

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

AB-9514

File: 21-477643 Reg: 14081361

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9226
3320 Fruitvale Avenue, Oakland, CA 94602-2316,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 1, 2015
Sacramento, CA

ISSUED OCTOBER 23, 2015

Appearances: Melissa Gelbart, of the law firm Solomon Saltsman & Jamieson, for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9226. Heather Hoganson, for respondent Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated April 15, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. From 1974 until 2009, appellants were previously licensed as Longs Drug Stores, with a different license number. Appellants have no record of disciplinary action against either their current or former license.

On October 7, 2014, the Department filed an accusation against appellants charging that, on August 1, 2014, appellants' clerk sold an alcoholic beverage to 17-year-old Alanna G. Although not noted in the accusation, Alanna was working as a minor decoy for the Oakland Police Department at the time.

At the administrative hearing held on March 17, 2015, documentary evidence was received and testimony concerning the sale was presented by Alanna (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, an unnamed clerk working in appellants' store sold a can of Bud Light beer, an alcoholic beverage, to the decoy. Prior to making the sale, the clerk asked to see the decoy's identification. The decoy showed her California driver's license to the clerk, who looked at it for approximately "one second." The license contained the words "AGE 18 IN 2014" and "AGE 21 IN 2017." After purchasing the beer, the decoy exited the store with it. She returned to the store to identify the clerk.

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

Appellants then filed this appeal contending the ALJ failed to consider specific physical and non-physical aspects of the decoy's appearance relevant to appellants' rule 141(b)(2) defense.

DISCUSSION

Appellants contend the ALJ failed “to analyze critical physical and nonphysical characteristics of the decoy.” (App.Br. at p. 3.) In particular, appellants direct the Board’s attention to the decoy’s jewelry (including a ring on her left ring finger, which appellants contend “had the appearance of a wedding band”), her toenail polish, the finding that she was “calm” in the store, and her experience on the Teens Tackle Tobacco Youth Advisory Board for Alameda County (which, according to appellants, made the decoy “appear confident, assertive, and aggressive.”) (RT at pp. 2-3, 5-10.)

Appellants rely heavily on *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] — which, they contend, mandates that “an agency’s decision ‘must set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order.’” (App.Br. At p. 2, quoting *Topanga, supra*, at p. 515.)

Rule 141, subdivision (b)(2),² states:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board is bound by the factual findings in the Department’s decision so long as those findings are supported by substantial evidence. The standard of review is as

²All references to rule 141 and its subdivisions are to Cal. Code Regs., tit. 4, § 141.

follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] 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. [Citations.] 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.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

In this case, the ALJ made the following findings of fact regarding the decoy's physical appearance:

VII

The decoy was 5'3/4" tall and weighed approximately 100 pounds on the day of the decoy operation. Her hair was long and combed down. She wore black pants, a T-shirt, a plaid shirt, flip flops, rings, earrings, and no make-up. She felt "calm" while in Respondents' store. Earlier that day, a police officer took a photograph of the decoy. (Exhibit 3).

VIII

The decoy's height and weight on the day of the hearing appeared to be similar to what they were on the day of the decoy operation. The decoy spoke softly, and answered most questions with very short answers. She did not appear nervous, and said so.

IX

The photograph of the decoy, the testimony about her appearance on the day of the decoy operation, and her appearance at the hearing (including her demeanor, poise, and mannerism) support a conclusion that the decoy displayed the appearance of a person under twenty-one years old when she bought the beer from Respondents' clerk.

(Findings of Fact VII-IX.) Based on these findings, the ALJ reached the following

conclusion:

II

Respondents argue that there was a violation of the Department's Rule 141(b)(2). Based on the findings in Paragraphs VII, VIII, and IX in the Findings of Fact, there was no violation of Rule 141(b)(2).

(Determination of Issues II.)

Appellants' argument on appeal centers on the ALJ's alleged failure to "analyze" certain physical and nonphysical appearance factors. For example, appellants contend that "the ALJ entirely omitted an analysis of [the decoy's] testimony that she 'was on the Youth Advisory Board for Alameda County for Teens Tackle Tobacco' and was a 'leader[] of [her] community,'" and "also failed to analyze the effect that her jewelry — and the location of that jewelry — and toenail polish had on her appearance." (App.Br. at p. 5.)

