TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00237-CV

New World Car Nissan, Inc., d/b/a World Car Nissan, Appellant

v.

Board of the Texas Department of Motor Vehicles; John Walker, III, in his Official Capacity as Chairman of the Board of the Texas Department of Motor Vehicles; and Nissan North America, Inc., Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT
NO. D-1-GN-14-004971, HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

New World Car Nissan, Inc. (World Car) appeals the trial court's order affirming a final order of the Board of the Texas Department of Motor Vehicles that dismissed World Car's appeal of an arbitration award. World Car asserts that the Board erred in determining that the arbitrator applied Chapter 2301 of the Texas Occupations Code, as required by the statute's provision allowing resolution of disputes through arbitration. *See* Tex. Occ. Code § 2301.466. The Board and its chairman, John Walker, III, (collectively, the Board) and Nissan North America, Inc. (Nissan) argue that World Car's appeal was properly dismissed because the arbitrator did apply Chapter 2301. Because we conclude that there was no error in the Board's determination that World Car did not meet the statutory threshold for appeal by establishing the arbitrator failed to apply the chapter, *see* Tex. Occ. Code § 2301.466(b), we will affirm.

BACKGROUND

World Car is a Nissan dealer of new motor vehicles, and Nissan is the North American Nissan distributor. In early 2011, Nissan proposed a limited-time incentive program, under which monetary bonuses were paid to dealers like World Car for new vehicle purchases from Nissan that met the terms of the program. As part of the incentive program, Nissan paid World Car bonuses totaling $103,800 for eleven cars World Car reported as purchased on the final day of the program. These payments were made by crediting World Car's account with Nissan on April 4, 2011. Following an internal audit, Nissan advised World Car that the eleven cars purchased on the last day of the program did not qualify for bonuses and that the credited amounts would be charged back to World Car's account. World Car engaged the internal appeals process with Nissan, but Nissan denied World Car's claim, and on March 21, 2012, Nissan notified World Car of its final decision that it would charge back the credited bonuses for the eleven cars at issue. On April 12, 2012, Nissan debited World Car's account in the amount of $103,800.

Disputes between vehicle dealers and distributors are governed by Chapter 2301 of the Texas Occupations Code, which gives the Board exclusive original jurisdiction to regulate those aspects of the distribution, sale, or lease of motor vehicles that are governed by the Chapter. *See* Tex. Occ. Code § 2301.151. Pertinent to the dispute at hand are two sections within Chapter 2301: Section 2301.466 authorizes the agreed use of arbitration to resolve disputes arising under the Chapter and Section 2301.475 governs audits and chargebacks within the context of incentive programs. *Id.* §§ 2301.466, .475. Specifically, in pertinent part, Section 2301.475(a) prohibits the charge back of money paid under an incentive program after the first anniversary of the date the

claim was paid. *Id.* § 2301.475(a)(1). Section 2301.466 provides that parties to a dispute can voluntarily submit the disagreement to arbitration, that the arbitrator is required to apply Chapter 2301 in resolving the controversy, and that "[e]ither party may appeal to the board a decision of an arbitrator on the ground that the arbitrator failed to apply this chapter." *Id.* § 2301.466.

Following unsuccessful mediation, on World Car's demand, World Car and Nissan submitted their dispute to arbitration. Pertinent to the issues before this Court, World Car alleged that because the debit of the chargebacks occurred more than one year after the bonuses had been originally credited, Nissan had violated Section 2301.475. Nissan argued that because it gave final notice of its final decision to charge back the amount of the bonuses within one year of the initial payment, no violation of Section 2301.475 occurred. The arbitrator denied World Car's claim, determining that Nissan's provision of notice of the chargebacks within one year of the initial credits satisfied the requirements of Section 2301.475. World Car appealed the arbitrator's award to the Board, claiming that the arbitrator failed to apply Section 2301.475. *See id.* § 2301.466. The Board referred the appeal to the State Office of Administrative Hearings, where an Administrative Law Judge (ALJ) held a hearing and produced a proposal for decision (PFD) dismissing World Car's appeal on cross-motions for summary disposition. The Board adopted the ALJ's proposal and issued an order dismissing World Car's appeal. World Car sought judicial review of the Board's order, and the district court affirmed the order. This appeal followed.

