

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 20-0359

DANIELLE JONES,)	
)	
Respondent, Appellant,)	APPELLANT’S OPENING BRIEF
and Cross-Appellee)	
vs.)	
)	
ALL STAR PAINTING INC.,)	
)	
Petitioner, Appellee,)	
and Cross-Appellant.)	
)	

ON APPEAL FROM THE MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT YELLOWSTONE COUNTY, THE HONORABLE DISTRICT JUDGE

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I. STATEMENT OF ISSUES

Danielle Jones's appeal presents the following issues for review:

1. Did the District Court err when it reversed the Department of Labor and Industry's Decision on Remand by concluding that it was "impacted" by improperly admitted evidence?

II. STATEMENT OF THE CASE

This is a workplace sexual harassment case coming back to this Court for the second time. Last time, the Court ordered the Department of Labor and Industry's Hearing Officer ("HO") to properly consider admissible evidence corroborating Danielle Jones's ("Jones," f/k/a Danielle Ananea) allegations of sexual harassment that occurred while she working for All Star Painting ("All Star") in Billings, Montana. *See Jones v. All Star Painting, Inc.*, 2018 MT 70, ¶ 27 (hereinafter referred to as "*Jones I*").

The HO followed this Court's instructions from *Jones I* by considering the admissible, corroborative evidence. Hr'g Officer Dec. on Remand, 3–5 (Nov. 27, 2018) (hereinafter referred to as "Decision on Remand"). Giving weight to that evidence, the HO determined Jones proved her case against All Star. Decision on Remand at 6. All Star appealed the Decision to the Yellowstone County District Court arguing that the Decision on Remand was based on inadmissible evidence.

The Yellowstone County District Court reversed the Decision on Remand by concluding that it was “impacted” by improperly admitted evidence and ordered re-opening of the administrative record.¹ Or. and Memo. Granting in Part Pet.’s Pet. for Judicial Review and Reversing and Remanding this Case for New Hr’g, 9 (April 20, 2020) (hereinafter referred to as “District Court’s Decision”).

The Yellowstone County District Court failed to apply the proper standard of review to this case, and even if it had done so, there was “reliable, probative, and substantial evidence” in the record supporting the HO’s Decision on Remand. Mont. Code Ann. § 2-4-704(2)(a)(v). There is no basis to reverse the HO’s Decision, and there is certainly no basis to order supplementation of an administrative record that closed nearly six (6) years ago. The HO’s Decision on Remand complies with this Court’s previous order and it should be sustained by reversing the District Court’s Decision.

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¹ The Yellowstone County District Court’s use of the word “impacted” is critical to this appeal because: (1) there is nothing in the Decision on Remand indicating that inadmissible evidence did in fact impact the HO’s analysis; and (2) there is no statute or case which would permit the Yellowstone District Court to reverse an administrative decision based on the suspicion of “impact” of inadmissible evidence. *See* Mont. Code Ann. § 2-4-704(2).

III. STATEMENT OF FACTS

This Court has already succinctly summarized many of the underlying facts in its *Jones I* opinion. ¶¶ 1–13. The following are additional facts bearing specifically on this second appeal:

1. Original Administrative Proceedings

In November of 2014, Jones brought an administrative complaint of workplace sexual harassment against All Star, alleging that the owner, Norman Hodges (“Hodges”), repeatedly sexually harassed and groped her at work. Hodges denied sexually harassing Jones and alleged she was making it all up. All Star employees who witnessed the harassment did not come forward to testify against their employer, Hodges. As a result, this was a “he said, she said” case. Jones called three witnesses who corroborated her sexual harassment allegations through testimony describing their observations of her when she would return home from work. In sum, these witnesses testified that Jones returned home from work visibly upset and distraught with the way she was being treated at work.

