article 1, Section 101(d). OMHST determined that William A. Coulson violated West Virginia Code § 22A-2-57(c) and 36 CSR 22-4.3 after receiving the results of a drug test conducted by Mr. Coulson's employer.

On December 30, 2008, the Board issued an Order finding probable cause to exist for the withdrawal of Mr. Coulson's mine certifications, stating "The Board having considered the same hereby finds probable cause to exist for withdrawal of said certifications of William A. Coulson of upon [sic] proper application to the Board." On January 6, 2009, the Board issued an Order scheduling the matter below for hearing on March 17, 2009.

On January 20, 2009, OMHST, as it did in most decertification cases involving a fatality, sent notification to Mr. Coulson that his underground coal miner certification was being temporarily suspended pursuant to 37 CSR § 2-2.1, *et seq.* According to 37 CSR § 2-2.2, the Director of OMHST has authority to temporarily suspend a certificate pending full hearing by the Board (a) if OMHST has conducted an investigation which revealed that the miner was active in a capacity which required the certification; (b) if the miner was assigned by the mine operator to perform duties set forth in the West Virginia Code or the Code of State Rules; (c) if the miner failed and/or neglected to perform such statutory or regulatory duties; and (d) if such violation of a health and safety standard resulted in the occurrence or high likelihood of the occurrence of the event against which the standard is directed or designed to prevent.

As a result of its investigation into the fatal accident which occurred on October 19, 2008, OMHST determined (a) that Mr. Coulson was a certified underground coal miner who was actively working in a position which required such certification; (b) that he was employed at McElroy Mine in Marshall County, West Virginia and was assigned the duty of operating a locomotive; (c) that Mr. Coulson neglected his duties pursuant to W. Va. Code § 22A-2-43(g), 36 CSR § 34-3.2 and 36 CSR § 18-4.1 when he unsafely and under the influence of a controlled substance operated the locomotive which collided with a trip of dollies thus pinning Mr. Victor Goudy between the locomotive and another rail car causing his death and that Mr. Coulson violated W. Va. Code § 22A-2-57(c) and 36 CSR § 22-4.3 when he was performing his assigned duties as a motorman while under the influence of a controlled substance as defined in W. Va. Code Chapter 60A-1-101(d); and (d) that there was a high likelihood that Mr. Coulson would repeat his reckless behavior thus causing another accident and/or fatality.

On January 26, 2009, Mr. Coulson sent a letter to the Board appealing OMHST's decision to temporarily suspend his underground coal miner certificate pending final hearing by the Board. Neither OMHST nor its counsel was served with Mr. Coulson's appeal letter. On February 19, 2009, the Board, without notice, a hearing, a conference call, or any other provision of due process to OMHST, acted upon Mr. Coulson's letter and issued an Order reinstating Mr. Coulson's underground coal miner certificate pending final hearing by the Board. Never was OMHST provided an opportunity to respond to Mr. Coulson's letter prior to the Board summarily issuing an order on February 19, 2009. In its Order, the Board stated,

Pending before the Board is the Motion of the charged party in this matter to reinstate his certifications pending a final hearing in this matter. The Board, finding that the Petitioner failed to make the proper application to the Board prior to imposing the suspension complained of, does hereby grant said Motion and unanimously Order [*sic*] that the charged party [*sic*] certification be reinstated pending the final hearing in this matter.

On February 27, 2009, counsel for OMHST sent a letter to the Board's chair stating that 37 CSR § 2-1, *et seq.*, contains no provision for making application to the Board and asking for the legal authority for said application. The Board failed to respond to OMHST's request; therefore, on March 2, 2009, OMHST filed the underlying "Petition for Writ of Prohibition, Motion for Preliminary Injunction and Request for an Expedited Hearing."

On March 9, 2009, the circuit court heard arguments on the Preliminary Injunction which it granted. The Court did not rule on OMHST's request for a Writ of Prohibition. On March 17, 2009, the Board held an evidentiary hearing in the decertification matter. At the close of the hearing, the Board retired to deliberate and then returned and issued the following oral order:

The Board has deliberated and considered the two charges contained in the petition. The Board finds that with regard to Charge One, the Board unanimously finds that

the piece of machinery was operated in an unsafe manner and, therefore, upholds the allegations contained in Charge One contained in the petition.