ANALYSIS

World Car claims that the trial court erred in affirming the Board's order dismissing World Car's appeal because four errors by the Board required reversal of its order. First, it claims

that the Board erred in finding that the arbitrator applied Chapter 2301 and that there was no genuine issue of material fact with respect to the arbitrator's application of the Chapter. Next, World Car contends that the Board misinterpreted the term "chargeback" when it adopted the PFD and dismissed New World's appeal. Third, it argues that the Board's scope of review of the arbitrator's award should have been broader than a determination of whether the chapter was applied. Lastly, World Car alleges that the Board's order violates due process by denying World Car's right to an administrative or judicial hearing. Because the resolution of this case turns on the scope of the Board's review, we will address that first.

Standard of Review

The Texas Occupations Code provides that an order of the Board regarding a matter arising under Chapter 2301 is accorded judicial review under the substantial evidence rule, pursuant to the Administrative Procedure Act. *See* Tex. Occ. Code § 2301.751. The substantial evidence standard of review prohibits us from substituting our judgment for the Board's judgment on the weight of evidence, but requires reversal if World Car's substantial rights have been prejudiced by certain legal errors. Tex. Gov't Code § 2001.174(2); *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012). This standard requires a court to reverse or remand a case for further proceedings "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are, among other things, affected by error of law or are "characterized by abuse of discretion." Tex. Gov't Code § 2001.174(2); *Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011). We presume that the Board's order is supported by substantial evidence, and World Car bears the heavy burden of

overcoming that presumption. *See Dutchmen Mfg., Inc. v. Texas Dep't of Transp., Motor Vehicle Div.*, 383 S.W.3d 217, 222 (Tex. App.—Austin 2012, no pet.).

Resolution of the issues in this case, however, turns on statutory construction, which is a question of law that we review de novo. *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 893 (Tex. 2017). Our primary objective in construing statutes is to give effect to the legislature's intent, which we seek "first and foremost" in the statutory text. *Colorado Cty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017). Without a definition in the statute, we rely on the plain meaning of the text unless a different meaning is apparent from the context or application of the plain language would lead to absurd results. *Id.* "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." Tex. Gov't Code § 311.011. We look to the entire act in determining the legislature's intent with respect to specific provisions. *See Texas Citizens*, 336 S.W.3d at 628.

Scope of the Board's review of the arbitrator's award

The parties agree that the scope of the Board's review of the arbitrator's decision on appeal is a threshold issue in this case. The Board's order states:

> When considering both motions [for summary disposition], the controlling issue before the ALJ was the Tex. Occ. Code § 2301.466(b) jurisdictional question of whether the arbitrator failed to apply Tex. Occ. Code Chapter 2301 in making a decision. The ALJ found and the Board agrees that there is no genuine issue as to the material fact that the arbitrator applied Chapter 2301 in the decision and that as a matter of law, [World Car's] appeal must be dismissed.

The order also incorporates by reference the PFD, which states: "The ALJ concludes that the review authorized by Section 2301.466(b) is limited to the question of whether the arbitrator failed to apply Section 2301.475."

World Car asserts that the Board erred in its interpretation of Section 2301.466(b), arguing that the section requires that on appeal, the Board must review an arbitration award to determine whether the arbitrator applied Chapter 2301 reasonably or as the Board would. World Car claims that the Board's exclusive jurisdiction to regulate the aspects of the distribution, sale, or lease of motor vehicles that are governed by the chapter, *see* Tex. Occ. Code § 2301.151, requires a more substantive review than the Board conducted. It urges that the Board must determine eligibility to appeal on the basis of whether the arbitrator applied the chapter "as written." Nissan and the Board each respond that the plain language of the statute sets out the full extent of the Board's scope of review of the arbitrator's award: the sole issue of whether the arbitrator "failed to apply" Chapter 2301. They argue that Section 2301.466(b) establishes the only threshold requirement a party must meet in order to appeal an arbitrator's decision, which does not permit World Car's broader interpretation.

