

Mailing Date: April 2, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-0802
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :
 :
 :
 vs. :
 :
 :
NORTHEAST CONCESSIONS, LP : License No. R-15046
1280 State Highway, Route 315 :
Wilkes-Barre, PA 08702-7002 :

Counsel for Licensee: Curtis J. Rogers, Esquire
Mohegan Sun at Pocono Downs
1280 Highway 315
Wilkes-Barre, PA 18702

Counsel for Bureau: Craig Strong, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Parkway
Macungie, PA 18062

OPINION

Northeast Concessions, LP (“Licensee”) appealed from the
Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”),

wherein the ALJ sustained the citation, imposed a one thousand two hundred fifty dollar (\$1,250.00) fine, and ordered compliance with the Pennsylvania Liquor Control Board's ("Board") Responsible Alcohol Management Program ("RAMP") within ninety (90) days.

The citation charged that, on February 5, 2007, Licensee, by its servants, agents, or employees, violated section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] by selling, furnishing and/or giving, or permitting such sale, furnishing or giving of alcoholic beverages to one (1) male minor, nineteen (19) years of age.

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 his discretion, or if his decision was not based upon substantial evidence. The Commonwealth Court has 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 July 26, 2007, Licensee's counsel sought leave from the ALJ to conduct depositions in preparation for the hearing, which the ALJ denied on July 27, 2007. (Admin. Notice). Licensee's sought reconsideration of the ALJ's denial on August 7, 2007. (Admin. Notice). The ALJ gave the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") time to respond to Licensee's request, which it did on August 24, 2007. (Admin. Notice). The ALJ denied Licensee's request by Opinion and Order Upon Licensee's Application for Discovery Depositions and the Bureau's Response thereto, issued August 28, 2007. (Admin. Notice).

On appeal, Licensee contends that the ALJ committed an error of law and abused his discretion in refusing to allow Licensee to engage in pre-trial discovery by means of depositions. Licensee further contends that the ALJ committed an error of law and abused his discretion in giving undue credibility to the testimony of the male minor alleged to have possessed or consumed alcohol in this case. Licensee also asserts that the ALJ committed an error of law and abused his discretion by failing to consider the deficiencies in the case presented by the Bureau. Finally, Licensee argues that the ALJ committed an error of law and abused his discretion in not considering or

applying the principles of the case of Bureau of Liquor Control Enforcement v. J.E.K. Enterprises, Inc.

The record reveals that Bureau Officer Terrence James Higgs, Jr. conducted an investigation of the licensed premises as a result of a complaint filed with the Pennsylvania State Police, Gaming Division. (N.T. 7-8). During the investigation, Officer Higgs and Bureau Officer Kelly reviewed surveillance tapes of the premises and took a patron questionnaire from the minor in question. (N.T. 7-8).

Trooper Thomas Major, from the Pennsylvania State Police, Gaming Enforcement Office at Pocono Downs, was working on the licensed premises on February 5, 2007. (N.T. 22). The licensed premises includes a simulcast racetrack area, where patrons eighteen (18) years of age and over are allowed to enter and bet on horse races. (N.T. 9-10, 64). He received a report from Licensee's security that an underage patron had been drinking on the casino gaming floor. (N.T. 23-24). Trooper Major and Trooper Chris Moore confronted the minor and issued a citation for underage drinking. (N.T. 23).

The minor was born on March 22, 1987. (N.T. 35). On February 5, 2007, the minor entered the licensed premises with several friends. (N.T.

35, 42-43). The minor went to the restroom and his friends went to the bar and purchased beers. (N.T. 35, 43). The minor joined his friends at the bar and took a bottle of Miller Lite beer that was sitting on the bar. (N.T. 35-36, 43). He drank some beer from the bottle. (N.T. 36).

After the minor went into the casino gaming portion of Licensee's premises, where patrons must be twenty-one (21) years of age or older, a server employed by Licensee approached him and asked if he wanted another beer, which he declined. (N.T. 36, 43-44). The server asked if the minor had identification; he indicated that he did not. (N.T. 36, 44). The server reported the minor and, as he attempted to exit the licensed premises, Licensee's security stopped him. (N.T. 37, 45). Security contacted Trooper Major, who then issued a citation to the minor for underage drinking. (N.T. 23, 37).

On February 5, 2007, John Gill was employed by Licensee as a bartender in the simulcast racetrack area. (N.T. 64). Mr. Gill carded and served three (3) male patrons four (4) bottles of beer. (N.T. 65). Mr. Gill placed the bottles on the bar, took money from the three (3) patrons, and then turned to serve other customers. (N.T. 65). He did not see the subject minor take a bottle of beer from the bar. (N.T. 65). Although he did not

see the minor in the bar area, he was permitted to be on that portion of the licensed premises. (N.T. 64).