The Board, by a two to one vote, member Dillon - - a two to one vote, dismisses - - finds that the - - finds that present and under the influence is not the same thing and, therefore, finds that the State has failed to uphold - - has failed to prove its burden under Charge Two, and with member Dillon dissenting, that charge is dismissed.

The Board finds that contributing factors in the accident were the lack of lighting on the back of the forward equipment and takes into consideration that the rules and practices in this mine were changed to require significantly different lighting and reflection - - reflective materials, the fact that the front motor did not communicate that they had stopped and their location when they stopped, and the fact that unfortunately the victim in this case placed himself in a dangerous and inappropriate location. Taking into consideration all of those factors, the Board decertifies Mr. Coulson for a period of 90 days, including and counting the period that he's already been decertified. The objections and exceptions of any aggrieved party is hereby preserved.

On March 24, 2009, in the writ of prohibition matter, the Board filed a Motion to Dismiss and Answer, and on May 4, 2009, the circuit court heard arguments on the same.

On May 7, 2009, OMHST filed a "Verified Petition for Emergency Stay, Notice of Intent to Appeal and Writ of Mandamus" with the circuit court because the final order in the underlying decertification matter had yet to be entered by the Board. On June 18, 2009, The Honorable Paul Zakaib, Jr., entered an "Order Granting Writ of Mandamus and Petition for Emergency Stay." Said Order directed the Chairman of the Board of Appeals to enter the Board's final order on or before July 2, 2009, and stayed re-issuance of Mr. Coulson's miner certification pending the final order of the circuit court on the appeal of the underlying decertification matter. On June 29, 2009, the Board entered its final order in the underlying decertification matter, and on July 24, 2009, the circuit court issued its Order Granting Respondent's Motion to Dismiss in the writ of prohibition/temporary suspension matter.

On July 29, 2009, OMHST filed Petitioner’s Petition for Appeal and Request for a Briefing Schedule with the Circuit Court of Kanawha County in the decertification matter. On January 29, 2010, the circuit court below entered its Final Order.

III. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED WHEN IT DID NOT GRANT PETITIONERS’ WRIT OF PROHIBITION AND CONCLUDED THAT THE BOARD HAS THE INHERENT POWER TO REQUIRE THE DIRECTOR TO MAKE APPLICATION BEFORE UTILIZING THE PROCEDURES FOR TEMPORARY SUSPENSION FOUND IN TITLE 37 SERIES 2 OF THE CODE OF STATE REGULATIONS.
- B. THE CIRCUIT COURT ERRED IN DISMISSING THE MATTER BELOW AS MOOT.
- C. THE CIRCUIT COURT ERRED IN CONCLUDING THAT AN APPEAL WAS AN ADEQUATE REMEDY.
- D. THE CIRCUIT COURT ERRED WHEN IT AFFIRMED THE BOARD’S DETERMINATION THAT THERE WAS NO EVIDENCE PRESENTED TO SHOW THAT THE RESPONDENT DEMONSTRATED ANY CHARACTERISTIC OF A PERSON UNDER THE INFLUENCE OF INTOXICANTS.
- E. THE CIRCUIT COURT ERRED IN NOT FINDING THAT THE BOARD MISAPPLIED W. VA. 36 C.S.R 22-4.5.
- F. THE CIRCUIT COURT ERRED IN NOT DETERMINING THAT THE PENALTY GIVEN RESPONDENT BELOW FOR CHARGE 1 WAS INSUFFICIENT AS A MATTER OF LAW.

