

Mailing Date: January 3, 2007

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 05-2757
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs. :

431 TRAN, INC. : License No. R-7947
429-431 West Lehigh Avenue :
Philadelphia, PA 19133-3136 :

Counsel for Licensee: John J. McCreesh, III, Esquire
McCreesh, McCreesh, McCreesh & Cannon
7053 Terminal Square
Upper Darby, PA 19082

Counsel for Bureau: James E. Dailey, Esquire
PENNSYLVANIA STATE POLICE,
Bureau of Liquor Control Enforcement
6901 Woodland Avenue
Philadelphia, PA 19145

OPINION

431 Tran, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Tania E. Wright ("ALJ"), wherein the ALJ sustained the citation against Licensee, imposed a two hundred dollar (\$200.00) fine, and assessed one (1) point against Licensee's record.

The citation charged that, on November 6, 2005, Licensee, by its servants, agents or employees, violated section 407 of the Liquor Code [47 P.S. § 4-407] by selling malt or brewed beverages for consumption off premises.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused her discretion, or if her decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, Licensee contends that the ALJ's first finding of fact was not supported by substantial evidence. Licensee also avers that the ALJ issued the Adjudication and Order prematurely in light of a thirty (30)-day continuance granted by the ALJ for the Pennsylvania State Police, Bureau of Liquor

Control Enforcement (“Bureau”) to set forth its position regarding citations issued for off-premises consumption without permits. Finally, Licensee contends that its counsel relied upon the Bureau’s withdrawal of a similar citation in another case in thinking that this case against Licensee was moot, and that this confusion caused the delay in filing this appeal.

A review of the record reveals that, at an administrative hearing on June 14, 2006, Licensee’s counsel stipulated to the facts presented in the Pre-hearing Memorandum of the Bureau. (N.T. 4-6).

On or about Sunday, November 6, 2005, at approximately 5:05 p.m., R. R. Burns, a Bureau officer, entered the licensed premises and observed a male serving one (1) patron. (N.T. 4-6; Ex. B-3). The officer purchased and was served a twelve (12)-ounce bottle of Corona beer to go, and he departed the premises at approximately 5:15 p.m. in possession of the beer. (N.T. 4-6; Ex. B-3). Licensee did not possess an Off-Premises Sales Permit on November 6, 2005. (N.T. 8; Ex. B-4).

At the conclusion of the hearing before the ALJ, counsel for the Bureau requested that the ALJ delay the issuance of her Adjudication for thirty (30) days in order to allow the Bureau to set forth its position concerning citations

for sales for off-premises consumption without permits.¹ (N.T. 8-9). The ALJ granted counsel's request for the thirty (30)-day hold before issuance of the Adjudication. (N.T. 11).

On July 11, 2006, however, the ALJ mailed her Adjudication and Order sustaining the citation, imposing a two hundred (\$200.00) dollar fine and assessing one (1) point against Licensee's record.

By letter dated October 2, 2006 to the ALJ, Licensee, by and through its counsel, sought reconsideration of the ALJ's decision. Licensee opined that the reason it was requesting reconsideration was that the ALJ issued her Adjudication and Order prior to the expiration of the thirty (30)-day continuance period. Moreover, Licensee argued that it was confused because the Bureau chose to withdraw the charges in another citation matter heard on the same day as the instant case.

On October 12, 2006, the ALJ issued a Response To Licensee's Petition For Reconsideration in which the ALJ denied Licensee's petition as

¹ It should be noted that on the same day of the hearing for the citation matter at issue, counsel for Licensee had another off-premises sales case (63 CVA, Inc., Citation No. 05-2702) scheduled before the same ALJ. The Bureau counsel requested a thirty (30)-day continuance for both matters for the same reason as set forth above. (Admin. Notice).

untimely, and found no lawful basis for granting the relief requested.² (Admin. Notice).

Section 471 of the Liquor Code expressly provides that appeals to the Board from a decision of the ALJ must be filed within thirty (30) days of the ALJ's decision. [47 P.S. § 4-471]. The filing deadline for this appeal from the ALJ's Adjudication and Order, pursuant to section 471 of the Liquor Code, was August 10, 2006. Licensee's appeal was filed with the Board on November 4, 2006, beyond thirty (30) days from the mailing date of the ALJ's Adjudication and Order.

Licensee, in filing its appeal eighty-six (86) days late, seeks to have its appeal allowed *nunc pro tunc*. Licensee contends that the ALJ's Adjudication was issued prematurely, prior to the expiration of the continuance period. Licensee further contends that, because the Bureau withdrew the citation in a similar case (63 CVA, Inc.) some nine (9) days after the Adjudication in question was issued, Licensee's counsel believed the premature Adjudication to have been issued in error and that it was, therefore, moot. It was not until

² By way of further explanation, the ALJ noted that while the release of the adjudication in this matter was inadvertent error, the Bureau did not withdraw Citation No. 05-2702 until July 20, 2006, after the expiration of the thirty (30)-day period. Further, the ALJ noted that the instant matter was different than the facts of Citation No. 05-2702 in that Licensee never appeared before Philadelphia City Council to request a permit and, therefore, never even applied to receive a permit.

the appeal period had run that Licensee's counsel was informed that the Adjudication would stand. Licensee contends that the circumstances as set forth in its appeal created undue confusion which caused a delay in filing the appeal in this matter.