When determining the meaning of a statute, our primary purpose is to ascertain and give effect to the legislature's intent. *Colorado Cty.*, 510 S.W.3d at 444; *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007). Where text is clear, text is determinative of that intent. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). The full text of the applicable statute here reads: "An arbitrator shall apply this chapter in resolving a controversy. Either party may appeal to the board a decision of an arbitrator on the ground that the arbitrator failed to apply this

chapter." Tex. Occ. Code § 2301.466(b). The first sentence mandates application of Chapter 2301 to all arbitrations arising under the chapter. This is uncontested. The second sentence is a conditional permissive grant of the right to appeal an arbitration award. It provides a single basis on which a party may appeal an arbitrator's decision to the Board—the arbitrator's failure to apply Chapter 2301. *See id.* This indicates a purposely limited right to appeal the arbitrator's award. *See City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006) (statutory limitation of appeal of hearing examiner's award to certain enumerated grounds was "severely circumscribed"). World Car's proposed interpretation would significantly broaden the scope of appeals available to parties who agreed to resolve their disputes through arbitration, contrary to the purposefully narrow scope articulated in the statute.

In addition, "apply" in common usage means "to make use of as suitable, fitting, or relevant." *Webster's New Third Int'l Dict.* 105 (2002). In a legal context, "apply" means "to employ for a limited purpose" or "to put to use with a particular subject matter," as in "apply the law to the facts." *Black's Law Dictionary* (9th ed. 2009). The plain meaning of the word, as indicated by these definitions, does not support the broader interpretation advanced by World Car. The statute does not condition appeal on the failure to apply the chapter as written or on misapplication of the chapter. We must assume any words not in the statute were purposely omitted. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 628 (Tex. 2008) (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) ("It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose . . . [and] we believe every word excluded from a statute must also be presumed to have been excluded for a purpose.")). World Car's construction of Section 2301.466

would require reading additional words into the language of the statute that are not there, which we cannot do. On the basis of the plain meaning of the text of the statute, we cannot conclude that the statute allows appeal on anything more than a single issue: did the arbitrator apply the Chapter?

Lastly, as Nissan and the Board argue, this more narrow reading of the statute also comports with general arbitration principles. The Board explains that any other reading of Section 2301.466(b) would call into question the finality of the arbitrator's decision, undermining the purpose of arbitration and the finality of the arbitrator's decision. "It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011). Though procedurally distinguishable, case law regarding vacatur of arbitration awards under the Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code §§ 171.001-.098 (TAA), the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA), and common law provides nonbinding but instructive context.[1] Texas law strongly favors arbitration and significantly limits judicial review of an arbitration award. *Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016); *Lawson v. Collins*, No. 03-17-00003-CV, 2017 WL 4228728, at *3 (Tex. App.—Austin Sept. 20, 2017, no pet. h.) (mem. op.). Arbitration awards are given the same effect as the judgment of a court of last resort. *East Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 n.11 (Tex. 2010) (citing *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002)). A mistake of fact or law is insufficient grounds on which to set aside an arbitration award. *Denbury Onshore,*

[1] Though the parties agree that the underlying agreement provided that any arbitration would be governed by the FAA, World Car is not pursuing relief under that law here.

LLC v. TexCal Energy S. Tex., L.P., 513 S.W.3d 511, 520 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Black v. Shor*, 443 S.W.3d 154, 168-69 (Tex. App.—Corpus Christi 2013, pet. denied); *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, 164 S.W.3d 438, 442 (Tex. App.—Houston [14th Dist.] 2005, no pet.). This legal context, consistent with the plain language of the statute, supports a narrow and specific opportunity for appeal under Section 2301.466 and limits the Board's review of such an appeal.

