

Deway +

**DOCKET NO. 607956**

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
SPEEDS PLUS INC.	§	ALCOHOLIC
D/B/A RACK DADDY'S	§	
PERMIT NOS. MB-453684, LB-453685	§	
& PE-453686	§	
TRAVIS COUNTY, TEXAS	§	
<i>(SOAH DOCKET NO. 458-04-5261)</i>	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 27th day of October, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Sharon Cloninger. The hearing convened on September 8, 2004 and adjourned October 15, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 13, 2004. The Proposal For Decision, was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

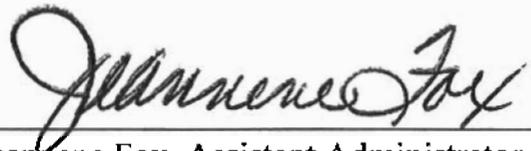
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's permits not be canceled and that the violations referenced in the Proposal For Decision be hereby **RESTRAINED**.

**This Order will become final and enforceable on November 17, 2005**, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties in the manner indicated below.

SIGNED on this the 27<sup>th</sup> day of October, 2005, at Austin, Texas.

On Behalf of the Administrator,

A handwritten signature in cursive script, reading "Jeannene Fox", is written over a horizontal line.

Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

/vr

Hon. Sharon Cloninger  
Administrative Law Judge  
State Office of Administrative Hearings  
Austin, Texas  
*VIA FAX (512) 475-4994*

Speeds Plus Inc.  
d/b/a Rack Daddy's  
**RESPONDENT**  
P. O. Box 224971  
Dallas, Texas 75222  
*VIA CERTIFIED MAIL RRR NO. 7005 0390 0005 7550 2101*

Stephen F. Shaw  
**ATTORNEY FOR RESPONDENT**  
8700 N. Stemmons Frwy., Ste. 470  
Dallas, Texas 75247  
*VIA FAX: (214) 920-2498*

TABC Legal Section

Licensing Division  
Austin District Office

12-29

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

||| DEC 15 2004

LEGAL DIVISION

December 13, 2004

Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa, Suite 160  
Austin, Texas 78731

**HAND DELIVERY**

**RE: Docket No. 458-04-5261; RACK DADDY'S**

Dear Ms. Fox:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX ADMIN CODE § 155.59(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

Sharon Cloninger  
Administrative Law Judge

SC/trp  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**  
Dewey A. Bracken, TABC, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**  
Frank Todd, Operations Manager, Speeds Plus Incorporated, P O Box 224971, Dallas, TX 75222 -**VIA REGULAR MAIL**



TABC was represented by its staff attorney Dewey A. Brackin and by its party representative, TABC Agent Tricia O'Cayce Rutledge. Respondent appeared through its employee Frank Todd, who is not an attorney, whose oral motion for a continuance in order to obtain counsel was denied on the record, and who proceeded under protest. Evidence and argument were heard, and the record closed October 15, 2004, after Staff submitted a brief on the "safe harbor" statute, and Respondent submitted a reply brief.

## II. BACKGROUND

Respondent is the holder of a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and Beverage Cartage Permit issued by TABC for the premises known as Rack Daddy's, located at 1779 Wells Branch Parkway, Austin, Travis County, Texas.

On June 24, 2003, Steven Austin Haines, age 19, of Eastland, Texas, was served at least 10 alcoholic beverages at Rack Daddy's by its employee Lindsie Rose Harris over about three hours. He drove away from Respondent's premises and, just minutes later, at approximately 1 a.m. on June 25, 2003, was in a single-car accident at 3000 Wells Branch Parkway. As a result of the accident, Mr. Haines died, and Mr. Haines' passenger Nicholas Neville, age 21, of Ranger, Texas, was seriously injured.<sup>1</sup> According to the toxicology report, Mr. Haines' ethanol level was 0.13 percent in the blood (heart); 0.19 percent vitreous; and 0.21 percent in the urine.<sup>2</sup> Under TEX. PENAL CODE § 49.01, a person is legally intoxicated if his alcohol concentration is 0.08 percent or higher; Mr. Haines was intoxicated when he left Rack Daddy's.<sup>3</sup>

Other patrons who had either gone to Rack Daddy's with Mr. Haines or who met him and other members of their party there are Rodney Bustamente, Paul Fugett, Alycia Kraemer, Mr.

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<sup>1</sup> TABC Exh. 1, at 1-2, and TABC Exhs. 2, 3, and 14.

<sup>2</sup> TABC Exh. 12.

<sup>3</sup> TEX. PENAL CODE ANN. § 49.01(1) defines "alcohol concentration" to be the number of grams of alcohol per: (A) 210 liters of breath; (B) 100 milliliters of blood; or (C) 67 milliliters of urine. TEX. PENAL CODE § 49.01(2) defines "intoxicated" to mean (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (B) having an alcohol concentration of 0.08 or more.

