

35648

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

*Petitioner,*

v.

Civil Action No. 09-AA-129  
Judge Tod J. Kaufman

WILLIAM A. COULSON,

*Respondent.*

**FINAL ORDER**

Before the Court is Petitioner's Petition for Appeal and Request for a Briefing Schedule, filed July 29, 2009, in which Petitioner appeals the Final Order of the West Virginia Coal Mine Safety Board of Appeals dated May 6, 2009, and entered on June 29, 2009, wherein Petitioner's coal miner certification was withheld for ninety (90) days.

Petitioner, represented by counsel, appeared at a final hearing before Hearing Examiner Christopher A. Bell that took place on July 18, 2008. Respondent filed its Brief on September 24, 2009, and Petitioner filed its Response to Respondent's Brief on October 6, 2009.

**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, a fatal underground 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 ("OMHST") conducted an investigation, and during that investigation found that William A. Coulson was operating the No. 47 locomotive when he collided with a trip of dollies, causing

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Victor Goudy to be caught between the locomotive and another rail car. Mr. Goudy died of his injuries.

Mr. Goudy has used his cap light to signal for Mr. Coulson to stop the locomotive Coulson was operating. This is known as "flagging," which is a standard means of communication in McElroy Mine that should be recognized by equipment operators. Once equipment operators see the flagging, they turn off the lights of the equipment they are operating to acknowledge to the flagger that they know they have been flagged. Mr. Coulson turned the locomotive lights off as he was going through the radius turn in the track and was approximately half a mile from the downward slope. However, Mr. Coulson never slowed the motor down after he turned off the lights. The locomotive Mr. Coulson was operating was going at a sufficient speed to wedge the coupler of his locomotive over top of the dolly that he stuck.

Mr. Coulson knew that he was following another crew but did not communicate with that crew as to their location. 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.

OMHST inspectors alleged that Mr. Coulson violated the following: W. Va. Code § 22A-2-43(g), which states that machine runners and helpers shall use care while operating mining machines; W. Va. 36 C.S.R. 3403.2, which states that 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; and W. Va. 36 C.S.R. 18-4.1, which states that equipment operators shall exercise reasonable care in operation of the equipment entrusted to them.

Shortly after the accident, Mr. Coulson's employer, McElroy Mine, required Mr. Coulson to submit to a drug test, despite the fact that Coulson did not appear to be impaired at the time of

the accident or immediately thereafter. The drug test showed that, at the time of the accident, Mr. Coulson had positive levels of Hydrocodone and Oxycodone in his system. Mr. Coulson had a prescription for Hydrocodone, but did not have a prescription for Oxycodone.

On November 3, 2008, McElroy Mine terminated Mr. Coulson's employment. On November 5, the Union grieved the termination on Mr. Coulson's behalf.

After learning of the results of the drug test in early December 2008, the West Virginia Office of Miners' Health, Safety, and Training filed a petition with the Coal Mine Safety Board of Appeals ("Board") seeking to permanently revoke all miner certificates possessed by Mr. Coulson. Authority for filing such a petition is found in W. Va. Code § 22A-1-31. Charge 1 of the Petition alleged that Mr. Coulson violated W. Va. Code § 22A-2-43(g), W. Va. 36 C.S.R. 3403.2, and W. Va. 36 C.S.R. 18-4.1. Charge 2 alleged that he violated W. Va. Code § 22A-2-57(c), which states that no person shall at any time carry into any mine any intoxicants or enter any mine while under the influence of intoxicants, and W. Va. 36 C.S.R. 22-4.3, which states that 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.

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 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 May 7, 2009, OMHST filed a Verified Petition for Emergency Stay, Notice of Intent to Appeal and Writ of Mandamus with this court because the final order in the underlying decertification matter had yet to be entered by the Board. On June 18, 2009, Judge Zakiab 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 matter.

#### Standard of Review

This Court's review is governed by the West Virginia Administrative Procedures Act, W.Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or

- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 474 S.E.2d 518, 525 (W.Va. 1996).