We conclude that the question before the Board with respect to the proposed order dismissing World Car's appeal of the arbitration order was limited to whether the arbitrator applied the statute. Accordingly, we overrule World Car's third issue.

Application of the chapter

In its first and second issues, World Car argues that the Board erred in determining that the arbitrator applied the chapter. Nissan and the Board argue that it is evident on the face of the award letter that the arbitrator applied Chapter 2301 generally and Section 2301.475 specifically. The award letter states:

> World Car asserts that Nissan's charge back for the bonus violates a Texas statute, Section 2301.475 of the Occupations Code that prohibits a manufacturer from charging back a dealer for an incentive payment after the first anniversary of the payment. Nissan notified World Car it had earned the inventive [sic] on April 4, 2011. Nissan notified World Car that it was charging back for the eleven vehicles on December 12, 2011. World Car sent an appeal letter on February 22, 2012. Nissan issued a letter on March 21, 2012, denying the appeal. Some accounting entry may have been made shortly after the first anniversary, but the actual charge back was complete when Nissan sent the March 21 letter.

The arbitrator thus cites to the relevant code section, states the section's requirement, and lists the specific relevant facts. He then applies the law to the facts to determine that the chargeback occurred on March 21, 2012, which was prior to the first anniversary of the payment. This shows the arbitrator employed and used the Chapter in connection with the facts presented, thus indicating that he applied Section 2301.475. *See Quinn v. Nafta Traders, Inc.*, 360 S.W.3d 713, 720 (Tex. App.—Dallas 2012, pet. denied) (relying on face of award to determine application of law); *Mega Builders, Inc. v. Paramount Stores, Inc.*, No. 14-14-00744-CV, 2015 WL 3429060, at *3 (Tex. App.—Houston [14th Dist.] May 28, 2015) (mem. op.) (same). We have no other record of the proceeding at the arbitration level, and World Car has not made a showing that contradicts what is evident on the face of the award. *See Mega Builders*, 2015 WL 3429060, at *3 ("Absent a record, we must presume that the record supports the arbitrator's determination of the proper amount of the award.").

World Car argues that citing the Section alone is not conclusive of application of the Chapter. It contends the arbitrator's "gross misapplication" of Chapter 2301 was the functional equivalent of a failure to apply the chapter. In distinguishable procedural contexts, Texas law has acknowledged that an arbitrator's power is not entirely without limit. *See, e.g.*, *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422, 431 (Tex. 2017); *Hoskins*, 497 S.W.3d at 494. However, World Car's gross misapplication argument is based on the premise that in order to reach the ultimate determination he did, the arbitrator had to reinterpret the definition of "chargeback" incorrectly to include "notice of chargeback," effectively failing to apply the Chapter. This argument is one of misinterpretation and wrongful application of the law, not non-application of the law.

World Car complains of legal error, disputes the correctness of the arbitrator's decision, and reurges the merits of its case. In light of the narrow language of Section 2301.466, this alleged mistake of law is insufficient grounds for appeal. On the record before us, even if the arbitrator had misapplied the Chapter in the way alleged, it would not have amounted to a failure to apply the law. Because we find no error in the Board's determination that the arbitrator applied Chapter 2301, we overrule World Car's first and second issues.

Due Process

In its fourth issue, World Car contends that the Board's decision to dismiss World Car's appeal effectively requires World Car to waive its rights under the Occupations Code, in violation of Section 2301.003. *See* Tex. Occ. Code § 2301.003 (agreements to waive terms of Chapter 2301 are void and unenforceable). World Car asserts that this action therefore violated its due process rights. World Car also argues that if a dealer elects voluntary arbitration but an arbitrator fails to apply the Code, then on appeal the Board must apply the Code to the proceedings. As best we can determine, all of World Car's allegations of due process violations are premised on its assertion that the arbitrator failed to apply Chapter 2301 of the Occupations Code. Because we have concluded that the Board did not err in determining that the arbitrator applied Section 2301.475, we overrule World Car's fourth issue.

CONCLUSION

Having overruled World Car's issues on appeal, we affirm the judgment of the trial court.

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

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