IV. POINTS AND AUTHORITIES RELIED UPON

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<u>Hinkle v. Black,</u> 164 W. Va. 112, 262 S. E. 2d 744 (1979)	17
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<u>In re Queen</u> 196 W. Va. 442, 473 S.E.2d 483 (1995)	25
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<u>Phillip Leon M. v. Greenbrier County Bd. of Educ.,</u> 199 W. Va. 400, 484 S.E.2d 909 (1996)	12
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Other Authority

2 Am. Jur. 2d. Admin. Law § 27 14

V. DISCUSSION OF THE LAW

Introduction

The Board is an administrative hearing tribunal empowered pursuant to W. Va. Code § 22A-5-1 to hear appeals, make determinations on questions of miners' entitlements due to withdrawal orders and appeals from discharge or discrimination, and suspension of certifications. W. Va. Code § 22A-1-31(a) gives the Director of OMHST the authority to charge a person certified by OMHST with neglect or failure to perform a duty mandated by Chapter 22A of the West Virginia Code. Series 1 of Title 37 of the Code of State Rules outlines the "Rules Applicable to Proceedings Initiated to Withdraw Certification." Series 2 of Title 37 of the Code of State Rules outlines the "Procedures for Temporary Suspension of Certificates." In 1983 this Court previously addressed temporary suspension of miner certifications; however, the instant matter requires further inquiry into the authority and procedures surrounding such temporary suspension.

Although W. Va. Code § 22A-2-57(c) and W. Va. 36 C.S.R. 22-4.3 have been in effect to protect the state's coal miners for approximately twenty-five years, this is a case of first impression. The issue of what constitutes being under the influence of controlled substances in a coal mine when there is no legal limit for drugs as there is for alcohol has not been tried by the administrative tribunal below. Without having the benefit of an objective standard like a blood alcohol content, this Court must decide if there was other sufficient evidence in the record for the circuit court below to make a determination as to whether Mr. Coulson was under the influence of a controlled substance when the locomotive that he was operating underground struck and killed Mr. Victor Goudy.

Further, while there have been other decertification matters before the Board of Appeals under W. Va. Code § 22A-1-31, the issue of whether the penalty imposed by the Board was sufficient in light of the circumstances is another matter of first impression before this Court.

Standard of Review

Before this Court is an appeal from an order of the Circuit Court of Kanawha County granting the Board's Motion to Dismiss. By granting the Motion to Dismiss, the circuit court also refused to grant the relief requested by the OMHST in its Petition for Writ of Prohibition. This Court has held:

The standard of appellate review of a circuit court's refusal to grant relief through an extraordinary writ of prohibition is *de novo*.

Syl. pt. 1, State ex rel. Callahan v. Santucci, 210 W. Va. 483, 557 S. E.2d 890 (2001).

Since OMHST also seeks this Court's review of the circuit court's refusal to grant Petitioners Writ of Prohibition, the standard of review that this Court should apply is *de novo*.

Our standard of review is *de novo* "[b]ecause interpretations of the West Virginia Constitution, along with interpretations of statutes and rules, are primarily questions of law." Phillip Leon M. v. Greenbrier County Bd. of Educ., 199 W. Va. 400, 404, 484 S.E.2d 909, 913 (1996); *accord* Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995) ("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.")

Perdue v. Wise, 216 W. Va. 318, 322, 607 S.E.2d 424, 428 (2004).

Further, on appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4 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, Muscastell v. Cline, 196 W. Va. 588, 474 S.E.2d 518 (1996).

VI. ARGUMENT

A. **The Circuit Court Erred When it Did Not Grant Petitioners’ Writ of Prohibition and Concluded That the Board Has the Inherent Power to Require the Director to Make Application Before Utilizing the Procedures for Temporary Suspension Found in Title 37 Series 2 of the Code of State Regulations.**

The West Virginia Legislature created the Board of Appeals by virtue of W. Va. Code § 22A-5-1 *et seq.* The Legislature gave the Director of OMHST the authority to charge an individual miner and seek decertification of his/her miner certificates when a miner has neglected or failed to perform a duty mandated by article one or article two of chapter 22A. The Legislature also gave the Board the power to “evaluate the charge [filed by the Director] and determine whether or not a violation of duty has been stated.” In evaluating the charge, the Board must determine whether “probable cause exists to support the allegation that the person charged has violated his or her duty.” W. Va. Code § 22A-1-31(b).

