National Indian Gaming Commission

CONCURRING OPINION

In the Matter of the Cherokee Nation of Oklahoma
NOV/CO-5-99
Docket Nos. NIGC 99-1

Cherokee Nation – Appellant

Chairman Deer, concurring:

I agree with the majority that the presiding official correctly concluded that the game "Reels and Deals" is a "gambling device" as that term is defined in 15 U.S.C. § 1171(a) and that the game Reels and Deals is an electronic game of chance.

I adopt the Recommendations of the Presiding Official while noting the following exceptions to the Recommendations:

First, the evidence of record does not support a finding that the Giles witnesses were able to "consistently win more than they lost." During play in the courtroom demonstrations, the Giles cousins never obtained a winning combination of three identical icons, despite having practiced for several hours in preparation specifically for the demonstration. They secured an individual targeted icon on about five occasions in some twenty attempts. Near misses do not constitute wins; there is no reward for coming close. The only evidence that the Giles "won more than they lost" is their own testimony, unsupported by any objective study. In addition, other testimony indicates that when the Giles cousins played the "Reels and Deals" game outside the hearing, they did so in a workshop where they build gaming devices. They do not pay to play. In monetary terms, because the amount it would have cost the Giles cousins to play is

undetermined, it is not possible to conclude that they "won more money than they lost." Money they would have paid to play the game would be considered money lost.

In addition, whatever "improvement" the Giles cousins may have demonstrated is the result of familiarity with the game, familiarity that is not reasonably available to the average player. This familiarity came from "almost unlimited opportunity to play the games for free over a period of several years." Recommended Decision, at 20. The Giles cousins install, service, and repair "Reels and Deals" devices (TR 681 and 863-875) and could have specialized knowledge about the game. In addition, they recommend technical changes for the "Reels and Deals" game (TR 922). While the evidence of record does not support the finding described above, it does support a finding that the Giles cousins, with their special experience, can achieve a rate of success better than blind or random play, where chance completely controls.

Second, the Presiding Official makes the following comment in the Recommended Decision: "Very advanced players, however, can consistently win more than they bet." Recommended Decision, at 21 (emphasis added). The Presiding Official makes the following further comment: "Evidence shows that even skillful play does not eliminate the chance factor, but it can result in consistent winnings by participants. . . . The evidence shows that the "Reels and Deals" design enables some participants . . . to consistently influence outcomes and win money by their play."

However the record does not support the conclusion that "skillful play" can result in consistent winnings by participants, even advanced players. Indeed, evidence of record supports a contrary conclusion: players cannot consistently obtain winning combinations by utilizing strategies that involve eye-hand coordination.

The Recommended Decision includes discussion about game demonstrations and testing, both actual and theoretical, offered by Respondent to show that "skillful play" is attainable. These include the following: (A) courtroom demonstrations and testimony by the Giles cousins; (B) Dr. Conti's study; (C) the Snyder-Manzano performance test; and (D) the computer model created by Dr. Bertram. However, these examples do not support a conclusion that a player can consistently obtain winning combinations by using skill strategies.

(A) The courtroom demonstrations and testimony of the Giles cousins are discussed in # 1 (above).

(B) Dr. Conti's study lacked several important controls. (TR 1160-1172; 1183-1198). The Presiding Official regarded the test results as "inconclusive." Recommended Decision, at 20. Even were the validity of these uncontrolled test results accepted, the results do not show consistent winning but the opposite. The majority of players did not show improvement in their attempts to catch a particular icon. Those players who arguably did show improvement contributed to a mean or average rate of success of 0.051 in capturing the targeted icon, compared to the blind or random play rate of 0.045. (TR 1120; Exhibit C-5A). The results of play were presented in Dr. Kennedy's testimony and in charts he prepared to display Dr. Conti's test results. See Exhibit G-28. These charts show inconsistent results among players, including the inability of players to replicate instances of improved performance. For example, during several hours of play, several players initially achieved a certain number of hits but later performed at a reduced level of success. Exhibit G-28 (Subjects 1,3,4,5,8,9,10,13,14,15,16,17). These test results support, at best, a conclusion that players will occasionally be more successful at

the game than at other times, a conclusion that can be the result of chance just as well as the use of skill. Several players reported that they considered the outcome of the game is due to luck or chance. (TR 1175-1178).

