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

AB-9538
File: 21-532814 Reg: 15081810

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9158
850 Oroville Dam Boulevard East, Oroville, CA 95965-5722,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 7, 2016
Sacramento, CA

ISSUED MAY 2, 2016

Appearances: *Appellants:* Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for appellants Garfield Beach, LLC and Longs Drug Stores California, LLC.
Respondent: Dean Lueders as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9158 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for fifteen days because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department, dated August 12, 2015, is set forth in the appendix.

Appellants' off-sale general license was issued on December 31, 2013. On January 7, 2015, the Department filed an accusation against appellants charging that, on September 25, 2014, a clerk working in appellants' store sold an alcoholic beverage to 19-year-old Allan Holman. Although not noted in the accusation, Holman was working as a minor decoy for the Oroville Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on July 7, 2015, documentary evidence was received and testimony concerning the sale was presented by Holman (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the clerk sold a six-pack of Bud Light beer, an alcoholic beverage, to the decoy. The clerk did not ask the decoy his age and did not ask to see his identification.

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

Appellants then filed an appeal contending that the administrative law judge (ALJ) failed to proceed in the manner required by law by misstating witness testimony and failing to address appellants' arguments.

DISCUSSION

Appellants contend that the ALJ failed to proceed in the manner required by law by misstating the decoy's testimony and failing to address appellants' arguments pertaining to their rule 141(b)(2) affirmative defense. (See Cal. Code Regs., tit. 4, § 141(b)(2).) Appellants insist "the ALJ committed fatal error by issuing a faulty proposed decision, which included findings that were wholly contradictory to witness testimony; findings that were contradictory to other findings; and an inadequate

rejection of Appellants' argument that failed to address its merits." (App.Br. at pp. 1-2.)

More specifically, appellants object to two passages in the decision below, which they characterize as "faulty and unsupported by the evidence" (App.Br. at p. 8), and to the ALJ's rejection of their argument that the decoy appeared over 21 because of his "indifference" during the decoy operation (App.Br. at p. 7.)

Notably, appellants insist that *any* factual oversight in the decision below merits reversal:

> As the trier of fact, the [ALJ] has the opportunity, which this Board does not, of observing the decoy as he or she testifies. If the ALJ squanders this opportunity and makes faulty findings based on observing the decoy and the testimony at the hearing, such is a fatal error, and this Board is precluded from relying on the decision.

(App.Br. at p. 1.)

Rule 141(b)(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.)

Appellants assume that *any* error or contradiction in the decision below requires reversal. This is incorrect. This Board will not reverse for an alleged defect in the decision below unless the appellant has shown the defect was prejudicial — that is, that a different result was probable had the defect not occurred. (See Code Civ. Proc., § 475.) "The burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial." (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601

[191 P.2d 432].)

Moreover, the findings of the trial court should be liberally construed to support the judgment. (*Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 680 [22 P.2d 5]; *Aguirre v. Fish & Game Com.* (1957) 151 Cal.App.2d 469, 474 [311 P.2d 903].) "[A] judgment may not be set aside unless the conflict in the findings is clear and the findings are incapable of being harmoniously construed." (*Lasher v. Faw* (1930) 209 Cal. 726, 731-732 [289 P. 821]; see also *Costello v. Bowen* (1947) 80 Cal.App.2d 621, 631 [182 P.2d 615]; *Harper v. Markarian* (1955) 131 Cal.App.2d 771, 778 [281 P.2d 305]; *Aguirre*, *supra*, at p. 474.) "A finding capable of two reasonable constructions must be interpreted according to the one that sustains the judgment, and a finding must be given such a construction, if a reasonable one, as will support the judgment." (*Chow*, *supra*, at p. 680.)

Our deference, however, is not limitless. "[W]here there are material, inconsistent findings upon substantially conflicting evidence, an appellate court must reverse; it is not appropriate for it to assume to strike one determination or the other in order to uphold the judgment." (*Brewer v. Simpson* (1960) 53 Cal.2d 567, 583 [2 Cal.Rptr. 609], emphasis added.)

> While findings should be liberally construed and a construction given to them if possible which will uphold rather than defeat the judgment [citation], a reviewing court may not attempt to reconcile irreconcilable findings. [Citation.] If one part of contradictory findings would support the judgment and another part *would necessarily upset it*, then the judgment must be reversed. [Citation.]