W. Va. Code § 22A-1-31 does not address temporarily suspending a miner’s certificates pending the final administrative hearing before the Board. The Director’s authority to temporarily suspend a miner’s certifications pending a final administrative hearing first arose in State ex rel.

Perry v. Miller, 171 W. Va. 509, 300 S.E.2d 622 (1983). In Perry, this Court stated:

Although it is true that there is no express statutory authority given to the Director to temporarily suspend the certificate or license of a mine foreman, it is clear from relevant statutes that the Director has the ultimate authority to license. Furthermore, we have recognized that where the Legislature has delegated to a board or agency part of its police power in the protection of public health and safety, precise legislative guidelines are not required. (Footnote omitted.)

State ex rel. Perry v. Miller, 171 W. Va. at 513, 300 S.E.2d at 626.

This Court then went on to state:

It would be a gross anomaly if the Director, when confronted with serious health and safety violations on the part of an individual whom he is required to certify as being competent, could not temporarily suspend such individual's license. To adopt any alternative would be not only risking the lives and safety of the employees who are protected by the statute but would expose the employer's plant and equipment to the possibility of serious damage or neglect. This would run counter to the clear and unequivocal legislative policy which we have outlined in note 3.

State ex rel. Perry v. Miller, 171 W. Va. at 515, 300 S.E.2d at 628.

This Court then concluded that a moulded writ would issue, "directing the Director of the Department of Mines to promulgate a temporary suspension regulation not inconsistent with the standards set out herein." State ex rel. Perry v. Miller, 171 W. Va. at 516, 300 S.E.2d at 629.

In response to this Court's decision in Perry, the "Procedures for Temporary Suspension of Certificates" were promulgated at W. Va. C.S.R. § 37-2-1 *et seq.* These procedures require the Board to first make a probable cause finding before the Director can issue a temporary suspension. No where in these procedures is there a requirement that before issuing a temporary suspension of a miner's certifications the Director must make "application" to the Board. Thus, the Board exceeded its legitimate powers by requiring the Director to make "application" to it before temporarily suspending a miner's certifications prior to the final administrative hearing.

Administrative agencies are not courts nor part of the judicial system and thus do not possess general judicial powers. 2 Am. Jur. 2d. Admin. Law § 27. Instead, as an administrative body, the Board's power consists of only that which is found under statute. In Syl. pt. 1, Francis O. Day Co., Inc. v. W. Va. Reclamation Bd. of Review, 188 W. Va. 418, 424 S.E.2d 763 (1992), this Court stated:

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

Since the Board is a creature of statute, possessing only those powers granted to it by statute and possessing no general or common law powers, the Board has no inherent power, as the circuit court found. Furthermore, the Board does not possess “implied powers” to a level that would allow it to alter the “Procedures for Temporary Suspension of Certificates,”¹, and require the Director to make “application” to it before issuing a temporary suspension when an “application” process is not found in the rule.

Thus, the circuit court erred when it failed to grant Appellants’ Writ of Prohibition and instead granted the Board’s Motion to Dismiss.

B. The Circuit Court Erred in Dismissing the Matter below as Moot.

In its decision, the circuit court found that after the evidentiary hearing was held in the underlying decertification matter below, the issue as to whether the Board has authority to require OMHST to apply to the Board for temporary decertification was technically moot. In Paragraph 11 of its Motion for Continuance filed with the circuit court on March 10, 2009, the Board stipulated that “the legal issues in the case need to be decided by this Court and agrees that the issues will **not be moot** even if this court hears and decides the issues herein pending after the final hearing before the Board scheduled on March 17, 2009.” The Board should not be able to have it both ways and had already entered its stipulation with the court.