The HO issued her first Decision and Notice of Issuance of Administrative Decision on March 21, 2016 (“First HO Decision”). The First HO Decision failed to acknowledge any of the testimony from Jones’s corroborating witnesses,

summarily concluded that Jones’s allegations were uncorroborated, and held that Jones failed to prove a *prima facie* case.²

2. This Court’s Review in Jones I

After unsuccessfully appealing the First HO Decision to the Montana Human Rights Commission (“HRC”) and the Lewis and Clark County District Court, Jones sought review from this Court in *Jones I*. After a thorough review of the record and pertinent law, this Court found that Jones’s witnesses did in fact corroborate her testimony:

Ryan Jones, Dustin Ritts, and Jeffrey Jones each testified to Jones’s demeanor at the time she worked for All Star. They each testified that she was upset, and each attributed Jones’s demeanor to her workplace environment. Though they could not offer eyewitness testimony to prove any alleged specific acts, their testimony supported Jones’s testimony that her work with All Star was causing her distress during this time. Their testimony does not go simply to Jones’ character for truthfulness, but supports an inference that she was being harassed at work.

Jones I, ¶ 25. Accordingly, the Court found that the HO failed to recognize the corroborative nature of the testimony and remanded the case back to the HO with instructions to “consider the testimony of Jones’s witnesses in accordance with the standards set forth in this Opinion, enter findings of fact explaining its review of

² As this Court pointed out in *Jones I*, Jones’s testimony alone was enough to establish a *prima facie* case. ¶ 20.

the evidence, and explain the effect, if any, this review has on its conclusions of law.” *Id.* at ¶ 27.

3. Second Administrative Decision

On remand, the HO did as the Court instructed. She considered the admissible testimony of Jones’s Corroborating Witnesses. Decision on Remand, 3–5. She entered findings of fact explaining her review of that corroborating evidence, and she explained the effect this evidence had on her conclusions of law. *Id.* at 5–12. After properly considering and weighing the evidence, the HO found “that Jones’ testimony that she was sexually harassed by Hodges during her employment with All Star is more credible than[sic] Hodges’ denials.” *Id.* at 6. Accordingly, the HO concluded Jones met her burden of proving that All Star subjected her to a hostile work environment and awarded Jones damages.

4. All Star’s Present Appeal

All Star appealed the HO’s Decision on Remand to the HRC and then to the Yellowstone County District Court. The HRC correctly recognized that “it is not appropriate for a board to substitute its judgment for that of the hearing officer as to the credibility of witnesses and the weight to be given their testimony.” Final Agency Decision, 6 (May 13, 2019) (quoting *Mayer v. Bd of Psychologists*, 2014

MT 85, ¶ 29). Consequently, the HRC affirmed the hearing officer’s decision because it was “supported by competent substantial evidence.” *Id.* at 7–8.

While the Yellowstone County District Court found for Jones on most issues raised by All Star, it reversed the HO’s determination that Jones was more credible than Hodges, asserting that the HO relied on improper hearsay. District Court’s Decision at 9–10. The District Court then remanded the case back to the HO for a new hearing where Jones has the burden to lay foundation for testimony that the District Court speculated the HO relied on. Jones now appeals the Yellowstone County District Court’s Decision.

IV. STANDARD OF REVIEW

In *Jones I*, this Court set forth the standard of judicial review of an agency decision under MAPA:

The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

- (a) the administrative findings, inferences, conclusions, or decisions are:
 - (i) in violation of constitutional or statutory provisions;
 - (ii) in excess of the statutory authority of the agency;
 - (iii) made upon unlawful procedure;
 - (iv) affected by other error of law;
 - (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

¶ 14 (quoting Mont. Code Ann. § 2-4-704(2)); *see also Schmidt v. Cook*, 2005 MT 53, ¶ 20. That standard of review applies to both the District Court’s review of the agency’s decision and the Montana Supreme Court’s subsequent review of the District Court’s decision. *Jones I*, ¶ 14 (citing *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 16; *Arlington v. Miller’s Trucking, Inc.*, 2015 MT 68, ¶ 10).