Neville; Justin Wharton; and Travis Wharton. Everyone was 21 or older except for Mr. Haines, who was 19, and Travis Wharton, who was 18.

### III. THE ALLEGATIONS AND APPLICABLE LAW

#### A. Allegations

Staff alleges that Respondent, its agent, servant or employee, with criminal negligence, sold or delivered an alcoholic beverage to a minor, in violation of TEX. ALCO. BEV. CODE ANN. § 106.13(a); that Respondent, its agent, servant or employee, sold or delivered an alcoholic beverage to an intoxicated person, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14); and that Respondent, its agent, servant, or employee, sold, served, or provided an alcoholic beverage to an individual when, at the time the provision occurred, it was apparent to the provider that the individual was obviously intoxicated to the extent that he presented a clear danger to himself and others, and the intoxication was a proximate cause of the damages suffered, in violation of TEX. ALCO. BEV. CODE ANN. § 2.02.

#### B. Respondent's Affirmative Defense

Respondent raised TEX. ALCO. BEV. CODE ANN. § 106.14(a), or the "safe harbor" statute, as an affirmative defense, claiming that Respondent is protected from TABC's action because Respondent complied with this statute.

In pertinent part, TEX. ALCO. BEV. CODE ANN. §106.14(a) states that the sale, service, dispensing, or delivery of alcoholic beverages to a minor or an intoxicated person shall not be attributable to the employer if:

- (1) the employer requires its employees to attend a Commission-approved seller training program<sup>4</sup>;

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<sup>4</sup> The phrase "seller-server" is commonly used to signify that a person has successfully graduated from a TABC-approved seller training program under TEX. ALCO. BEV. CODE ANN. § 106.14. Commission rules at 16 TEX. ADMIN CODE (TAC) ch. 50 establish the requirements for approval of seller-server training programs, and the requirements and procedures for certification under these programs. Graduates of these programs receive a certificate to signify successful completion of the program, and this certificate is valid for two years. These seller-server training programs are calculated to modify the behavior of seller-servers of alcoholic beverages, primarily to prevent the sale of alcoholic beverages to minors and intoxicated persons. TABC maintains a list of currently certified sellers. See 16 TAC §§ 50.1, and 50.8(a)(b)(d).

- (2) the employee has actually attended such a training program; and
- (3) the employer has not directly or indirectly encouraged the employee to violate such law.

A licensee who claims exemption from administrative action under TEX. ALCO. BEV. CODE ANN. § 106.14(a) bears the burden of proof. TABC's recovery against a licensee is barred if that licensee alleges and proves all three components of the statute.

Further clarification of the requirements of the "safe harbor" statute are found at the Commission rules in 16 TAC ch. 50. As relates to TEX. ALCO. BEV. CODE ANN. § 106.14(a)(1), a licensee shall not be deemed to require its employees to attend a Commission-approved seller-server training program unless employees are required to attend such program within 30 days of their initial employment, and each employee's certification has not expired, been suspended, or revoked.<sup>5</sup>

Regarding TEX. ALCO. BEV. CODE ANN. § 106.14(a)(3), the following practices constitute *prima facie* evidence of indirect encouragement to sell or serve alcoholic beverages to minors or intoxicated persons:

1. the permittee fails to insure that all employees possess currently valid seller-server certificates of training;
2. the permittee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the permittee to prohibit such sales, service, or consumption;
3. the permittee fails to insure that employees have read and understood the permittee's policies and procedures regarding sales, service or consumption of alcoholic beverages by or to minors or intoxicated persons.<sup>6</sup>

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<sup>5</sup> See 16 TAC § 50.10(a) and (b).

<sup>6</sup> See 16 TAC § 50.10(d).

#### IV. EVIDENCE AND ANALYSIS

**A. Did Respondent's agent, servant or employee, with criminal negligence,<sup>7</sup> sell or deliver an alcoholic beverage to a minor, in violation of TEX. ALCO. BEV. CODE ANN. § 106.13(a), on June 24, 2003?**

Ms. Harris was Respondent's employee on June 24, 2003. As a result of this incident, criminal charges have been filed against her; as of the hearing date, she was not under arrest and had not been located by law enforcement officers. However, in August 2003, she was identified by Ms. Kraemer, Mr. Neville, and Mr. Bustamente, who were shown Texas Department of Public Safety photo spreads by Agent Rutledge, as the waitress who had served their group at Rack Daddy's on June 24, 2003.<sup>8</sup> Ms. Kraemer described Ms. Harris as a white female, five-feet-two-inches tall, skinny, petite, with straight, shoulder-length blonde hair with dark roots.<sup>9</sup> Also, Ms. Kraemer testified that Mr. Haines and Travis Wharton "were yelling out 'Lindsie' that night," so she assumed the waitress was named "Lindsie." Ms. Kraemer testified that Ms. Harris served Mr. Haines at least 10 alcoholic beverages.