As support for their claim that the ALJ was required to "analyze" the evidence — including physical attributes as insubstantial as toenail polish — appellants rely on *Topanga Association for a Scenic Community, supra*.

For this Board, *Topanga* is the zombie at the end of a low-budget horror flick — just when this Board believes *Topanga* has been laid, at long last, to rest, it thrusts its livid fist from the earth and grasps at our ankles. (See, e.g., *7-Eleven, Inc./Bassi & Sons, Inc.* (2015) AB-9447 [disapproving appellant's interpretation of *Topanga* as requiring explanation or analysis of findings]; accord *7-Eleven, Inc./Singh* (2014) AB-9344; *Garfield Beach CVS, LLC/Longs Drug Stores California, LLC* (2013) AB-9255; *Chevron Stations, Inc.* (2010) AB-9046; *7-Eleven, Inc.* (2011) AB-9028.) Like so many of their predecessors, appellants fundamentally misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This becomes clear when one reads the entire sentence that includes the phrase on which

appellants rely: “We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order.” (*Topanga, supra*, at p. 515, emphasis added.) In *No Slo Transit*, the court of appeal quoted with approval — and emphasized with italics — a comment regarding *Topanga* made in an earlier case: “The holding in *Topanga* was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.” (*No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], emphasis in original, quoting *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909].)

Of course, this Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ’s analysis — assuming some reasoning is provided — to determine whether the ALJ’s findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. (See, e.g., *Block v. Nicholson Corp.* (1947) 77 Cal.App.2d 739, 747 [176 P.2d 739] [reversing and remanding trial court’s decision where findings were wholly inconsistent with the evidence].) This should not be read to require an explanation or analysis to bridge any sort of “gap”; typically, the evidence an appellant insists is essential and dispositive is

either irrelevant or has no bearing whatsoever on the findings of fact. While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

Furthermore, as this Board has noted elsewhere, an ALJ is not required to provide a “laundry list” of factors he found inconsequential. (See, e.g., *7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.) “[I]t 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*, at p. 4.)

Such is the case here. The ALJ made clear findings of fact regarding the decoy’s appearance, both physical and nonphysical. (See Findings of Fact VII-IX.) He noted that she wore, among other jewelry, “rings.” Appellant contends that “the fact that [the decoy] was wearing a ring on her left ring finger . . . had the effect of making [the decoy] appear as an adult because it had the appearance of wedding band.” (App.Br. at 5.) Appellants fail to note, however, that the decoy was wearing rings on “multiple fingers.” (RT at p. 24; see also Exhibit 3.) Appellants also fail to explain how the presence of a ring on an individual’s left ring finger necessarily makes that individual appear over the age of 21. After all, the legal age of consent to marriage in California is 18.³ (Fam. Code § 301.) Finally, there is nothing in rule 141 prohibiting the use of married decoys, provided they “display the appearance which could generally be expected of a person under 21 years of age.” Indeed, it would be unreasonable and

³Indeed, there is no minimum age limit for marriage in California, provided minors obtain parental consent and a court order. (Fam. Code § 302.)

irresponsible for a clerk to rely on the presence of a ring alone to determine whether an individual is of legal age to purchase alcohol.

The evidence that the decoy wore a ring on her left ring finger therefore in no way contradicts the finding that she appeared under 21 on the date of the operation. (See Findings of Fact IX.)