“When reviewing an administrative agency's findings of fact, courts defer to the agency's findings unless they are clearly erroneous. Generally, findings of fact are not clearly erroneous if they are supported by substantial credible evidence.” *State By and Through Dept. of Soc. and Rehab. Services v. Shodair Hosp.*, 273 Mont. 155, 163 (1995) (citing Mont. Code Ann. § 2-4-704(2)(a)(v); *Westmoreland Resources v. Dep’t of Revenue*, 263 Mont. 303, 310 (1994)) (internal citations omitted). This Court has adopted a three-prong test to determine when factual findings are “clearly erroneous” under Mont. Code Ann. § 2-4-704(2)(a)(v): (1) whether the findings of fact are supported by substantial evidence, which “consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance”; (2) whether the fact finder misapprehended the effect of the evidence; and (3) whether a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *Total Mechanical Heating*

& *Air Conditioning v. Empl. Rel. Div., Uninsured Employers' Fund*, 2002 MT 55, ¶ 22 (citing cases).

V. SUMMARY OF THE ARGUMENT

As this Court recognized in *Jones I*, Jones's sexual harassment allegations were supported by admissible corroborating witness's testimony. ¶ 25.³ On remand, the HO gave this admissible evidence legal effect by concluding that Jones's allegations of sexual harassment were corroborated and therefore more credible than All Star's denials. Decision on Remand at 5–6. In so doing, the HO made the critical credibility determination at the heart of this case based on the admissible evidence, just as she was instructed by this Court in *Jones I*.

Contrary to the District Court's Decision, there is no indication in the Decision on Remand that the HO relied on inadmissible hearsay in making the determination that Jones was more credible than Hodges. Moreover, the Yellowstone County District Court failed to apply the standard of review required under MAPA. When the correct standard is applied, the HO's Decision on Remand is supported by substantial, credible, and admissible evidence. Thus, even if the HO admitted some evidence into the record that should have been excluded,

³ It is now the law of this case that Jones's claim of being sexually harassed while working at All Star was corroborated by three witnesses. *See, e.g., Muri v. Frank*, 2003 MT 316, ¶ 11.

it does not change the fundamental conclusion that the Decision on Remand is based on substantial, credible, and admissible evidence and should be affirmed in its entirety.

VI. ARGUMENT

As the Court stated in *Jones I*:

The Montana Human Rights Act (MHRA) prohibits discrimination in the terms and conditions of employment on the basis of sex. The creation of a hostile work environment due to sexual harassment is a violation of the MHRA. To establish a prima facie case, the complaining party must demonstrate: (1) that the party is a member of a protected class; (2) that the party was subjected to offensive conduct that amounted to actual discrimination because of sex; (3) that the conduct was unwelcome; and (4) that the sexual harassment was so severe or pervasive to alter the conditions of employment and create an abusive working environment.

¶ 18 (internal citations omitted). Whether a hostile work environment has been created “can be determined only by looking at all the circumstances. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).⁴ Circumstances constituting a “hostile” or “abusive” work environment may include:

the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being

⁴ Though this case was filed pursuant to Montana law, Montana courts have held that because the Montana Human Rights Act was closely modeled after Title VII, “reference to federal case law is both appropriate and helpful” in construing the HRA. *Williams v. Joe Lowther Ins. Agency, Inc.*, 2008 MT 46, ¶ 2.

is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id.

Jones’s testimony at the contested case hearing was alone sufficient to prove her case of a hostile work environment because she established: “(1) she was subjected to verbal or physical conduct of a harassing nature; (2) the conduct was unwelcome; and (3) the harassment permeated the work environment to the point that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Stringer-Altmaier*, 2006 MT 129, ¶22; *see also Nichols v. Azteca Restaurant Ent., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001).