Mr. Haines, born March 5, 1984, was 19 years old on June 24, 2003,<sup>10</sup> and a minor.<sup>11</sup> Both Ms. Kraemer and Mr. Neville testified that neither Ms. Harris nor any of Respondent's other employees carded Mr. Haines to ascertain his age.<sup>12</sup> She described Mr. Haines to appear to be underage.<sup>13</sup> She said he was wearing blue jeans, a baggy T-shirt, a necklace, and a "baseball-type"

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<sup>7</sup> A person acts with criminal negligence. . .when he ought to be aware of a substantial and justifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstance's as viewed from the actor's standpoint. TEX. PENAL CODE § 6.03(d)(4).

<sup>8</sup> TABC Exh. 9 and TABC Exh. 10, at 2. Mr. Fugett did not correctly identify Ms. Harris in the line-up, but only had personal contact with her once at Rack Daddy's. TABC Exh. 10, at 3.

<sup>9</sup> TABC Exh. 10, at 2.

<sup>10</sup> TABC Exh. 4, and TABC Exh. 10, at 1.

<sup>11</sup> TEX. ALCO. BEV. CODE ANN. § 106.01 states that "minor" means a person under 21 years of age.

<sup>12</sup> Had Mr. Haines been carded, the only identification he would have been able to produce would have been his valid Texas driver's license, indicating his age to be 19. Trooper Donald Lundy, who worked the accident, testified that no other personal identification for Mr. Haines, such as a fake I.D., was found at the scene.

<sup>13</sup> Ms. Kraemer only met Mr. Haines that night, through his friends Mr. Neville and Travis Wharton. She did not know he was under 21 until after the accident.

hat that night. She said he looked like the photo she was shown at hearing,<sup>14</sup> except that his hair was shorter on the sides.

The photograph of Mr. Haines, taken shortly before June 24, 2003, reflects he appeared young enough that failure to perceive the risk that he might be underage and to request identification was a gross deviation from the standard of care an ordinary person would exercise,<sup>15</sup> and rises to criminal negligence. The ALJ finds Staff proved Respondent's employee—Ms. Harris—with criminal negligence served alcoholic beverages to a minor—Mr. Haines—on June 24, 2003.<sup>16</sup>

**B. Did Respondent, its agent, servant or employee, sell or deliver an alcoholic beverage to an intoxicated person, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14), on June 24, 2003?**

Before leaving Rack Daddy's, Mr. Haines exhibited signs of intoxication, in that he did not have the normal use of mental or physical faculties due to the introduction of alcohol into the body. According to Ms. Kraemer and Mr. Neville, Ms. Harris was the only waitress who served their group during the approximately three hours they were at Rack Daddy's. Ms. Harris served Mr. Haines an estimated 10 or 11 drinks, mainly beer and Crown and Coke, and continued to serve him after his eyes were red and half-way shut and after he had dropped two drinks on the floor.

**1. Ms. Kraemer's testimony**

Ms. Kraemer said Ms. Harris began taking their orders as soon as they arrived, somewhere between 9 p.m. and 10 p.m., and that Mr. Haines drank beer, Crown and Coke, and at least one shot. She said Mr. Haines had "well over" 10 drinks by the last half hour of the evening when he was sitting on a stool and attempted to set his Crown and Coke on the pool table but missed. Ms. Kraemer said she cleaned up the broken glass, and Ms. Harris then brought him a beer because that was what Mr. Haines said he wanted. She said "no sooner than she gave him the beer, Austin

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<sup>14</sup> TABC Exh. 4.

<sup>15</sup> *Edmonson v. State*, 955 S.W.2d 474, 473 (Tex.App.—Austin 1997, no writ).

<sup>16</sup> See *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 838-839 (Tex.App.—Fort Worth 1995, writ denied).

dropped it. We laughed about it. Half poured out of it. Austin took awhile to pick it up then started taking sips.”

Ms. Kraemer testified that by the end of the evening, Mr. Haines’ eyes were red and half-way shut, and that she and Mr. Haines had a conversation about how their eyes looked red and small, not normal. She said she, Mr. Haines, and Mr. Neville all discussed how intoxicated they were.

In Ms. Kraemer’s opinion, Ms. Harris should have known Mr. Haines was intoxicated. She said indicators of intoxication are that he dropped the Crown and Coke, then dropped the beer; that he stumbled a little when he got off the stool he was sitting on; and that his eyes were red.