¹W. Va. C.S.R. § 37-2-1 *et seq.*

To determine mootness, the circuit court used the three prong test outlined in Israel by Israel v. W. Va. Secondary Schools Activities Comm'n, 182 W. Va. 454, 388 S.E.2d 480 (1989). *See also*, Syl. pt. 2, State v. Merritt, 221 W. Va. 141, 650 S.E.2d 240 (2007):

. . . first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

The court's findings that "there are no collateral consequences that will result from this case because it has been decided by the Board and is the only case like it that has been filed against the Board in the last 20 years" and "this is not a matter that will be repeatedly presented to the trial court" are wrong. Mr. Coulson's individual case may be at its end; however, charges for decertification are filed by OMHST with the Board frequently. Each time a charge of decertification is filed with the Board, the Board must evaluate the charge and determine whether or not a breach of duty has been stated. If so, the Board issues its probable cause order. The Board utilizes the same boilerplate probable cause order containing the same "application" language that is at issue in this case. Therefore, this matter will continue to be repeated as other miners are issued temporary suspension notices because the Board does not have the inherent or implied authority to alter the procedures found in the rule and, therefore, will continue to exceed its legitimate powers.

Moreover, since the Board has not expressed in any manner what type of "application" it desires, OMHST could conceivably always fail to make "proper application" until such time as the Board is required to define what "proper application" means. To place such a "moving target" burden upon the OMHST effectively nullifies W. Va. C.S.R. § 37-2-1 *et seq.* Thus, this issue needed

to be addressed by the courts as a matter of great public interest and for guidance to the local bar and the attorneys for the state who regularly handle miner decertification cases. Therefore, the circuit court erred in concluding that this matter was moot.

C. The Circuit Court Erred in Concluding That an Appeal Was an Adequate Remedy.

The circuit court held in Conclusion of Law No. 9:

“In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance. . . .” Syllabus point 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S. E. 2d 744 (1979).” Syllabus point 1, *State ex rel. Stanley v. Sine*, 215 W. Va. 100, 594 S. E. 2d 314 (2004). Here Petitioners clearly had the statutory right to appeal the Board of Appeals Order reinstating Mr. Coulson’s certification to the Circuit Court and they elected not to do it.

First, OMHST submits that the Board’s February 19, 2009 Order was a non-appealable interlocutory order and, therefore, would not be appealable until after the Board issued its final order. Assuming *arguendo*, that the language of W. Va. Code § 22A-1-19 could be read broadly enough to allow OMHST to appeal the Board’s order, an appeal was not an adequate remedy. By temporarily suspending Mr. Coulson’s miner’s certifications, OMHST was trying to insure that Mr. Coulson did not work in any mine pending the final administrative hearing. Once the Board entered its order, Mr. Coulson could have returned to work at any mine immediately. Without the extraordinary Writ of Prohibition, OMHST would not have any method to obtain judicial review of the Board’s February 19, 2009 order prior to the final administrative hearing that was scheduled for March 17, 2009.

Furthermore, Appellants submit that the Board's unilateral creation of an "application" process, when no "application" is required by the statute or rule in question, is a substantial, clear-cut, legal error plainly in contravention of the law warranting the use of a writ of prohibition. Thus, the circuit court erred when it concluded that OMHST's appeal rights under W. Va. Code § 22A-1-19 were adequate.

D. The Circuit Court Erred When it Affirmed the Board's Determination That There Was No Evidence Presented to Show That the Respondent Demonstrated Any Characteristic of a Person under the Influence of Intoxicants.

In its decision, the Circuit Court found that

[t]he mere presence of intoxicants in the body does not affect or influence a person's faculties in such a way that it impacts a person's physical or mental control. More information is necessary to discover whether such a person would have been influenced by the intoxicants in his or her system. For example, the OMHST's expert, William Randall Lynn, Ph.D., explained in his testimony that the concentration of the intoxicant in the urine can be compared to the dilution of the urine to provide more insight into actual amount of the intoxicant in the body and, in turn, the effect the intoxicant would have on the person. (Transcript pages 64-68.) Another concern regarding the effect of the intoxicant on the person is the person's tolerance to the drug and the possibility of that intoxicant's being present in the body at the same time as another intoxicant's presence in the blood. (Transcript pages 61-62, 69-72.)

Without any further information than that presented at the hearing, this Court is of the opinion that the OMHST did not carry its burden to prove by a preponderance of the evidence the Mr. Coulson was guilty of the charges contained in Charge 2.

