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

AB-9350
File: 20-389358 Reg: 12077565

7-ELEVEN, INC. and CONVENIENCE GROUP, INC.,
dba 7-Eleven #2173-18867C
5880 West Manchester Avenue, Los Angeles, CA 90045,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: February 6, 2014
Los Angeles, CA

Redeliberated April 3, 2014
Sacramento, CA
ISSUED APRIL 14, 2014

7-Eleven, Inc. and Convenience Group, Inc., doing business as 7-Eleven #2173-18867C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with 5 days stayed, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Convenience Group, Inc., appearing through their counsel, Ralph Barat Saltsman and Erica Woodruff, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

---

[1]The decision of the Department, dated March 7, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 1, 2002. On October 11, 2012, the Department filed an accusation against appellants charging that, on August 21, 2012, appellants' clerk, Kahsay Giday Hidru (the clerk), sold an alcoholic beverage to 17-year-old Clayton V. Although not noted in the accusation, Clayton was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on January 31, 2013, documentary evidence was received and testimony concerning the sale was presented by Clayton (the decoy) and by Samuel Aguilar, an agent for the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, Agent Aguilar entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the coolers, selected a 16-ounce can of Bud Light beer, and proceeded to the counter. He stood in line, and when it was his turn, he set the beer on the counter. The clerk scanned the beer and entered something in the register. The decoy paid for the beer, and the clerk returned some change. The clerk exited, followed by Agent Aguilar.

During the operation, the decoy wore a baseball cap turned backward. Additionally, both of his ears were pierced and he wore “spacers,” a wide-gauge piece of jewelry that enlarges the piercing and leaves a visible mark when the jewelry is removed.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending: (1) the ALJ failed to address all factors of the decoy’s appearance when conducting his rule 141(b)(2) analysis; (2) the

ALJ based his conclusions of law regarding gauged ear piercings on facts not in the record; and (3) the ALJ erred in holding that the operation was conducted in a fair manner, as required by rule 141(a).

DISCUSSION

I

Appellants contend that the ALJ failed to consider all facets of the decoy's appearance. In particular, appellants argue that the ALJ failed to consider how the decoy's hat, which he wore throughout the operation, altered his appearance. Additionally, appellants argue that the ALJ did not properly address the fact that the decoy wore spacers in his ears.

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. *(CMPB Friends Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . . .) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

This Board has held that an ALJ should not focus his analysis solely on a decoy's *physical* appearance and thereby give insufficient consideration to relevant

non-physical attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven Inc./Sahni Enterprises* (2004) AB-8083; *Circle K Stores* (1999) AB-7080.)

This should not, however, be interpreted to require that the ALJ provide a "laundry list" of factors he found inconsequential. (*7-Eleven, Inc./Patel* (2013) AB-9237; accord *Circle K Stores* (1999) AB-7080.) "It is not the Appeals Board's expectation that the Department, and the ALJ's [sic], be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered." (*Circle K Stores*, *supra*, AB-7080 at p. 4.)

The ALJ made the following findings of fact regarding the decoy's appearance:

> 5. Clayton appeared and testified at the hearing. On August 21, 2012, he was 5'4" tall and weighed 167 pounds. He wore a sweatshirt with a hood, jeans, a baseball cap, and Vans. At all times that he was inside the Licensed Premises his hood was down and the baseball cap was on his head backwards. In his ears were gauges/spacers (i.e., earrings which create a large hole in the earlobe through which one can see). (Exhibits 2-5.) At the hearing he was 5'4½" tall and weighed 163 pounds. He was not wearing the cap, although he had one with him, and had removed the gauges/spacers from his ears (leaving deep, noticeable marks in the earlobe).
>
> ¶ . . . ¶
>
> 8. Clayton appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Hidru at the Licensed Premises on August 21, 2012, Clayton displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Hidru.

(Findings of Fact ¶¶ 5, 8.) Based on these findings, the ALJ reached the following conclusions of law:

> 5. The Respondents argue that the decoy operation at the Licensed Premises failed to comply with rule 141(a)[fn] and, therefore, the

> accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that, it was unfair for Clayton to alter his appearance by wearing a cap and gauges/spacers. This argument is rejected. Clayton's face was visible at all times since he wore the cap backwards. The gauges/spacers, far from making it more difficult to determine Clayton's age, should have made it easier—adults do not wear gauges/spacers, minors do. Far from "hiding" Clayton's age, the gauges/spacers highlighted it.

(Conclusions of Law ¶ 5.)