Ms. Kraemer said the changes in the group’s behavior should have alerted both Ms. Harris and the bartender, whom she could easily see from where she was sitting, that patrons were intoxicated. She said the group was so loud earlier in the evening that the bartender told them to be quiet, but that by the end of the evening, people in the group were “kind of droopy” and not talking. She said Ms. Harris also should have been aware that members of the group were intoxicated because of the number of drinks she had served them: before they could finish a drink, she would come over to take another order. Ms. Kraemer said you could not even see the ledge near their pool table, because it was covered in bottles and glasses.

Ms. Kraemer said that when the group started to leave, nobody went to the bartender or manager to ask them to intercede. She admitted that had she been sober, she would have offered to call a taxi for Mr. Haines.<sup>17</sup>

## **2. Mr. Neville’s testimony**

Mr. Neville testified that he, Mr. Haines, Ms. Kraemer and Travis Wharton arrived at Rack Daddy’s in separate cars at about 10 p.m. and stayed until between 12:30 a.m. and 1 a.m. He said Mr. Haines ordered two or three drinks for every drink Mr. Neville ordered. He said Mr. Haines’ behavior changed from the time they arrived until they left. He remembers thinking Mr. Haines, who

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<sup>17</sup> See also Ms. Kraemer’s June 26, 2003 statement to Agent Rutledge. TABC Exh. 10, at 2.

is ordinarily a quiet person,<sup>18</sup> was intoxicated, because his eyes were glassy, he was stumbling and yelling, and he was flirting with the waitress. He said he saw Mr. Haines set a Crown and Coke down in mid-air, as if he were trying to set it on a table that was not there. He said after Mr. Haines dropped the Crown and Coke, the waitress served him another drink or beer, which he also dropped; she then served him again. He said neither the waitress nor the bartender offered Mr. Haines coffee or water, or told him he had had too much to drink.

### **3. Witness statements given to Agent Rutledge**

Agent Rutledge's October 22, 2003 Incident Report contains statements from several witnesses.<sup>19</sup>

#### **a. Mr. Bustamente**

Mr. Bustamente provided a statement on July 3, 2003. He said he arrived after the rest of the group did and was carded by the male bartender. Without identifying specific people, he said the "guys" were yelling at the waitress for drinks and bought bourbon and Cokes. He said Kamikazee shots were ordered and consumed. He left Rack Daddy's before Mr. Haines did, at approximately 12:30 a.m.<sup>20</sup>

#### **b. Mr. Fugett**

Agent Rutledge took Mr. Fugett's statement on August 13, 2003. He said that to his knowledge, nobody in the group was carded. He said he believes Mr. Haines, Mr. Neville, and Justin Wharton were drinking Crown and Coke, like he was. He said a waitress came over to the group about twice with shots that were a dollar apiece, and some of the guys took shots. He said drinks were dropped or spilled. He said two of the guys carried their drinks from the pool table area

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<sup>18</sup> Mr. Haines and Mr. Neville attended high school together in Eastland, Texas.

<sup>19</sup> TABC Exh. 10.

<sup>20</sup> TABC Exh. 10, at 2.

to the exit door, took one last drink, then set them down and left Rack Daddy's. He said Mr. Haines, and his passenger Mr. Neville, were the first to leave the parking lot of Rack Daddy's.<sup>21</sup>

**c. Mr. Neville**

Mr. Neville provided a statement to Agent Rutledge on August 16, 2003, although he had gaps in his memory due to head injuries sustained in the car accident that night, and was on pain medication. He recalled that Mr. Haines took a shot at Rack Daddy's.<sup>22</sup>

**d. Justin Wharton**

Mr. Wharton said he was not carded, and he did not see Mr. Fugett, Mr. Haines, Ms. Kraemer, Mr. Neville, or his brother Travis carded. He speculated that had they been carded, he would not have been served because he did not have photo identification with him, and Mr. Haines and Travis would not have been served because they are minors.<sup>23</sup> He said each of them paid for their own drinks, including Crown and Cokes that were on special for four dollars. He said he and Mr. Haines had about 10 drinks, but he did not specify if that was 10 drinks apiece or in total. He said Travis, a minor, was drunk and unable to drive due to his level of intoxication.

**e. Travis Wharton**

Travis Wharton would not give a statement to Agent Rutledge.<sup>24</sup>

**4. ALJ's analysis**

Witnesses confirmed that Mr. Haines was at Rack Daddy's from about 9:30 p.m. or 10 p.m. to nearly 1 a.m., during which time he was served at least 10 alcoholic beverages by Ms. Harris,

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> TABC Exh. 10, at 3.