Kenneth Matthews is employed as a shift supervisor in Licensee's security department. (N.T. 67). On February 5, 2007, Mr. Matthews was notified that there was a minor on the premises in possession of alcohol. (N.T. 67-68). Mr. Matthews confronted the minor, who admitted that he was nineteen (19) years old. (N.T. 68). Mr. Matthews contacted the Trooper Major. (N.T. 68-69).

Licensee first argues that the ALJ committed an error of law and abused his discretion in refusing to allow Licensee to engage in pre-trial discovery by means of depositions. While section 15.49 of the Board's Regulation provides that depositions shall be in accordance with 1 Pa. Code section 35.145, it does not mandate that they be conducted. [40 Pa. Code § 15.49]. Section 35.145 of Title 1 of the Pennsylvania Code provides that "[t]he testimony of a witness may be taken by deposition, upon application by a participant in a proceeding pending before the agency, before the hearing is closed, upon approval by the agency head or the presiding officer." [1 Pa. Code § 35.145]. The ALJ denied Licensee's request for leave to take depositions, since Licensee failed to convince him that they would further

clarify the issue of whether a minor was permitted to have alcoholic beverages on its premises. Since Licensee had the benefit of a pre-trial memorandum procedure, and it was not prejudiced by the ALJ's denial of Licensee's request for depositions, the Board finds that the ALJ did not commit an error of law or abuse his discretion in refusing to allow Licensee to engage in pre-trial discovery by means of depositions.

Licensee's second argument is that the ALJ committed an error of law and abused his discretion in giving undue credibility to the testimony of the male minor alleged to have possessed or consumed alcohol in this case.

Section 493(1) of the Liquor Code provides that it shall be unlawful “[f]or any licensee . . . or employee, servant or agent of such licensee . . . to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given . . . to any minor” [47 P.S. § 4-493(1)]. Section 495 of the Liquor Code also provides that a licensee who has provided alcohol to a minor may, nonetheless, escape liability if the licensee required the minor to provide proper identification, and if the licensee acted in good faith. [47 P.S. § 4-495(e), (f)].

In the instant matter, there is no dispute that the subject minor, nineteen (19) years of age, consumed alcohol on the licensed premises on February 5, 2007. There is also no dispute that Licensee's employee, Mr. Gill, served four (4) bottles of beer to (3) patrons by placing the bottles on the bar. If the minor was able to obtain alcohol because Licensee's employee failed to prevent his access to alcohol, Licensee is deemed to have furnished that alcohol. Commonwealth, Pennsylvania Liquor Control Bd. v. Abraham, 116 Pa. Cmwlth. 270, 541 A.2d 1161 (1988).

It is well settled that matters of witness credibility are the sole prerogative of the ALJ, and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984). In the instant case, the ALJ found the testimony of the male minor to be credible and adequate to support the charge in the citation.

Licensee also asserts that the ALJ committed an error of law and abused his discretion by failing to consider the deficiencies in the case presented by the Bureau. On this ground, the Board will not disturb the decision of the ALJ. The resolution of matters of witness credibility and evidentiary weight

are within the province of the trier of fact, in this case the ALJ. In Re Omicron Enterprises, 449 A.2d 857 (Pa. Cmwlth. 1982).

Finally, Licensee argues that the ALJ committed an error of law and abused his discretion in not considering or applying the principles of the case of Bureau of Liquor Control Enforcement v. J.E.K. Enterprises, Inc., 680 A.2d 53 (Pa. Cmwlth. 1996). However, licensees are assured a defense to a citation issued under section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] only if they act in good faith, and also require execution of a declaration of age card, retain a photocopy or video presentation of the valid identification upon which they have relied, or use a card scanning device to test the validity of the identification presented. [47 P.S. § 4-495].

Licensee failed to meet the requirements of section 495, and Pennsylvania State Police, Bureau of Liquor Control Enforcement v. J.E.K. Enterprises, Inc., 680 A.2d 53 (Pa. Cmwlth. 1996), does not convince the Board that the ALJ's decision must be reversed.

Therefore, the Board finds that the ALJ did not abuse its discretion or commit an error of law in rendering its decision in this matter. The ALJ's decision in this matter is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee must adhere to all other conditions set forth in the ALJ's
Order dated January 31, 2008.

Board Secretary