We are satisfied that the ALJ not only considered the decoy's hat and piercings, but also explained the effect they had on his appearance. These inferences, based on the ALJ's observations and experience, are reasonable, and we see no grounds to reconsider.

II

Appellants contend that the ALJ's conclusion that "adults do not wear gauges/spacers, minors do" was not based on facts in the record, and is unsupported by anything but personal opinion.

This Board has emphasized that an ALJ may rely on his own experience in determining a decoy's apparent age, and that he "is fully capable of making the determination required by Rule 141(b)(2) without the opinions of others." (*Flores* (2004) AB-8191, at p. 5.) The ALJ need not rely on experts or evidence in making this determination. This Board has, in fact, repeatedly upheld evidentiary rulings excluding both evidence and expert testimony intended to establish a decoy's apparent age specifically because the general appearance of minors is a matter within the ALJ's own knowledge. (See, e.g., *id.* at pp. 5-6 [excluding results of poll]; *Circle K Stores, Inc.* (2000) AB-7322, at p. 4 [excluding expert testimony]; *Prestige Stations* (1999) AB-7248, at pp. 2-3 [excluding expert testimony].)

The ALJ made the generalization, based on his own experience, that "adults do not wear gauges/spacers, minors do." (Conclusions of Law ¶ 5.) Appellants characterize this as a "broad conclusion of law." (App.Br. at p. 6.) It is not a statement of law, however; the ALJ does not assert that the presence of spacers establishes compliance per se with rule 141(b)(2). He does not even go so far to claim that his generalization is without exception. The statement is nothing more than a tersely stated factual generalization properly based on the ALJ's own observations of minors and adults.

Appellants assert that without supporting evidence in the record, this generalization was improper. Appellants are incorrect. An ALJ may rely on his own experience in determining a decoy's apparent age. He need not base his determination on evidence or expert testimony presented by the parties. He may, in fact, exclude such evidence and instead rely wholly on his own knowledge of the general appearance of minors.

When the generalization is put in context, it is apparent that the ALJ, based on his experience, found that spacers did not obscure the decoy's appearance, and were indicative of youth: "The gauges/spacers, far from making it more difficult to determine Clayton's age, should have made it easier — adults do not wear gauges/spacers, minors do. Far from 'hiding' Clayton's age, the gauges/spacers highlighted it." (Conclusions of Law ¶ 5.) This is a determination properly within the ALJ's discretion, and we see no reason to disturb it.

III

Appellants contend that the decoy's accessories, including his hat and piercings, violated the fairness requirements of rule 141(a). Appellants point to testimony

indicating that decoys are discouraged from wearing hats or piercings, and argue that these altered the decoy's appearance, making it more difficult for the clerk to determine the decoy's age and thereby rendering the operation unfair.

As an initial matter, appellants have shown no evidence that the accessories in fact violated any Department policy. Instead, they rely on testimony from Agent Aguilar that is so vague that little can be inferred about Department policy at all:

> THE COURT: Has anyone ever told you that decoys should not wear hats?
>
> THE WITNESS: I believe it is suggested or inferred.
>
> THE COURT: And where is that? How did you come to that belief?
>
> THE WITNESS: I don't recall exactly. It is something that possibly has been discussed, but I couldn't say if there's a specific form number or something formally in writing at this time anyway.
>
> . . . .
>
> [MS. RENSHAW]: Why was the decoy wearing a hat on this decoy operation?
>
> THE WITNESS]: I don't have an answer.

[RT at pp. 33-34.] This exchange tells us little, if anything, about Department policy regarding hats, and nothing at all about piercings. It does nothing to establish that the accessories made the operation unfair. It absolutely does not support the inference, which appellants reach, that "[w]hile there may not be a specific policy regarding whether a decoy can wear a hat, it is discouraged because hats are known to change the appearance of a minor." (App.Br. at p. 7.) There is nothing whatsoever in the record to indicate the reasoning behind a policy that may or may not exist. Appellants read too much into too little.

Appellants nevertheless argue that the accessories complicated the task of

determining the decoy's age: "[n]ot only did the clerk have to evaluate whether [the decoy's] face appeared young, but he also had to consider whether his gauges and baseball hat were an indication of his age." (App.Br. at p. 8.)

The clerk did not testify. We do not know whether he struggled to guess the decoy's age, or simply ignored it. Appellants' assertion that these accessories made his task more difficult is mere speculation.

We are left with the assessment of the ALJ, who concluded that neither the decoy's hat nor his spacers obscured his appearance, and that the spacers, in fact, made him appear younger. This determination was well within the ALJ's knowledge and discretion. We see no grounds to disturb the decision below.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[2]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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