<sup>24</sup> TABC Exh. 10, at 4.

some drinks being served even after his eyes were red and half-way shut, he was stumbling and yelling, and at least one drink being served after Mr. Haines had dropped a Crown and Coke, then immediately after Ms. Harris served him again, a beer bottle on the floor. Mr. Haines, Ms. Kraemer, and Mr. Neville discussed how intoxicated they were. Ms. Kraemer said it was obvious to her that Mr. Haines was intoxicated.<sup>25</sup> The ALJ finds that Mr. Haines was intoxicated by the end of the evening, before Ms. Harris served him the Crown and Coke and beer that he dropped on the floor. Staff has proved that Respondent's employee Ms. Harris sold or served alcoholic beverages to Mr. Haines, an intoxicated person, on June 24, 2003.

**C. Did Respondent, its agent, servant, or employee, sell, serve, or provide an alcoholic beverage to a person obviously intoxicated so that the person presented a clear danger to himself and others, and the intoxication was a proximate cause of the damages suffered, in violation of TEX. ALCO. BEV. CODE ANN. § 2.02, on June 24, 2003?**

**1. Ms. Harris served and sold alcoholic beverages to Mr. Haines after he was obviously intoxicated to the point that he presented a clear danger to himself or others**

Mr. Haines did not have the normal use of his mental or physical faculties, due to the ingestion of alcoholic beverages, by the time Ms. Harris served him the Crown and Coke that he dropped on the floor. After he dropped the Crown and Coke, it should have been apparent to Ms. Harris that Mr. Haines presented a clear danger to himself and others. He could not even lean forward to set a drink on the pool table without dropping it. His eyes were red and half-way shut. Ms. Harris, as the only waitress who had been serving him all evening, should have been aware that he had consumed at least 10 alcoholic beverages over about a three-hour period, and should have been aware from her TABC-approved training class and experience as a waitress that most people are severely impaired, to the point of being dangerous to themselves or others, after drinking 10 or more alcoholic beverages over about three hours. Yet, when he asked her to bring him a beer after dropping the Crown and Coke, she neither refused to serve him nor called a manager or the bartender to intervene. Instead, she brought him a beer, which he dropped as soon as she served him. She should have observed that he took a long time to pick it up, then took sips from it. She either served

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<sup>25</sup> See *Fay-Ray Corp v. Texas Alco. Bev. Comm'n*, 959 S.W.2d 362, 368 (Tex.App.-Austin 1998, no pet).

him another drink after he dropped the beer, according to Mr. Neville's testimony, or did not serve him any more after that point, according to Ms. Kraemer's testimony.

## **2. Intoxication was a proximate cause of the damages**

Trooper Lundy's uncontroverted testimony is that speeding and intoxication, but primarily intoxication, caused Mr. Haines' car accident.<sup>26</sup> He said Mr. Haines was traveling at least 85 miles per hour in a 40 mile-per-hour zone, when his car hit the curb at least three times, crossed the traffic lanes, and hit a tree. He said the immediate area of the accident scene smelled of alcohol.

Trooper Lundy testified that driving requires divided attention, which is impaired by consumption of alcoholic beverages, and that at an alcohol concentration of 0.10 or higher, a driver loses most of his driving abilities. He estimated that for Mr. Haines' alcohol concentration to have reached 0.19 percent, he would have had to consume nine drinks in an hour, assuming the average person's alcohol concentration rises by 0.02 percent per drink per hour. He estimated that for Mr. Haines' alcohol concentration to have been at 0.19 percent after drinking at Rack Daddy's for about four hours, he would have had to consume approximately 12 or 13 drinks, assuming the average person also eliminates 0.02 percent alcohol in an hour's time. He testified that most people who have an alcohol concentration as high as Mr. Haines did will display signs of intoxication.

## **3. ALJ's analysis**

The ALJ finds Staff proved Respondent's employee Ms. Harris served Mr. Haines after he dropped the Crown and Coke, and displayed other signs of intoxication that should have been apparent to her were those of a person intoxicated to the point that he was a danger to himself and others.<sup>27</sup> The ALJ finds Staff also proved that Mr. Haines' intoxication was a proximate cause of the car accident. Therefore, Staff has proved Respondent violated TEX. ALCO. BEV. CODE § 2.02 on June 24, 2003.

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<sup>26</sup> See also TABC Exhs. 1, 2, 3, and 14.

<sup>27</sup> See *Perseus, Inc. v. Canody*, 995 S.W.2d 202 (Tex.App.—San Antonio 1999, rehearing overruled).