The circumstances described by Licensee's counsel arose as a result of counsel's own failure to immediately act to inquire about the ALJ Adjudication's validity when it was issued on July 11, 2006.

Pursuant to section 35.241(a) of the General Rules of Administrative Practice and Procedure [1 Pa. Code § 35.24(a)] and section 15.56 of the Board's Regulations [40 Pa. Code § 15.56], an application for rehearing or reconsideration must be filed within fifteen (15) days of the adjudication of the ALJ. Notwithstanding the requirement that a motion for reconsideration must be filed within fifteen (15) days after issuance of an ALJ adjudication, the aggrieved party must seek review by the Board within thirty (30) days of the ALJ's decision, because even the filing of even a timely motion for reconsideration to the ALJ does not toll the running of the time period for filing an appeal with the Board. [40 Pa. Code § 17.21(c)].

Licensee's appeal should have been filed on or before August 10, 2006 in order to be considered timely. It was not, however, filed until eighty-six

(86) days after the thirty (30)-day period had elapsed. Therefore, Licensee seeks to have the ALJ's Adjudication reviewed *nunc pro tunc* by the Board.

The Pennsylvania Supreme Court has stated that “[w]here an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or his counsel, and the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and the period which elapses is of very short duration, and Appellee is not prejudiced by the delay, the court may allow an appeal *nunc pro tunc*.” Cook v. Unemployment Compensation Bd. of Review, 671 A.2d 1130, 1141 (Pa. 1996).

In applying the standards set forth in the Cook case, the Board finds that Licensee failed to adequately satisfy the first factor of the Cook criteria. Specifically, Licensee failed to establish that its failure to file a timely appeal was caused by its own non-negligent actions. Licensee alleges that because it believed the ALJ's Adjudication had been issued in error, it was, therefore, moot. Licensee's counsel took no formal action to confirm its belief, but decided to let the Adjudication stand, even though it believed it was issued in error. Licensee should have immediately filed a timely request for reconsideration wherein it could have set forth its explanation about why it

assumed the Adjudication was otherwise moot. Had Licensee filed a prompt request for reconsideration, it may have been on course to file a more timely appeal to the Board.

The circumstances outlined in Licensee's petition do not clearly suggest factors that would have prevented Licensee from filing a timely appeal.

In Criss v. Wise, 781 A.2d 1160 (Pa. 2001), the Supreme Court stated that the exception for allowance of an appeal *nunc pro tunc* in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that it attempted to file an appeal, but unforeseeable and unavoidable events precluded it from actually doing so. See Cook, 671 A.2d at 1132. There is no evidence in the instant matter which suggests that Licensee attempted to file a timely appeal.

Licensee also failed to meet the second criteria set forth in Cook, which examines whether or not the remedial filing was attempted within a short time after the appellant has the opportunity to address it. In Cook, the appellant filed his appeal three (3) days after he was released from the hospital, and four (4) days after the expiration of the appeal period. Clearly, whatever extraordinary circumstances are alleged as the reason for the late filing of an appeal (i.e., fraud, breakdown of the court's operation through default of its

officers, or non-negligent conduct on the part of appellant, appellant's attorney, or the attorney's staff), the petition to file the appeal *nunc pro tunc* must be filed within a reasonable time after the occurrence of the extraordinary circumstance. Cook, 671 A.2d at 1132.

In Bass v. Commonwealth, Bureau of Corrections, 401 A.2d 1133, 1135 (Pa. 1979), the Supreme Court stated that, "[w]ithout doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it most difficult to arrive at a conclusion that the failure to file was non-negligent."

In the instant matter, the appeal was filed by Licensee more than two and one-half (2½) months after the appeal period expired. Licensee is tasked with notice of the underlying adjudications and orders when said correspondence is mailed to the address of record and not returned undelivered by the United States Post Office. See Moss v. Unemployment Compensation Bd. of Review, 557 A.2d 839 (Pa. Cmwlth. 1989).

Based upon the foregoing, Licensee failed to establish that its circumstances met all factors of the Cook criteria. Therefore, its appeal *nunc pro tunc* must be denied.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed as untimely filed.

It is hereby ordered that Licensee pay the fine in the amount of two hundred dollars (\$200.00). Failure to pay the fine within twenty (20) days of the mailing date of this Order will result in license suspension and/or revocation.

It is further ordered that one (1) point is hereby assessed against the record of the Licensee pursuant to 40 Pa. Code § 3.122(d).

Licensee must adhere to all conditions set forth in the ALJ's Orders in this matter.

Board Secretary