OMHST submits that indeed there is sufficient evidence in the administrative record as a whole to determine that Mr. Coulson demonstrated signs of drug influence at the time that the locomotive he was operating struck and killed Mr. Goudy. The Board itself outlined ample evidence in its Findings of Fact for Charge 1 to make a determination that Mr. Coulson was under the influence of a controlled substance. Moreover, the Board concluded in Charge 1 that Mr. Coulson

was operating the locomotive unsafely - a determination which can be used as evidence of being under the influence.

While there is no West Virginia law directly on point, this Court can take direction from Albrecht v. State, 173 W. Va. 268, 314 S.E.2d 859 (1984). Mr. Albrecht was not given a chemical sobriety test following a motor vehicle accident yet was found to be under the influence of alcohol for the purposes of making an administrative revocation of his driver's license. This Court concluded that there were no provisions in 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 because there were other sufficient facts to establish by a preponderance of the evidence that Mr. Albrecht had been driving under the influence of alcohol. Albrecht v. State, 173 W. Va. 268, 273, 314 S.E.2d 859, 864 (1984).

The facts relied upon were that Mr. Albrecht lost control of the vehicle he was driving and crashed into a utility pole seven or eight feet from the road; his vehicle smelled of alcohol when the trooper arrived to investigate the accident; and he subsequently admitted to the trooper that he had been drinking prior to the accident. Id. This Court further found that if "one dismisses Mr. Albrecht's seemingly drunken behavior [incoherence, staggering and inability to stand without assistance] as the result of a cerebral concussion, there is still sufficient evidence to support the decision of the Commissioner of Motor Vehicles." Id.

In the instant matter, the following facts are not in dispute and were made part of the Board's Findings of Fact: 1) Mr. Coulson turned off the headlights of the locomotive he was operating in response to Mr. Goudy's signal for Mr. Coulson to stop; 2) Mr. Coulson turned off the headlights as he was going through the radius turn which was approximately ½ mile from the slope; 3) Mr.

Coulson never slowed the motor down once he turned off the lights of the locomotive that he was operating; 4) Mr. Coulson knew that he was following another crew but did not communicate with the crew as to their location; 5) Mr. Coulson had worked in the area of the mine where the accident occurred for a very long time and was familiar with that area of the mine; and 6) the locomotive which Mr. Coulson was operating was going at sufficient speed to wedge the coupler of his locomotive over the top of the dolly which he struck. Pursuant to this Court's rationale in Albrecht, the Board's Findings of Fact in Charge 1 were sufficient to establish by a preponderance of the evidence that Mr. Coulson had been under the influence of a controlled substance when the locomotive that he was operating struck and killed Mr. Goudy regardless of whether there was evidence presented of incoherence, staggering, etc.

OMHST presented additional evidence of Mr. Coulson's being under the influence of a controlled substance which the Board presumably did not consider in its determination. The shift began at 8:00 a.m. (R. 000353 at 25) with the accident occurring at approximately 12:00 p.m. (R. 000354 at 3), and there was still a measurable level of Oxycodone and Hydrocodone in Mr. Coulson's system at 3:45 p.m. when the drug test was administered (R. 000464). The Board also specifically concluded that Mr. Coulson was unsafely operating the locomotive. (R. 000008.)

Other courts have addressed similar issues in their jurisdictions. In Holloman v. State, 820 So.2d 52 (Miss. App. June 18, 2002)², the Court of Appeals of Mississippi addressed the issue of whether there was sufficient evidence to prove that Holloman was under the influence of methamphetamine and cocaine at the time of his automobile accident. As in the instant matter, the State in Holloman did not purport to offer scientific evidence as to the quantity of the drugs

²cf., Robinson v. State, 98 Ark. App. 237, 254 S.W.3d 750 (Ark. App. Apr 04, 2007).

discovered in Holloman's system. Instead, the evidence in Holloman consisted of a positive drug test coupled with observed evidence of Holloman's unusual behavior shortly before the accident and the fact that he was driving erratically and at a dangerously high rate of speed just moments before impact. Id. at 57.

