

**BEFORE THE COAL MINE SAFETY BOARD OF APPEALS
STATE OF WEST VIRGINIA**

**In the Matter of
West Virginia Office of Miners'
Health, Safety, and Training**

Docket No.: 16-D-27

v.

**Corey Watkins.
Respondent**

ORDER TO REINSTATE CERTIFICATIONS

On July 28, 2016 the Coal Mine Safety Board of Appeals held a hearing concerning the above captioned matter. All members of the Board were present. All parties were present and represented by counsel. The Board hereby makes the following findings:

1. The Board fully considered the evidence, both testimonial and documentary, and the arguments of the parties.
2. The Board finds that an unknown, unnamed foreman at Marion County Mine contacted Brandon Marx, an hourly employee at Harrison County Mine and told Mr. Marx that four hourly employees and two salary employees at Marion County Mine were using meth and carrying urine samples with them.
3. The Board finds that the person receiving the call from Mr. Marx had experience with Mr. Marx and believed him to be a credible person based upon his prior experience with Mr. Marx. The Board further finds that because the foreman was unidentified there is no evidence offered as to indicia of reliability with regard to the aforementioned unknown.

unnamed foreman and accordingly, no indicia of reliability with regard to his report.

Thereafter, based upon that report steps were taken by Respondent's Employer to cause there to be urine samples to be taken from the six identified persons.

4. With regard to the testing of Respondent the Board finds that Mr. Watkins was approached to give a sample and after some attempts the sample was secured. The Board finds that the collector immediately observed that the sample appeared or felt warm or hot to her which was unusual in her experience.
5. Notwithstanding at least three alleged observations of the collector that in her opinion the sample was outside the temperature range, the collector immediately closed out the paperwork with regard to that sample and Respondent was dismissed and told that he was free to go.
6. Thereafter, the Respondent left the testing area. Respondent was gone at least as long as it would take him to shower and change clothes before the Employer summoned him to give another sample.
7. Based upon the foregoing findings it is a two to one determination by this Board that the request for a sample was not a reasonable suspicion test because the source of the information upon which it was based, the information of the unnamed, unknown foreman, not that of Brandon Marx, evidences no indicia of credibility of the foreman. Therefore, the Board finds that the testing of Respondent was not a reasonable suspicion test because there was no indicia of credibility of the source of the information. Member Graham dissents from this finding.
8. With regard to the allegation that Mr. Watkins refused to be tested it is a *unanimous* decision of this Board that the request for the second test was not a valid request because

under DOT regulations, 49 CFR 40.67(c), the collector must *immediately* conduct a collection under direct observation if, among other things, pursuant to 49 CFR 40.67(c)(3), the temperature of the original specimen was out of range. In this case, the request for the second direct observational sample was not immediate. Thus, Respondent's Employer's request for the second sample was not valid. Therefore, the Board unanimously finds that Respondent's inability and failure to provide a second sample was not a refusal.

9. Petitioner's objections are noted for the record.

WHEREFORE, IT IS THE ORDER OF THIS BOARD THAT RESPONDENT COREY WATKINS' CERTIFICATIONS BE IMMEDIATELY REINSTATED.

Entered: August 18, 2010
Clinton W Smith
Clinton W. Smith, Chairman
Coal Mine Safety Board of Appeals

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