**D. Is Respondent protected from TABC's action because Respondent complied with TEX. ALCO. BEV. CODE ANN. § 106.14(a), the "safer harbor" statute, on June 24, 2003?**

**1. Did Respondent require its employees to attend a TABC-approved seller training program?**

**a. Employee handbook sets out attendance requirement**

Respondent required its employees to attend a TABC-approved seller training program, as set out in Respondent's Employee Handbook at § 3.1, regarding Alcohol Servers' Responsibility, which states in part:

All applicants must have completed a state-approved program in responsible management of alcohol service prior to working their first shift. In Texas, this means you will be TABC certified. . . Failure to renew certification prior to expiration will result in suspension without pay until proof of certification is provided to Corporate Supervisor. Management that allows employees to work in location in any capacity will be subject to disciplinary action and possible suspension.<sup>28</sup>

**b. Respondent's employees actually attended training**

All of Respondent's employees who worked the evening shift on June 24, 2003, when Mr. Haines was on the premises, held seller-server certifications that were valid and current.<sup>29</sup> Those employees are Ms. Harris, Patricia Daks, Russel Gilbert, and Tasha White-Reynolds.<sup>30</sup> In addition, a TABC database inquiry by Agent Rutledge shows that all of Rack Daddy's listed employees had attended a TABC-approved seller training program as of June 24, 2003, and none of their certifications were expired, revoked, or suspended as of that date.<sup>31</sup>

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<sup>28</sup> Respondent's Exh. 5, at 3.

<sup>29</sup> Respondent's Exh. 5, at 1-4.

<sup>30</sup> *Id.*

<sup>31</sup> Respondent's Exh. 5, at 4.

**c. ALJ's analysis**

The ALJ finds that Respondent meets the training program attendance requirement of the "safe harbor" statute as set out in TEX. ALCO. BEV. CODE ANN. § 106.14(a)(1), in that Respondent requires employees to be TABC-certified before their first shift, well in advance of the 30-day requirement in 16 TAC § 50.10(a)(b), and all of Respondent's employees had actually attended TABC-approved training and held valid and current TABC-certifications on June 24, 2003.

**2. Had the server in question actually attended such a training program?**

Staff stipulated that Ms. Harris held a current TABC-approved seller-server certification on June 24, 2003. The ALJ finds that Ms. Harris had actually attended a server-seller program, and that Respondent prevails on this prong. In addition, even if another employee served Mr. Haines that evening, which might have been the case since at least one witness stated Mr. Haines bought a drink or drinks at the bar, Respondent has satisfied this prong of the "safe harbor" statute, because all of Rack Daddy's employees who were working the evening shift on June 24, 2003, were TABC certified.<sup>32</sup>

**3. Did Respondent directly or indirectly encourage the server in question to commit the violations at issue in this matter?****a. Area supervisor's monthly meetings with employees**

Michael Bigley, Respondent's area supervisor on June 24, 2003, and in the months preceding, testified at the hearing, and presented a log book showing TABC-related meeting topics and lists of attendees for monthly meetings, most of which he presided over, from December 2002 through June 2003.<sup>33</sup> He presided over the June 2003 meeting, and has an independent recollection of the meeting.

The notes for the June 2003 meeting, which was attended by all 11 of Rack Daddy's employees, including Ms. Harris, Ms. Daks, Ms. White-Reynolds, and Mr. Gilbert, who were on

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<sup>32</sup> Patricia Daks, Russell Gilbert, Lindsie Harris, and Tasha White-Reynolds were working the evening shift on June 24, 2003, at Rack Daddy's, and all held current and valid TABC-approved seller-server certification. Respondent's Exh. 9.

<sup>33</sup> See Respondent's Exh. 1

duty the evening of June 24, 2003, indicate the topics addressed included notifying the manager after a customer has had more than four drinks, so that the manager can watch the customer; taking the keys from any customer who appears intoxicated, and calling a taxi; when to cut customers off or call a manager over; what minors say and do to get served; and the policy that minors are never to be served.<sup>34</sup>

The May 2003 monthly meeting, attended by all 11 Rack Daddy's employees, addressed carding people, responsible service, the "cutting off" policy, getting a manager, time of last call, time of pulling drinks, signs of intoxicated customers, what minors say and do to get served, and the policy that minors are never to be served.<sup>35</sup>

The April 2003 meeting addressed the same topics as the May 2003 meeting, and was attended by 10 of Rack Daddy's employees, including Ms. Harris, Ms. Daks, and Ms. White-Reynolds. Mr. Gilbert's name was not on the list.<sup>36</sup>

The December 18, 2002, and January, February, and March 2003 meetings also addressed the same topics as the April 2003 meeting, were attended by Rack Daddy's employees including Ms. Harris, Ms. Daks, and Ms. White-Reynolds, and not attended by Mr. Gilbert, whose name was not on the list.<sup>37</sup> The December 10, 2002 meeting addressed the same topics as the April 2003 meeting, and was attended by Ms. Harris and Ms. Daks, among other employees. Ms. White-Reynolds did not initial her name. Mr. Gilbert's name was not on the list.<sup>38</sup>