Holloman argued that the evidence of the mere presence of such drugs in his system does not prove that he was under the influence of those narcotic substances within the meaning of the statute. Id. at 58. The Mississippi court noted that Holloman's argument misses the other evidence presented to the jury, namely, his unusual behavior and his erratic driving. Id. The court further noted that,

On the related question of determining whether a person was under the influence of alcohol, the Mississippi Supreme Court has granted substantial leeway to the finders of fact in making such a determination and has placed the threshold for such a determination notably low, taking judicial notice that the presence of even small amounts of alcohol can cause an almost imperceptible impairment that, nevertheless, "may spell the difference between accident or no accident..." Allen v. Blanks, 384 So.2d 63, 67 (Miss. 1980).

Holloman at 58. Finally, the Holloman court concluded that it was satisfied that the uncontroverted evidence that Holloman had ingested illegal narcotics that were still present in measurable quantities in his body, together with evidence of remarkably unusual behavior and his demonstrably reckless operation of a motor vehicle were enough when considered in conjunction, to support a reasonable inference by the jurors that Holloman was, in fact, under the influence of the narcotic substances at the time of the fatal accident. Id. at 59.

Here, it is uncontroverted that Mr. Coulson had ingested Oxycodone and Hydrocodone that were still present in measurable quantities in his body almost four hours after the fatal accident. Further, evidence was presented below that Mr. Coulson was unaware of his location in the mine even though he had worked there for years and that he failed to communicate with the other crew

that he knew he was following. There was evidence presented that even though Mr. Coulson acknowledged Mr. Goudy's signal to stop, Mr. Coulson did not even slow down the locomotive he was operating then proceeded to wedge the coupler of the locomotive over the top of the dolly which he struck. Most notably, the Board itself concluded that Mr. Coulson was operating the locomotive in an unsafe manner which can be compared to Holloman's reckless operation.

More recently, the Court of Appeals of Mississippi in Knight v. State, 14 So.3d 76 (Miss. App. July 28, 2009) addressed the issue of whether there was sufficient evidence to support a conviction of common law DUI when the defendant's blood alcohol results were unavailable but there was evidence that he operated his vehicle under circumstances indicating his ability to operate the vehicle was impaired by the consumption of alcohol. In Knight, the evidence presented to the court in its finding beyond a reasonable doubt that Knight was driving under the influence was: 1) he was driving in a reckless manner; 2) alcohol was present in his vehicle; 3) the smell of alcohol was present around his vehicle; 4) he admitted that he had consumed a couple of beers at some point that evening; and 5) he refused to submit to a breathalyzer. Id. at 79. Pursuant to the holding in Knight, even without objective evidence of the presence of controlled substances in Mr. Coulson's system, other evidence can be sufficient to make a finding that he was under the influence. Here, however, the Board, which only had to make a finding by a preponderance of the evidence, had the benefit of a drug test showing a measurable amount of controlled substances in Mr. Coulson's system as well as other sufficient evidence yet still erred in its conclusion that was not under the influence of those controlled substances.

E. The Circuit Court Erred in Not Finding That the Board Misapplied W. Va. 36 C.S.R 22-4.5.

In Charge 2 of the Petition of Withdrawal of Certifications, Mr. Coulson was charged with a violation of W. Va. 36 C.S.R. 22-4.3 which states in pertinent part: “No person shall at any time carry into any mine or work area of any mine any intoxicant or enter any mine or work area of any mine while under the influence of intoxicants.” W. Va. 36 C.S.R. 22-4.5 states,

Any miner who has been denied entry or removed from the mine pursuant to section 4.4 of these regulations shall be afforded the opportunity to receive a timely and appropriate medical examination to be provided by the operator. The operator shall afford the miner the opportunity for transportation to the medical facility where the examination will be performed. Such medical examination may include the administration by a physician of tests prescribed and approved by the Department of Health of the State of West Virginia for the determination of a base of a controlled substance or alcohol pursuant to Chapter 17C, Article 5 of West Virginia Code. **If the results of any such tests demonstrates a blood alcohol level of one tenth (.10) of one percent (1%) or more by volume, or the presence of controlled substances to a degree which renders such person incapable of performing safely, such tests shall be determinative that a person is “under the influence” for purposes of this section.**

[Emphasis added.]