At oral argument, appellants contended that because they raised the specific feature of the ring on the decoy's left ring finger before the ALJ during closing argument at the administrative hearing, that feature merited thorough analysis in the ALJ's proposed decision. Appellants repeatedly cited a previous decision of this Board, *Circle K Stores, Inc.* (2001) AB-7641, to support this contention. We do not agree. The Board finds nothing in the language from *Circle K Stores, Inc.*, *supra*, that mandates such a comprehensive discussion. As we stated in that case:

The crux of appellant's argument is that, by definition, a decoy wearing a wedding band violates Rule 141(b)(2). We do not agree. Jewelry of any kind worn by a decoy is just one factor to be considered. While a wedding ring may be seen as an indicator of age, it can only indicate that the person is at least 18. Can a person wearing a wedding ring display the appearance one could generally expect from a person under the age of 21? We believe the answer has to be yes. The presence of the wedding ring is only one thing to consider. It is certainly possible for someone wearing a wedding ring to have overall physical and behavioral features that clearly show he or she is under 21. The ALJ must consider the decoy as a "whole person," and not limit consideration of appearance to any one single aspect.

(*Circle K Stores, Inc.*, *supra*, at p. 3.)

Just because a ring on a decoy's left ring finger is *one factor* that *may be* considered by an ALJ, there is no requirement that the ALJ expressly do so in his or her proposed decision. That said, it is our expectation that in preparing their decisions, ALJs carefully consider each of the specific factual and legal contentions *expressly*

argued by appellants throughout the administrative hearing — including, in the rule 141(b)(2) context, specific indicia of age to which appellants call attention — and that there is evidence of such consideration on the face of the proposed decision. While the failure to do so will not necessarily result in reversal, the Department would no doubt be better served if the Board were not left to guess whether appellants’ fact-specific arguments were improperly ignored.

Appellants also direct this Board to the ALJ’s failure to address the decoy’s toenail polish. (App.Br. at p. 5.) Appellants do not explain what effect, if any, toenail polish might have on a decoy’s apparent age — or, for that matter, how the clerk could manage to observe the decoy’s feet from behind a register counter. The fact that the decoy wore toenail polish is irrelevant; there was no error in its omission.

Appellants further point out that the ALJ omitted mention of the decoy’s experience on the Teens Tackle Tobacco Youth Advisory Board for Alameda County. (App.Br. at pp. 5-6.) Appellants rely on *Azzam* (2001) AB-7631, which, they claim, indicates that “[t]his Board recognizes that ‘[a]chievements and responsibility’ will ‘certainly have a bearing on the apparent age.’”

The Board questions whether appellants in fact read the *Azzam* decision. The language quoted is drawn from a separate case, and reads, in its entirety,

While the trier of fact must consider the entire person, physical and demeanor attributes, in determining the apparent age of a decoy, work or education experience and levels of responsibility attained do not, *ipso facto*, aid in that determination or otherwise produce a given result. A person, all things considered, appears to be a certain age. Achievements and responsibility, while they certainly have a bearing on the apparent age, are just an inherent part of the appearance the decoy projects. *They do not, independently, become elements which permit a magic addition of a year or two or three to a person’s physical appearance.*

(*Azzam, supra*, at p. 5, emphasis added, quoting *Prestige Stations, Inc.* (2001))

AB-7624.) The Board is *Azzam* went on to say,

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. *There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.*

(*Azzam, supra*, at p. 5, emphasis added.) To paraphrase, if a decoy's life experience in some way makes her appear older, it will simply become an intrinsic part of the observable appearance she projects — the very appearance the ALJ assesses by observing her at hearing. The omission of the decoy's experience with Teens Tackle Tobacco therefore did not constitute error, provided the ALJ made findings regarding the decoy's apparent age.

Here, the ALJ did make the requisite findings, and there is no evidence whatsoever that the decoy's experience in any way made her appear over 21. Appellants argue that the experience made her “appear confident, assertive, and aggressive,” (App.Br. at p. 8), but provide no testimonial or other evidentiary support for that impression. In fact, the ALJ — who, as trier of fact, has the opportunity to observe the decoy firsthand — in no way noted aggression: he observed, among other things, that she “spoke softly,” and noted her testimony that she felt “calm” while inside the licensed premises. (Findings of Fact VII-VIII.)

While this particular decision is not as rich in detail as most this Board encounters, that is perhaps unsurprising, given that appellants presented no witnesses

and no exhibits. The burden of proving a rule 141(b)(2) defense lies with appellants; here, appellants built no case. The omission of irrelevant facts and minutiae does not constitute error.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.