#### **b. Memos to location managers**

Respondent presented a series of memos to location managers related to TABC's rules and statutes, which were admitted into evidence. The memos, in chronological order, state the following:

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<sup>34</sup> Respondent's Exh. 1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

- An undated memo to location managers requests documentation of each employee's TABC Server Certification expiration date, requires all employees to be certified, and warns that if an employee is not certified, it could result in disciplinary action, termination, or both.<sup>39</sup>
- In a September 11, 1992 memo regarding TABC certification, general managers are told the employee is to pay for certification within 10 days of employment, is to be reimbursed after six months and Respondent will pay for re-certification if an employee has been with the company for six months or more.<sup>40</sup>
- A November 4, 1994 memo to all managers, assistants, and MITS<sup>41</sup> states that all employees are required to be certified by TABC before their first shift.<sup>42</sup>
- In a September 7, 2000 memo from Jim Ebersole to all employees regarding new TABC regulations, with TABC's changes to seller-training regulations attached, Mr. Ebersole requires all employees to return a signed copy to him by September 15, 2000. The memo explains that the change requires mandatory participation in server training by servers who have violated a provision of the Code or rules relating to the sale, service, dispensing or delivery of alcoholic beverages to a minor or intoxicated person more than once in a 12-month period. The attached TABC letter states "For retailers to obtain exemption from administrative sanctions, they will need to have written policies and procedures which are understood and followed by all sellers/servers to prevent the sale/service of alcoholic beverages to minors and intoxicated persons."<sup>43</sup>
- An August 20, 2004 compliance meeting sheet, signed by 12 employees including Ms. Daks, states that all patrons are to be identified to verify they are over the drinking age, no customers are to be over-served, all employees are to have server certification, ride assistance is available, all servers have authority to stop service to all customers that are perceived to have reached their legal limit of alcohol consumption.<sup>44</sup>
- Alcohol servers must renew their certification before expiration, or they will be suspended without pay until proof of certification is provided to the Corporate Supervisor. Management that allows employees without certification to work in a location in any capacity will be subject to disciplinary action and possible suspension. (The facsimile date on the memo is September 7, 2004; no other date appears on the memo.)<sup>45</sup>

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<sup>39</sup> Respondent's Exh. 2.

<sup>40</sup> Respondent's Exh. 6.

<sup>41</sup> The term was not defined at the hearing, but possibly means "managers in training."

<sup>42</sup> Respondent's Exh. 7.

<sup>43</sup> Respondent's Exh. 5.

<sup>44</sup> Respondent's Exh. 3. Although this meeting was held after the incident in question, the ALJ includes it in the list because it is in evidence.

<sup>45</sup> Respondent's Exh. 8.

**c. Agent Rutledge's testimony and report**

Agent Rutledge testified that she met with Rack Daddy's manager, Mr. Gilbert, on June 28, 2003, three days after the accident, at which time Respondent's policies against serving minors or intoxicated persons were not posted as required. She said Mr. Gilbert told her he did not know the policies were to be posted. She said he told her the policies are in the employment application packet, and the acknowledgments signed by employees stating that they have read the policies are at corporate headquarters. By November 14, 2003, when Agent Rutledge wrote her Incident Report, the signed acknowledgments had not been provided to her. However, when Agent Rutledge inspected Rack Daddy's on October 29, 2003, she noted that the policies were posted.<sup>46</sup>

**d. Indirect encouragement through failure to enforce policies**

Staff argued that Respondent allowed employees with expired seller-server certificates to work, in contradiction of Respondent's policy that "failure to renew certification prior to expiration will result in suspension without pay until proof of certification is provided to Corporate Supervisor; Management that allows employees to work in location in any capacity will be subject to disciplinary action and possible suspension," thereby indirectly encouraging Ms. Harris to serve a minor or intoxicated person. However, while there is evidence that certificates for some employees expired before being renewed, there is insufficient evidence to show that Respondent allowed employees with expired certificates to work.<sup>47</sup> In fact, Mr. Bigley testified that during his tenure as area supervisor, from about May 2002 through July 2003, if an employee's certification expired, the employee would be suspended without pay until the certification was renewed.

**e. ALJ's analysis**

There is no evidence that Respondent directly encouraged Ms. Harris to serve intoxicated persons or minors. Respondent's policy, as set forth in its employee handbook, at monthly meetings, and in memos to location managers, is that all employees are to be TABC-certified sellers, and that intoxicated persons and minors are not to be served alcoholic beverages.

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<sup>46</sup> See also TABC Exh. 10, at 4.

<sup>47</sup> Respondent's Exh. 9, at 1.

