

Mailing Date: August 12, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	
BUREAU OF LIQUOR CONTROL	:	Citation No. 08-1945
ENFORCEMENT	:	
	:	
v.	:	
	:	
LUCKY SPEROS, INC.	:	License No. R-18261
T/A FOUR B'S RESTAURANT	:	
& TAVERN	:	
3245 SUSQUEHANNA TRAIL	:	
YORK, PA 17402-9736	:	

Counsel for Licensee: Theodore Aggelis, *Pro Se*  
Treasurer/Stockholder  
Director and Manager

Counsel for Bureau: Thomas M. Ballaron, Assistant Counsel  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
3655 Vartan Way  
Harrisburg, PA 17110

**OPINION**

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”), appeals the dismissal of Citation No. 08-1945 as set forth in the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), dated May 28, 2009.

The citation in the present matter alleged that on January 4 and 5, 2008, Lucky Speros, Inc. t/a Four B's Restaurant & Tavern ("Licensee") furnished alcoholic beverages to one (1) female minor, twenty (20) years of age, in violation of section 493(1) of the Liquor Code. [47 P.S. § 4-493(1)].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/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, 484 A.2d 413 (Pa. Cmwlth. 1984). Additionally, when the decision is unfavorable to the burdened party, and no evidence is presented in opposition (i.e. the evidence is uncontradicted), an appropriate component of Board review is an analysis of whether the ALJ capriciously disregarded material, competent evidence. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board, 812 A.2d 478 (Pa. 2002).

On appeal, the Bureau submits the following issue for the Board's review:

The specific issue presented for review is whether the ALJ based his conclusion regarding the credibility of the Commonwealth's witnesses upon substantial evidence of record.

In addressing this matter, the Board has reviewed the certified record provided by the Office of the Administrative Law Judge, including the Notes of Testimony from the hearing of April 14, 2009, and the ALJ's Adjudication and Order, with the Bureau's contention in mind, and has concluded that the ALJ capriciously disregarded the evidence when he dismissed the citation. Accordingly, we reverse.

The Bureau's uncontradicted evidence in the present matter established that on January 4, 2009, M.M. ("Minor") was twenty (20) years of age with a date of birth of September 27, 1987. [N.T. 84]. Between 8:30 p.m. and 9:00 p.m., the Minor arrived at Licensee's establishment. [N.T. 86]. She was accompanied by her boyfriend, Shane Emig. [N.T. 86, 114]. The Minor spent the evening with friends seated at one of the tables and consumed various types of alcoholic beverages including three (3) whiskey sours, two (2) shots and a pitcher of beer. [N.T. 89, 95]. Mr. Emig saw the Minor drinking alcoholic beverages, although he did not purchase any drinks for her. [N.T. 116]. The

Minor could not recall specifically who served her drinks, but she did recall that she ordered drinks from both the waitress who came to the table and one of the bartenders behind the bar. [N.T. 95]. At no time was she ever asked for identification before she was served an alcoholic drink by Licensee's employees. [N.T. 99]. The Minor continued to drink throughout the evening and left Licensee's establishment with Mr. Emig at approximately 1:45 a.m. on January 5, 2008. [N.T. 108]. While driving home, the Minor lost control of her car, crashing into a house and causing an explosion. [N.T. 85].

In dismissing the citation, the ALJ made no findings of fact regarding the service of alcohol to the Minor on January 4 or 5, 2009. [Adjudication & Order, May 28, 2009.]. In fact, the ALJ specifically stated that he made "no findings regarding the substantive portion of the Bureau's case." [Adjudication & Order, May 28, 2009, Pg. 6]. The ALJ went on to state the following:

I am convinced both witnesses were truthful as they know it. I am particularly concerned the minor's drunken condition which gave rise to the DUI charge and a very serious automobile accident, may have clouded her memory.

I am further troubled that the minor's memory may have been fixed. At the hearing, the minor remembered very accurately what she drank on the night in question. I inquired as to why her memory was so accurate. The minor responded she had been questioned any number of times about the incident (N.T. 98). I

have similar difficulties with the corroborating witness, the minor's partner on the evening in question.

[Adjudication & Order, May 28, 2009, Pg. 6, 7].

As noted above, section 471(b) of the Liquor Code provides that “the board shall only reverse the decision of the administrative law judge if the administrative law judge committed an error of law, abused its discretion or if its decision is not based on substantial evidence.” [47 §4-471(b)]. However, as the Pennsylvania Commonwealth Court has noted: “where the burdened party is the only party to present evidence and does not prevail before the agency, the ‘substantial evidence’ test falters.” Russell v. W.C.A.B. (Volkswagen of America, 550 A.2d 1364, 1365 (Pa. Cmwlth. 1988). The Court went on to state that:

If no evidence was presented to support the prevailing party, there is no evidence upon which to apply the “substantial evidence” test; i.e., it is impossible to find substantial evidence to support a position for which no evidence was introduced. In such cases, therefore, the appropriate scope of review,... is whether the [fact-finder] erred as a matter of law or capriciously disregarded competent evidence.

[Id.].

In the present matter, the Bureau presented substantial, uncontradicted testimony from the Minor and her boyfriend to prove that Licensee provided

alcohol to the Minor. Licensee presented no evidence regarding the service of alcohol to the Minor, nor did it raise the defense that it had taken precautions to prevent service to minors. Yet, the Bureau did not prevail. Further, the Bureau has substantially raised this issue for Board review. Accordingly, the Board has examined this appeal with the capricious disregard standard in mind.

A capricious or arbitrary disregard of evidence exists only “when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result.” Station Square Gaming L.P. v. Pennsylvania Gaming Control Board, 927 A.2d 232, 237 (Pa. 2007) (quoting Arena v. Packaging Systems Corporation, 507 A.2d 18, 20 (Pa. 1986)). As the Commonwealth Court has noted, the “express consideration and rejection of evidence... does not constitute capricious disregard of evidence.” Nelson v. State Bd. of Veterinary Medicine, 938 A.2d 1163, 1170 n. 13 (Pa. Cmwlth. 2007); In re Nevling, 907 A.2d 672, 675 n. 4 (Pa. Cmwlth. 2006).

The ALJ committed a clear abuse of discretion in this case when he capriciously disregarded the testimony of the Minor and Mr. Emig. The ALJ did not consider and reject the evidence presented by the Bureau as is evidenced by the lack of findings of fact on the substantive issue in the case. In fact, the

ALJ stated that he believed the witnesses were truthful. [Adjudication & Order, May 28, 2009, Pg. 6]. Rather, the ALJ willfully ignored the evidence from the Minor and her boyfriend on the theory that their memories had been “fixed.”

The record is utterly devoid of any facts to support the ALJ’s theory. The issue of witness competency was never raised during the hearing. There is no evidence in the record that the Minor’s memory was in any way clouded by her alcohol consumption or as the result of the car crash. There is no evidence that Mr. Emig’s memory was clouded by alcohol consumption. No testimony was ever elicited by either party or the ALJ on how the memories were fixed or by whom. Consequently, as there are no facts to support the ALJ’s theory that the witnesses’ memories were faulty, and therefore their testimony incompetent, the Board must conclude that the ALJ abused his discretion when he capriciously disregarded the testimony of the Minor and her boyfriend.

It is impossible to ignore the uncontradicted evidence presented by the Bureau. Accordingly, the decision of the ALJ is reversed.

**ORDER**

The decision of the ALJ is reversed.

The appeal of the Bureau is affirmed.

The case is hereby remanded to the ALJ for imposition of a penalty consistent with this Opinion.

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Board Secretary