(*Selig Cahn, Inc. v. Alschuler* (1943) 56 Cal.App.2d 875, 876-877 [133 P.2d 671], emphasis added; see also *U.S. Indus., Inc. v. Vadnais* (1969) 270 Cal.App.2d 520, 532 [76 Cal.Rptr. 44].)

With regard to the allegedly defective findings in the decision below, we must determine whether an error or irreconcilable conflict actually exists, and if it does, whether appellant has shown prejudice meriting reversal.

Appellant first directs this Board's attention to the following findings: "[The decoy] appeared *anxious* to answer the questions asked of him, often answering the questions before they were completely asked. He did not appear *nervous*, and stated that he was not." (Findings of Fact, ¶ VI, emphasis added.) Appellants complain,

> This finding is faulty for two reasons: First, the contradictory nature (appears anxious but does not appear nervous) leaves both this Board without guidance or clarity as to the minor decoy's actual behavior during the hearing — logic suggests that a minor decoy cannot simultaneously appear anxious yet not appear nervous. Further, and perhaps more importantly, the ALJ improperly fails to extend his analysis to what effect the minor decoy's anxious appearance/not nervous appearance had on his apparent age. To guess at what the ALJ means, or even, what he deduced from this conclusion, would be a substitution of independent judgment by this Board, which it cannot do.

(App.Br. at p. 5.)

The ALJ, however, did not merely state that the decoy appeared "anxious." The entirety of the sentence — which appellants have truncated in order to manufacture ambiguity — states that the decoy "appeared *anxious to answer the questions asked of him*, often answering the questions before they were completely asked." (Findings of Fact, ¶ VI.) This statement does not imply at all that he was *nervous* — that is, that he was sweating or shaking in his shoes — but rather that he was *quite eager* to answer the questions posed. This interpretation does not conflict with the following sentence, which states that the decoy "did not appear nervous." Appellants would have this Board believe that it is impossible to parse the decoy's behavior at the hearing when, in reality, the decoy's conduct is described in detail without any apparent conflict.

We also reject appellants' contention that the Board is exceeding its authority by thus interpreting the findings. On the contrary, case law *requires* this Board to interpret the findings in order to determine whether a conflict actually exists. (See, e.g., *Chow*, *supra*, at p. 680.)

Appellants further object that the ALJ "put words in the [the decoy's] mouth by finding that he *stated* that he was not nervous." (App.Br. at p. 6, emphasis in original, citing Findings of Fact, ¶ VI.) Appellants contend that the decoy refrained twice from stating that he was not nervous. (App.Br. at p. 6, citing RT at pp. 12, 23-24.) According to appellants, the finding is therefore unsupported by the evidence.

The Department points out that the decoy did state that he was "indifferent" toward the decoy operation, and suggests that the ALJ interpreted this to mean that the decoy was not nervous. (Dept.Br. at p. 5, citing RT at p. 25.)

A review of the record reveals that the latter interpretation, advocated by the Department, was actually the inference advocated by appellants themselves in their closing argument:

> [The decoy] is a very confident, mature, bright young man who is going to make a wonderful police officer, I think. Unfortunately, as a decoy, I believe he has the appearance that is not generally respective [*sic*] of somebody underage. His calm demeanor, his background in patrol work and his, as he stated, indifference to what would normally be, I think, a very taxing, mentally and emotionally, job of a decoy acting with a law enforcement agency, in a sense a sting operation. Most individuals of his age would have the nervousness that comes with this. I think [the decoy's] indifference is a wonderful attribute. Unfortunately, because of that and the way he physically looks I believe they violated 141(b)(2).

(RT at p. 27.) Appellants' rule 141(b)(2) defense thus relied largely on the inference that by "indifferent," the decoy meant he was not nervous — the very inference they now complain is "not supported by the testimony in the administrative record." (*Id.* at

pp. 5-6.) Appellants cannot have it both ways. We therefore defer to the ALJ's finding that the decoy stated he was "not nervous," which was inferentially supported by his testimony that he was "indifferent" to the operation.

Appellants also direct this Board to a second finding, this time regarding the decoy's experience: "September 25, 2014 was the first day that the decoy had participated in a decoy operation." (Findings of Fact, ¶ V.) Appellants contend that this finding is unsupported by the evidence, and that based on his testimony, it was "clear and uncontroverted" that the decoy had participated in previous operations. (App.Br. at p. 7.)