A. The HO’s Decision on Remand is supported by substantial credible evidence.

This Court has been quite clear that the mere existence of inadmissible evidence in the record is not a basis for a district court to reverse an administrative decision. *Donnes v. State ex rel. Superintendent of Pub. Instruction*, 206 Mont. 530, 537, 672 P.2d 617, 620 (1983) (noting that the ultimate decision must be “clearly erroneous” for reversal). The actual legal test, and the test that applies under MAPA, is whether the administrative decision is supported by “substantial evidence” that is credible and properly admitted. *Abbey v. City of Billings Police*

Comm'n, 268 Mont. 354, 367, 886 P.2d 922, 930 (1994); Mont. Code Ann. § 2-4-704(2).

Here, the administrative record includes more than enough credible and admissible evidence supporting the HO's determination that Jones was more credible than Hodges, and therefore Jones's version of events would be believed, and she proved her case. The existence of hearsay or other inadmissible evidence in the record does not change this fundamental conclusion.

1. Danielle Jones testified in detail regarding the harassment she endured as an All Star Painting employee.

Jones testified to numerous, specific instances of harassing or threatening conduct by Hodges, and her testimony alone is sufficient to prove her claims. For example, Hodges asked Jones at work whether she was satisfied with her "sex life" with her boyfriend. Transcript of Proceedings, 26:25–28:11 (Nov. 19–20, 2015) (referred to herein as "Tr."). Hodges stood under Jones while she was working on the taller of the crew's two ladders and unabashedly looked up her shorts. Tr. 24:8–23. Hodges made remarks to Marvin Thomas about Jones's pubic hair grooming habits. Tr. 26:26–28:18. Hodges put one hand on Jones's upper thigh with his fingers going underneath the bottom of her shorts while she was on a ladder during her first or second week of work. Tr. 25:9–26:11. Hodges touched Jones's underwear and her hip while gesturing as if he intended to snap her panties.

Tr. 31:16–32:12. While Jones was bent over folding tarps, Hodges came up behind her and stuck her paycheck down her pants and into her underwear. Tr. 21:18–23:18. One of the final acts of harassment was Hodges thrusting a chicken bone in and out of the back of Jones’s pants and underwear, simulating sexual intercourse. Tr. 19:14–21:11.

Hodges’s conduct made Jones feel anxious, humiliated, and deeply upset. Tr. 44:7–14. She felt violated by his conduct, in part because much of it occurred out in the open and in front of her coworkers. While she was at work, Jones felt the constant need to be on her guard to protect herself from further harassment. Tr. 23:19–24:4; 46:1–8. Jones dreaded going to work because she anticipated, correctly, that the sexual harassment would continue. Tr. 147:5–21. She considered leaving her job at All Star several times before mid-September but stayed because the job paid well and she needed the money to financially support her young daughter. Tr. 31:9–15.

2. Ryan Jones testified about Jones’s emotional reactions to Hodge’s harassment.

During Jones’s second week of work, Ryan Jones learned from both Jones and her coworker that Hodges had been looking up her shorts while she was working on a ladder. Tr. 114:15–115:21. Ryan Jones testified that Jones has been “a lot more irritable,” “sensitive,” and “distracted” since the second week of her

employment at All Star and that it causes her to become upset to the point of crying nearly every day. Tr. 121:6–123:13. This Court ruled that such testimony corroborated Jones’s claims and specifically instructed the HO to consider it as such on remand. *Jones I*, ¶¶ 25–27.

3. Dustin Ritts testified as to his observations of Jones while she was an All Star Painting employee

Dustin Ritts was Jones’s and Ryan Jones’s roommate during the summer of 2014. Tr. 171:4–12. Jones described and complained about Hodges’s conduct to Ryan Jones and their roommate Dustin Ritts. Tr. 171:4–174:20. Dustin Ritts observed that Jones was upset and angry as a result of the harassment. Tr. 174:17–20. This Court ruled that such testimony corroborated Jones’s claims and specifically instructed the HO to consider it as such on remand. *Jones I*, ¶¶ 25–27.