(C) Mr. Snyder submitted a report and testified about a one-person performance test of Mr. Manzano. Mr. Manzano did not testify at the hearing and was not subject to cross-examination about his method of play during the test. Mr. Snyder's testimony and report indicate that Mr. Manzano played over 900 games then announced that "he got it," meaning he could skillfully play the game. (TR 1030-1032; 1059-1060). However, Mr. Manzano's performance test completely lacks any degree of reliability or credibility. The test was uncontrolled and, for the most part, the testing was unobserved by any witness or even by Mr. Snyder who designed and conducted the testing. Mr. Manzano was told to play 1000 games and record his results in a log. No one watched Mr. Manzano play the game except for Mr. Snyder who occasionally stopped in to see how he was doing. (TR 1044-1046). After not showing success and becoming frustrated, Mr. Snyder offered Mr. Manzano a new motive: he would win a financial bonus for achieving a specified level of successful play. Because of this financial motivation, and because the test was to be limited to 1000 game plays, Mr. Manzano may have thought that he would be expected to show "improvement" at about 900 game plays.

Because the Manzano test completely lacks credibility, the testing results should not be considered a reliable basis to support a finding that skillful play can be achieved or that skillful play can result in consistent winnings by participants. Indeed, the tests cannot support any finding concerning play of the game.

(D) Dr. Bertram testified concerning his mathematical analysis of games of skill that includes the concept of optimal play, the selection of the game option that returns the most amount of money to a player. Using a computer and not actual human test subjects, he theorized that by timing the interval between targeted icons, a player could obtain a payback of approximately 111%. Dr. Bertram's theory would require a player to use a stopwatch or other timing device to carefully time the intervals between targeted selected rapidly-spinning icons. (TR 595-603). However, this approach would not work in a tribal casino, as it is likely that a player bringing a stopwatch or a computer into the gaming facility would be asked to leave. (TR 1320-1321). If it were possible for a player to utilize a stopwatch in the manner postulated by Dr. Bertram, after observing a time mark, a player would have to manually push a button and obtain an instantaneous response by the gaming device. Dr. Bertram's theory assumes also that the player can successfully execute on the time mark within four rapidly-spinning icons.

Dr. Bertram's theory also requires a player to have knowledge of the reel strip, or the sequence of the icons as they appear, which according to Dr. Bertram "can be obtained, in a tedious fashion through observation, by playing many games at fixed time intervals and piecing together the reels strips, or by using information from the manufacturer." Exhibit G-16 (Report from Dr. Bertram), page 2. Dr. Bertram's theory that a player can receive a payback of 111% does not include the cost of obtaining the information about icon sequence obtained through this "tedious" play. The manufacturer does not make the reel strip information available to players. (TR 922).

Dr. Bertram's theoretical analysis is difficult to grasp and has no real-world application possibility. He does not know of any player who has utilized his theory or

who has actually achieved the theoretical success ratio of 111% return. (TR 664; 676-678). Dr. Bertram admitted that, although people attempt to play optimally, he does not know of anyone who has actually played "Reels and Deals" optimally. (TR 676). The theory does not support a conclusion that participants in Reels and Deals who skillfully play can obtain consistent winnings. Players do not have and cannot obtain through reasonable effort the reel strip information critical to Dr. Bertram's analysis. Players cannot play in the casino environment in the manner envisioned by Dr. Bertram.

For the preceding reasons, while there is evidence that some select players with unique experiences, such as the Giles cousins, can attain results that exceed results expected in random play, the conclusions in the Recommended Decision that skillful play can result in consistent winnings should not be included in the Commission decision. The "Reels and Deals" game is still a game where chance is not merely substantial but is predominant.

Third, the Presiding Official offered the following finding in the Recommended Decision: "There is a substantial element of chance available for every game of Reels & Deals." Recommended Decision, at 21 (emphasis added). The evidence of record supports a finding that a substantial element of chance is always present in the play of "Reels and Deals" and is not just available. The following observations found elsewhere in the Recommended Decision indicate that even "advanced" players are not able to eliminate chance through the use of game strategies: "Evidence also showed that the application of strategies does not always result in catching or selecting a targeted icon." Recommended Decision, at 20. "As noted above, even for advanced play by motivated participants, the element of chance cannot be eliminated." Recommended Decision, at 21.

"Reels and Deals contains an element of chance." Recommended Decision, at 22. "The honesty characteristics described above do not eliminate chance as a significant factor in this game's operation." Recommended Decision, at 23 (emphasis added).

Accordingly, I find that the evidence overwhelmingly proves that play of the game of "Reels and Deals" reflects a substantial element of chance that is always present in the game.

Finally, I take exception with the majority's speculative statement that "if the record had supported the proposition that an average player could develop sufficient skill to affect consistently the outcome of the game so as to win at an appreciable level above blind play, we would be more favorably inclined to Appellant's proposition". This statement is a standard not based in the law and unsupported by the record. "Deliberate *dicta* . . . should be deliberately avoided." *United State v. United Gypsum Company,* 333 U.S. 364 (1948). If these types of games are truly amusement devices, they do not belong in gambling halls but in arcades.

Date: May 24, 2002

Montie R. Deer
Chairman