On cross-examination, the decoy testified as follows:

[BY MR. KROLL, COUNSEL FOR APPELLANTS:]

Q The decoy operation on September 25th of last year, was that the first time that you acted as a decoy?

A That wasn't the first time.

Q Prior to that date had you been involved as a[n] explorer or cadet or some other —

A I was part of a volunteer law enforcement program here at the Oroville Police Department.

Q I'm sorry. I missed that first part.

A Sorry. I'm part of a volunteer service, volunteers and police service here in Oroville.

Q When did you first join that volunteer service?

A August of last year.

Q Okay. So you were probably involved in that volunteer service for about a month before the time of the decoy operation?

A Correct.

(RT at pp. 9-10.) Later, in discussing the sequence of events within the premises, the

decoy testified:

> [BY MR. KROLL:]
> Q Were you wearing a wire or any type of recording device?
>
> A Not at the time, no.
>
> Q You seem a little hesitant. Were you —
>
> A On other operations I used a wire. At that operation I did not.

(RT at p. 15.) Taken at face value, the testimony does support appellants' position — the decoy was unambiguous in stating that this "wasn't the first time" he had acted as a decoy, and referred tangentially to wearing a wire "[o]n other operations." The inference that this was the decoy's first operation is unsupported by the record.

The Department responds by essentially conceding the point: "Although it does appear that the minor testified that this was not his first decoy operation [citation], at most, the decoy could have only been used as a decoy for a one month period of time." (Dept.Br. at p. 5.)

The error, then, is clear. The law, however, requires appellants to further show that the error was prejudicial.

In a recent case, for example, this Board reversed where the decision below included a finding that the operation in question was the decoy's first. (See generally *Hawara* (2016) AB-9527.) The evidence established that the decoy had in fact participated in either five or nine previous operations. (*Id.* at p. 9.) The Department conceded the error. (*Ibid.*) In reversing, this Board noted that the decoy's experience was integral to the appellants' case:

> Given the extent of testimony appellants elicited on the topics (approximately six (6) pages' worth), and the fact that appellants dedicated a substantial portion of their closing argument to addressing

> them, we share appellants' concerns regarding the absence of findings relating to the decoy's law enforcement experience and confidence in his role as a minor decoy. This coupled with the fact that the ALJ mischaracterized the testimony covering the extent of the decoy's previous experience — finding this was his first operation when, in actuality, he had been on at least five (RT at p. 39) or even nine (RT at p. 54) previous minor decoy operations — leaves us "to guess whether the ALJ ignored appellants' [specific rule 141(b)(2)] defense, or simply overlooked it in drafting the decision." [Citation.]

(*Ibid.*) Thus, the error was prejudicial in that it deprived appellants of the meat of their rule 141(b)(2) defense.

In this case, appellants gave very little attention to whether the decoy had participated in previous operations. The two passages cited above are the only references in the transcript to any previous decoy operations whatsoever. Moreover, appellants raised only the decoy's patrol work in their closing argument, not his history as a decoy. (App.Br. at pp. 26-28.) At no point did appellants attempt to show how these past decoy operations — mentioned only in passing — might have had any actual, observable effect on the decoy's appearance. Unlike *Hawara*, the error below involves a fact that played no role whatsoever in appellants' rule 141(b)(2) affirmative defense. While appellants have shown error, they have not shown prejudicial effect.

Finally, appellants contend the ALJ "misconstrued" their rule 141(b)(2) argument when he concluded: "Respondents have not shown, and the [ALJ] is not aware of, any authority which holds that a teenager who purchases alcoholic beverages has to care or show interest, or that confidence and maturity are limited to persons who are at least twenty-one years old." (Determination of Issues, ¶ II.) Appellants counter that "the ALJ's fixation on 'authority' is misplaced" and "[t]he ALJ *is* the authority to hold that a minor decoy who shows no emotion does not have the general appearance expected of

a highly emotional teenager. It is common sense that teenagers are not generally so stoic." (App.Br. at p. 8, emphasis in original.)

Though their argument is convoluted, appellants ultimately appeal to a stereotype of "highly emotional" teenagers as "authority" to overrule the findings below. Another stereotype, of course, is that teenagers are apathetic. In lieu of weighing competing generalizations, we defer to the expertise and inferences of the ALJ on this issue and affirm 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.