### Discussion

Petitioner OMHST assignments of error are the following: (1) the penalty imposed on Mr. Coulson is arbitrary and capricious; (2) the Board's finding that "present" and "under the influence" are not the same thing is clearly wrong and erroneous in view of the reliable, probative, and substantial evidence on the whole record and in violation of statutory provisions; and (3) the Board's dismissal of Charge 2 is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record.

The root of each of these assignments of error is whether a positive drug test proof by a preponderance of the evidence that the person tested was "under the influence" of the intoxicant for which he tested positive within the purview of W. Va. Code § 22A-2-57(c) and W. Va. 36 C.S.R. 22-4.3. Neither the this section of the West Virginia Code nor the C.S.R. provide any further requirements or definitions in this regard.

A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute. Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). Generally the words of a statute are to be

given their ordinary and familiar significance and meaning. *Amick v. C & T Development Co., Inc.*, 187 W. Va. 115, 118, 416 S.E.2d 73, 76 (1992). . It is not for this Court arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposefully included, we are obliged not to add to statutes something the Legislature purposefully omitted. *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996). Moreover, a statute, or an administrative rule, may not, under the guise of interpretation, be modified, revised, amended or rewritten. Syl. Pt. 1, *Consumer Advocate Div. v. Public Srv. Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989). However, 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).

In the present case, we must get to the heart of what the legislature meant by “under the influence of intoxicants.” The Merriam-Webster Dictionary defines influence as “the act or power of producing an effect without apparent exertion of force or direct exercise of command.” Thus, it seems the concern is the effect produced by intoxicants. This leads to the matter of what effects are of concern here. Another section of the West Virginia Code provides insight as to the negative effects of intoxicants and perhaps why the legislature would want to restrict the use of intoxicants in work situations such as the one with which we are dealing here. According to W. Va. Code § 60-1-5, intoxicated shall mean having one’s faculties impaired by alcohol or other drugs to the point where physical or mental control or both are markedly diminished.

This inquiry leads to the conclusion that the meaning of “under the influence of intoxicants” is essentially impaired by the ingestion of an intoxicant in such a way that one’s

faculties are compromised to the point that physical and/or mental control is markedly diminished. The 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 that Mr. Coulson was guilty of the charges contained in Charge 2. The OMHST showed simply that Mr. Coulson had ingested an unprescribed drug at some time in the recent past following the incident and that he did not appear impaired to his coworker Gerald Loudon. Additionally, Joel Daniel Butler, who assisted with the taking of Mr. Coulson's urine sample, never mentioned in his testimony that Mr. Coulson appeared impaired. Accordingly, the Court must conclude that the Board did not err when it dismissed Charge 2.

Finally, 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. The fact that the incident resulted in the death of Victor Goudy is tragic, but the fact that the incident resulted in a fatality does not by

itself warrant a harsher penalty than a violation of the same statutes and rules that did not result in a fatality. By all appearances, this was simply a tragic accident that could have been prevented if the people involved had acted differently that day. Mr. Coulson shoulders his portion of the blame for what happened and has been punished accordingly in relation to the violations of rules and statutes committed that day.

Ruling

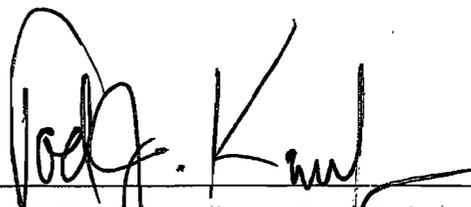
The Court hereby AFFIRMS the decision of the West Virginia Coal Mine Safety Board of Appeals below. This case is DISMISSED and STRICKEN from the docket of the Court.

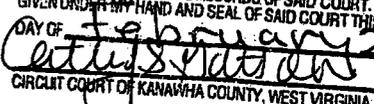
The clerk of the court shall distribute copies of this Order to all counsel of record:

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Assistant Attorney General  
1615 Washington Street, East  
Charleston, WV 25311

Mr. William Coulson  
2103 Seventh Street  
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Enter this Order the 29<sup>th</sup> day of January, 2010.

  
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Tod J. Kaufman, Circuit Court Judge for  
Kanawha County

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF February 2010  
  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK  
MP