

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8281

File: 21-398225 Reg: 03056076

WESE, INC. dba Snappy Food Mart and Liquor
4172 West Imperial Highway, Hawthorne, CA 90250,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 3, 2005
Rehearing June 2, 2005
Los Angeles, CA

ISSUED AUGUST 25, 2005

Wese, Inc., doing business as Snappy Food Mart and Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license, conditionally stayed the order of revocation, and suspended its license for 20 days, for its clerk, Sang Pill Shin, having sold drug paraphernalia, consisting of a glass tube air freshener and a Chore Boy scouring pad, to an undercover Department investigator, a violation of Health and Safety Code section 11364.7, subdivision (b).

Appearances on appeal include appellant Wese, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 9, 2003. Thereafter, on

¹The decision of the Department, dated April 22, 2004, is set forth in the appendix.

October 22, 2003, the Department instituted an accusation against appellant charging the delivery, furnishing or transfer of drug paraphernalia, in violation of Health and Safety Code section 11364.7, subdivision (b).

An administrative hearing was held on February 4, 2003, at which time oral and documentary evidence was received. At that hearing, Department investigator Sanchez testified that he asked the clerk if he had a “crack pipe.” According to the investigator, the clerk responded by saying “You mean ...” and then, with his right hand, physically simulated a smoking gesture. The investigator confirmed his request for a “crack pipe,” and copied the clerk’s gesture. The clerk then held up the glass pipe air freshener and asked if that is what Sanchez wanted. When Sanchez asked for a filter, the clerk produced a Chore Boy scouring pad from beneath the counter.²

The clerk testified that he was not a regular employee, but was only helping his uncle, the licensee. He stated that he had never before heard the word “crack,” that he did not know the glass pipe air freshener could be used to ingest drugs, and that he understood the investigator to be asking only about “pipe.” He offered the investigator the glass pipe air freshener only after he remembered someone had on a previous occasion referred to it as a “pipe.”

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the evidence does not support the decision. Appellant asserts that the clerk who sold the items in question had never heard and would not have known the meaning of the word “crack,” did not know the items could be used as drug paraphernalia, and did not sell them for that

² A photograph taken by one of the investigators (Exhibit 7) depicts a box of the scouring pads beneath the counter and directly under the glass pipe air fresheners on the counter above.

purpose.

DISCUSSION

Appellant argues that the evidence does not support the decision, arguing that the glass pipe air freshener was not marketed as drug paraphernalia. Appellant discusses the evidence in considerable detail, with the main thrust of its argument to the effect that the clerk believed the items in question were nothing other than what they purported to be - an air freshener enclosed in a glass pipe, and a common copper scouring pad.

Appellant's arguments are premised on the sufficiency of the evidence. Thus, the Appeals Board must determine, after considering the entire record, whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) In making that determination, the Board is guided by fundamental principles.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse*

v. Bank of America (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

The administrative law judge made an express finding that the clerk's testimony was not credible. We have reviewed the clerk's testimony in its entirety, and find no reason for rejecting that finding.

This Board has heard a number of appeals in which otherwise innocent objects which can be adapted to smoke crack cocaine have been marketed for that purpose. Most recently, it rejected an appeal in *Sandhu* (2004) AB-8128 where the item in question consisted of a glass tube in which a small cloth rose was enclosed. The Board described the case as "much like others which have come before the Appeals Board," and outlined at some length the legal principles which it deemed controlling. In brief, the focus is on the intent of the seller - does he intend that the items in question be used to ingest crack cocaine, and was that his intent when he offered them to the investigator. (See, e.g., *People v. Nelson* (1985) 171 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279].)

Against this background, resolution of this case is uncomplicated.

It is undoubtedly true, as appellant contends, that the glass pipe air freshener can have a use other than as drug paraphernalia. The same can be said about other seemingly innocent objects. But in this case, it is clear that the clerk knew its intended

use was to be a device with which to smoke cocaine.³ Without the investigator having said anything other than “Do you have any crack pipes,” appellants’ clerk offered him the glass air freshener pipe. When asked for a filter, the clerk similarly offered a Chore Boy scouring pad. The clerk obviously knew the object could be used to smoke crack cocaine, knew or should have known from the investigator’s request for a “crack pipe” of its intended use, and offered it to the investigator for that use. In the context of the investigator’s request, the innocent combination of such items strikes us as fantasy. By marketing the glass pipe air freshener and the Chore Boy scouring pad to the investigator as drug paraphernalia, intending them to be used for an illicit purpose, the clerk brought himself squarely within the prohibitions of the cited sections of the Health and Safety Code.

We acknowledge the testimony of the licensee that he had no reason to know the items in question could be used as drug paraphernalia. We also note that he was furnished a notice from the Department alerting him and other licensees to such possibilities, which, had he read it, might have prevented the violation which the Department found.⁴ The record does not indicate whether the clerk saw the notice.

³ The ALJ chose not to believe the clerk’s denials of any knowledge about crack cocaine or the way it is smoked. As pointed out above (see page 4) a credibility issue is for the trier of fact.

⁴ The Department issued a notice (Exhibit 8) to its licensees, including appellant, calling their attention to Business and Professions Code section 24200.6, enacted in 2003. That statute provides as follows:

The department may revoke or suspend any license if the licensee or the agent or employee of the licensee violates any provision of Section 11364.7 of the Health and Safety Code. For purposes of this provision, a licensee, or the agent or employee of the licensee, is deemed to have knowledge that the item or items delivered , furnished, transferred, or possessed will be used to plant, propagate,
(continued...)

ORDER

The decision of the Department is affirmed.⁵

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴(...continued)

cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance, if the department or any other state or local law enforcement agency notifies the licensee in writing that the items, individually or in combination, are commonly sold or marketed for that purpose.

The Department's notice alerted licensees to a number of products commonly marketed as drug paraphernalia, included among them such items as "glass tubes commonly marketed as a bud vase or air freshener."

Although appellant objected to the introduction of this exhibit, we see no prejudice from its admission into evidence. Appellant's clerk, by his conduct, acknowledged that he was aware of the illicit purposes to which the items could be put, and intended that they be used for such purposes.

⁵ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.