4. The testimony of Jeffrey Jones further corroborated that Jones was sexually harassed at All Star.

Jeffrey Jones testified as to his understanding, gained during Jones’s employment at All Star, of the harassment Jones experienced at work and her emotional distress as a result thereof. Tr. 284:3–288:10. Jeffrey Jones also testified about his personal observations that Jones was noticeably upset as a result of Hodges’ harassing conduct. Tr. 287:23–288:10. This Court ruled that such

testimony corroborated Jones's claims and specifically instructed the HO to consider it as such on remand. *Jones I*, ¶¶ 25–27.

5. It is simply implausible that Jones's allegations and the corroborative witness testimony are all fabricated.

“The findings of the Hearing Examiner, especially as to witness credibility, are entitled to great deference, because a hearing examiner has the unique opportunity to hear and observe all the testimony entered in the case.” *Mercer v. McGee*, 2008 MT 374, ¶ 22.

Jones alleged very specific instances of sexual harassment. In response, Hodges alleged that Jones was making it all up. As a result, only one of them could have testified honestly; there is no middle ground in this case.

This Court recognized that three witnesses corroborated Jones's allegations by testifying that she was exhibiting obvious signs of mental and emotional distress and complaining about the sexual harassment contemporaneously to its occurrence. Thus, to accept Hodges's defense that Jones fabricated all her allegations, the following would have to be believed:

a. Jones hatched a scheme to falsely accuse Hodges of sexual harassment in August of 2014;

b. Her scheme included acting upset and distraught when she returned home from work so that Ryan Jones, Dustin Ritts, and Jeffrey Jones would all be tricked into believing she had been mistreated at work; and

c. She was lying under oath about oddly specific and unique types of sexual harassment at the contested case hearing, such as the time Hodges inserted a chicken bone in and out of her shorts simulating a sex act.

Such an elaborate scheme is neither plausible nor credible.⁵ Yet, that is exactly what the HO would have to conclude in order to believe Hodges and not believe Jones. When all of the admissible evidence is considered, the HO rightly determined that Jones was more credible than Hodges.

6. The District Court speculated that the HO relied on inadmissible hearsay.

The District Court took issue with a single sentence in the HO's 13-page Decision on Remand: "Each testified that Jones described in specific detail about offensive conduct she was subjected to during her employment." District Court's Decision at 4 (quoting Decision on Remand at 5). However, the District Court

⁵ To be sure, it stands to reason that one would need a substantial motive to perpetuate such a drawn-out scheme. Here, Jones was only seeking \$500.00 in economic damages; hardly a motive to engage in a multi-layered scheme involving her housemates and one of their fathers. Charging Party's Post-Hearing Br., 20, Dec. 23, 2015.

took this sentence out of context and improperly analyzed it in a vacuum. District Court's Decision at 4. The entire paragraph in the Decision on Remand reads:

The Hearing Officer noted in the original Hearing Officer Decision that she did not find any one witness particularly more credible than the other. Relying upon what she believed to be an assessment of the allegations based upon dates and locations offered by the parties during their testimony, the Hearing Officer failed to adequately consider the testimony of Jones' witnesses, who all confirmed that Jones regularly complained of Hodges' conduct toward her during her employment with All Star. Jones, Jones' husband, Jones' father-in-law, and Jones' former roommate all confirmed that she appeared angry, distraught, depressed, and generally upset during her employment. Each testified that Jones described in specific detail about offensive conduct she was subjected to during her employment. Jones' testimony was corroborated by each of these witnesses.

Decision on Remand at 5. The District Court isolated a single sentence in the HO's analysis and speculated that because the HO simply mentioned the fact these witnesses testified that Jones described to them specific acts of harassment, which as a matter of fact they did so testify, the HO relied on such testimony to reach her ultimate decision. The District Court's reversal on this ground is fatally flawed.