It is without question that Mr. Coulson was given a test that determines the base of a controlled substance. The Board below specifically found the results of the drug screens admissible. (R. 000010, C.O.L. 2.) The test showed the level of Oxycodone present in Mr. Coulson’s system was 408 ng/mL, and the level of Hydrocodone present was 1520 ng/mL. (R. 000009, F.O.F. 7 and 9.) As to Charge 1 below, the Board unanimously concluded that Mr. Coulson “violated W. Va. Code § 22A-2-43(g), 36 CSR 34-3.2 and 36 CSR 18-4.1 when the No. 47 locomotive that he was **unsafely operating** collided with a trip of dollies.” [Emphasis added.] Since the evidence showed the presence of a controlled substance in Mr. Coulson and since the Board affirmed Charge 1 finding that Mr. Coulson was operating the locomotive unsafely, the regulation required the Board to find

that Mr. Coulson was under the influence thus upholding Charge 2 as well. The circuit court erred in not finding that the Board misapplied W. Va. 36 C.S.R. 22-4.5.

F. The Circuit Court Erred in Not Determining That the Penalty Given Respondent Below for Charge 1 Was Insufficient as a Matter of Law.

In the Petition for Withdrawal of Certifications, the Director of OMHST prayed that Mr. Coulson be permanently decertified as an underground coal miner in the State of West Virginia due to his unsafe operation of the locomotive and due to his being under the influence of intoxicants when he entered the coal mine. In its disposition of the underlying matter, the Board decertified Mr. Coulson for a period of ninety (90) days including and counting the period which he had already served under his temporary suspension by the Director. Because the Board dismissed Charge 2, the penalty assessed was based upon Charge 1 only - that the piece of machinery was operated in an unsafe manner. Mr. Coulson's unsafe operation of a 27 ton locomotive caused the impalement and death of Mr. Victor Goudy, yet Mr. Coulson received only a three (3) month penalty for his unsafe operation of the locomotive. The circuit court below held that "in light of the fact that OMHST only proved Charge 1, the Court is of the opinion that the penalty imposed on Mr. Coulson was reasonable."

In Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001), this Court addressed the reasonableness of a penalty by an administrative agency and the discretion of that agency to assess such a penalty. In Adkins, the Department of Education suspended Adkins's teacher certification for two years for untruthfulness on a certification application. The circuit court found the two year suspension to be arbitrary and capricious and ordered the suspension to be

reduced to one year. This Court reversed the circuit court's ruling and reinstated the two year suspension reasoning that

... As we explained in Syllabus Point 3 of In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1995), 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.

Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 108, 556 S.E.2d 72, 75 (2001).

Here, the agency (OMHST) moved for permanent decertification and presented substantial evidence on both Charges 1 and 2 at hearing to justify such a period of decertification. Clearly, the Board abused its discretion when it determined that Mr. Coulson's unsafe operation of a locomotive which resulted in the death of Mr. Victor Goudy was worth only three (3) months' decertification. Because the Board erred in not finding that Mr. Coulson was under the influence of intoxicants when he entered the mine, it did not take into consideration such a conclusion in its disposition which in itself is in error. In comparison, Adkins lied on an application for teacher certification and was suspended from teaching for two years. Clearly, Mr. Coulson's unsafe operation of a 27 ton locomotive, his being under the influence of intoxicants while in a mine, and the resulting death of Mr. Victor Goudy warrant *at the very least* a suspension comparable to that of Adkins.

VII. PRAYER FOR RELIEF

For the above-listed reasons, Appellants pray that the July 24, 2009 and January 29, 2010 orders of the Circuit Court of Kanawha County be reversed.

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Brief of Appellants" was served upon the following parties by depositing the same, postage prepaid, in the United States mail, this 28th day of July, 2009, addressed as follows:

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