The single sentence the District Court focused on does not indicate the HO relied on Jones's witnesses' testimony about specific acts of harassment. The HO's decision does not go into any detail whatsoever about what such acts were, what Jones communicated to her witness such acts consisted of, or even which

incidents Jones told each witness about.⁶ When viewed in the context of the entire decision, the HO mentioned Jones’s witnesses’ testimony about Hodge’s conduct only to provide context for why the witnesses’ observations about Jones’s declining mental and emotional state were corroborative of her claims, i.e. Jones was complaining about how she was treated at All Star and was visibly upset while doing so. This Court made a very similar observation: “Ritts further testified that Jones complained constantly when she worked for All Star and that she did not complain when employed elsewhere. **This testimony is not hearsay[.]**” *Jones I*, ¶ 22 (emphasis added). Indeed, the fact that Jones was complaining about work, without a specific recounting of events, is not hearsay at all, but is the admissible personal observations of her witnesses. Mont. R. Evid. 801; *Donnes* 206 Mont. at 535–37.

The HO was careful to provide context for why Jones’s corroborating witnesses’ testimony was probative without stating the specific acts each witness testified to. Yet, the District Court unexplainably went to the record and inserted the witnesses’ testimony about specific acts into its analysis of the HO’s decision, despite the fact this testimony is absent from the decision itself. District Court’s Decision at 4 (setting forth Jones’s Corroborating Witnesses’ testimony about

⁶ In contrast, the HO goes into significant detail about the acts themselves without any reference to Jones’s corroborating witnesses. Decision on Remand at 2-3.

specific acts of harassment). By inserting testimony from the record into the HO's decision, the District Court itself created the issue it ultimately based the reversal on.

The District Court's real issue appears to be what it deems inadmissible hearsay is in the record. However, the fact the record contains inadmissible hearsay is not a basis to reverse the HO's decision. *Donnes*, 206 Mont. at 535–37; *see also Abbey*, 268 Mont. at 360–61 (fact-finder agency viewing inadmissible documents not reversible error). In *Donnes*, a tenured public-school teacher appealed her termination. 206 Mont. at 532. The superintendent conducted a hearing in which testimony and evidence was presented by all parties. *Id.* at 533. At the hearing, the principal of the school testified about numerous complaints the school had received regarding the teacher's conduct. *Id.* While much of the testimony was inadmissible hearsay, the evidence was admitted to show that complaints had been made, not that the allegations in the complaints were true. *Id.* at 533–37. On appeal, this Court found that even though such inadmissible hearsay was in the record, other substantial evidence in the record was “sufficient to support the independent and consistent decisions of the Trustees, the County Superintendent and the District Court”. *Id.* at 536–37.

Here, like in *Donnes*, the fact that Jones's corroborating witnesses testified to the complaints Jones made to them about Hodges does not warrant reversal

under MAPA. Courts in bench trials, and agencies acting as judge and jury in MAPA cases, frequently view inadmissible documents and allow objectionable testimony because unlike a jury, they are trained to not rely on inadmissible evidence in reaching a decision. *See, e.g., Id.; see also Abbey*, 268 Mont. at 360–61.

The critical flaw with the District Court’s reasoning is that, even if the HO relied on inadmissible hearsay as the court speculates, the HO’s decision is not clearly erroneous because it is supported by substantial, admissible evidence. Jones testified about very specific acts of harassment and the fact such harassment made her feel anxious and humiliated, *inter alia*. Jones’s corroborating witnesses confirmed that Jones was displaying outwards signs of such negative emotions in the context of discussing her job at All Star. This Court already ruled that the effect of such evidence was that Jones’s claims of harassment were corroborated. *Jones I*, ¶ 25. Once this Court instructed the HO to reconsider such evidence, the only logical result is that Jones is more credible than Hodges.⁷ As such, even if the HO relied on inadmissible hearsay, her ultimate credibility determination is still

⁷ As mentioned above, the HO originally saw Jones and Hodges on equal footing credibility wise but decided for Hodges because she misunderstood the effect of the nine homeowners’ testimony and ignored Jones’s corroborating evidence.

based on substantial, properly admitted evidence, and there is no basis under MAPA's standard of review to reverse the HO's decision.

Instead of acknowledging the existence of the credible, admissible evidence supporting the HO's Decision on Remand, the Yellowstone County District Court focused on a few instances where the HO permitted testimony over Hodges's hearsay objection as a basis for reversal. But there is no indication from the Decision on Remand that the HO's decision was dependent on inadmissible hearsay. To the contrary, Jones's detailed testimony of sexual harassment was corroborated by admissible testimony from her witnesses and there was sufficient evidence in the record to support the HO's Decision on Remand.

B. The District Court's reversal of the HO's witness credibility determination was not proper under MAPA's standard of review.

MAPA sets forth very specific grounds by which a reviewing court may reverse a hearing officer's decision. Mont. Code Ann. § 2-4-704(2). Here, the District Court's Decision does not state or explain which basis under MAPA, if any, it used to reverse the HO's discretionary witness credibility determination. *See* District Court's Decision at 4–10. Instead, the District Court stated that the HO's "decision was impacted by improperly admitted evidence." *Id.* at 9. There is no case or statute which permits a district court to reverse an administrative

decision by concluding that the decision was “impacted by improperly admitted evidence.”

While the Yellowstone County District Court never states which basis for reversal under MAPA it relies on, the only standard that appears to apply here is MAPA’s “clearly erroneous” standard.⁸ *Donnes*, 206 Mont. at 536 (Citing MAPA in noting, “To effect a reversal of the District Court’s decision based on the weight of the evidence, this Court must find the decision of the District Court to be clearly erroneous.”)

Whether the HO’s decision was “impacted” by improperly admitted evidence is not a basis to reverse a decision under MAPA. Mont. Code Ann. § 2-4-704(2). At best, this error demonstrates that the District Court did not properly understand the standard of review it was required to apply under MAPA. At worst, it means the District Court did not apply the correct standard of review at all. Regardless, there is substantial admissible evidence in the record supporting the HO’s Decision on Remand, which should be affirmed in its entirety.

⁸ The Yellowstone District Court’s issue with the HO’s Decision on Remand—and the stated basis for reversal—was the prospect that the HO relied on inadmissible hearsay. This appears to be a problem with the weight of the evidence, and Jones’s counsel therefore believes that the only MAPA standard that could apply would be the “clearly erroneous” standard.

VII. CONCLUSION

In *Jones I*, this Court instructed the HO to consider Jones's corroborating witnesses' testimony, enter findings of fact explaining her review of the evidence, and explain if such review changed her conclusions of law. The HO did exactly as instructed on remand. Critically, the HO determined that when the admissible, corroborative evidence was considered, Jones was more credible than Hodges. Such credibility determinations are solely within the discretion of the fact finder, and even if she mentioned hearsay in passing, there was no basis under MAPA to reverse the decision because substantial evidence supports the decision. As such, this Court should reverse the District Court's reversal and affirm the decision of the HO in its entirety.

WHEREFORE, Jones respectfully requests the Court to enter an Order:

- (a) Reversing the District Court's grant of All Star's petition for judicial review;
- (b) Affirming the HO's Decision on Remand in its entirety;
- (c) For such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 24th day of September, 2020.

MEYER, SHAFFER & STEPANS, PLLP

/s/ Ryan R. Shaffer

Ryan R. Shaffer

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT’S OPENING BRIEF with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing APPELLANT’S OPENING BRIEF upon each attorney of record, as follows:

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Dated this 24th day of September, 2020.

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By: Jessica Yuh, Paralegal

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word, is not more than 4,992 words, excluding certificate of service and certificate of compliance.

Dated this 24th day of September, 2020.

MEYER, SHAFFER & STEPANS, PLLP

/s/ Ryan R. Shaffer _____

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I, Ryan Shaffer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-24-2020:

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