Neither is there evidence that Respondent indirectly encouraged Ms. Harris to serve alcoholic beverages to intoxicated persons or minors. *Prima facie* evidence<sup>48</sup> of indirect encouragement, as set out in 16 TAC § 50.10(d)(1), includes that the permittee fails to insure that all employees possess currently valid seller-server certificates of training issued and maintained in conformity with Commission rules. There was some discussion at the hearing regarding whether some of the certifications had expired before they were renewed, and whether some of Respondent's employees were allowed to work with expired certification prior to June 24, 2003, but insufficient evidence was presented to prove this point. Instead, the evidence establishes that Respondent's employees all possessed currently valid seller-server certificates of training on June 24, 2003.

Also listed as *prima facie* evidence of indirect encouragement under 16 TAC § 50.10(d)(2) is that the permittee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the permittee to prohibit such sales, service, or consumption.

Staff did prove that on June 28, 2003, when Agent Rutledge visited Rack Daddy's, no policies and procedures were posted. Respondent's policies and procedures included "cutting off" customers, recognizing signs of intoxication, and prohibiting service to minors, all designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons. Although the policies and procedures were not posted within view of Respondent's employees, monthly meetings were attended by all employees in which these policies and procedures were discussed and in which there was role playing to learn what minors say and do to get served. Respondent's policies expressed a strong commitment to prohibit consumption by minors and intoxicated persons, stating in particular that minors are never to be served, and patrons who have had four drinks are to be watched by the manager. Respondent successfully contradicted Staff's evidence on this point by demonstrating substantial compliance with the posting requirement, in that there was an alternative means in place by which employees were educated concerning Respondent's policies.

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<sup>48</sup> *Prima facie* evidence is good and sufficient on its face. Such evidence, as in the judgment of the law, is sufficient to establish a given fact, . . . which if not rebutted or contradicted, will remain sufficient. *Black's Law Dictionary*, (6th ed.1991)

And finally, 16 TAC § 50.10(d)(3) lists as *prima facie* evidence of indirect encouragement that the permittee fails to insure that employees have read and understood the permittee's policies and procedures regarding sales, service, or consumption of alcoholic beverages by or to minors or intoxicated persons. In this case, in addition to requiring employees to be TABC-certified sellers, each of Rack Daddy's employees attended a monthly meeting between December 2002 and June 2003, during which Respondent's policies against the provision of alcohol to minors and intoxicated persons, and procedures for "cutting off" service and checking the identification of minors, were discussed with employees by Mr. Bigley, the area supervisor.<sup>49</sup> In addition, Mr. Gilbert told Agent Rutledge that each new employee was required to read the policies and procedures and sign an acknowledgment, kept on file at corporate headquarters. Although Mr. Gilbert did not provide copies of the signed acknowledgments to Agent Rutledge by November 14, 2003, when she wrote her Incident Report, there is no evidence that the signed acknowledgments do not exist. In fact, in a report by Agent Rutledge, she states that Respondent's Employee Handbook as provided by opposing counsel<sup>50</sup> appears to be in compliance with TEX. ALCO. BEV. CODE ANN. § 106.14 and all employees found on the list provided by opposing counsel did sign a receipt saying they had read and understood the handbook.<sup>51</sup> The ALJ, therefore, finds that Rack Daddy's employees both read and understood Respondent's policies and procedures regarding sales, service, or consumption of alcoholic beverages by or to minors or intoxicated persons.

## V. CONCLUSION

Staff proved by a preponderance of the evidence that on June 24, 2003, Mr. Haines was 19 years old, that he was not asked to present identification proving his age by any of Respondent's employees during the approximately three hours he was at Rack Daddy's, and that in spite of being a minor, he was served alcoholic beverages by Ms. Harris, a waitress employed by Respondent. Staff proved by a preponderance of the evidence that Ms. Harris continued to serve alcoholic beverages to Mr. Haines even after he was intoxicated. Staff also proved by a preponderance of the evidence that Ms. Harris served Mr. Haines a beer after Mr. Haines was intoxicated to the point of being a

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<sup>49</sup> The ALJ assumes that for the months in which Mr. Gilbert's name does not appear on the list, he was not a Rack Daddy's employee.

<sup>50</sup> Respondent was represented by counsel until about a week before the hearing on the merits convened.

<sup>51</sup> Respondent's Exh. 9, at 4.

danger to himself or others, and that his intoxication was the proximate cause of the car accident that resulted in his death and in Mr. Neville's serious injuries. Thus, Staff proved its allegations against Respondent.

However, Respondent met the three prongs of the "safe harbor" statute, and is thus protected from imposition of any penalty by TABC regarding the allegations.

The first prong is satisfied because Respondent proved that its employees were required to attend a TABC-approved seller-server training program.

Respondent also satisfied the second prong of the "safe harbor" statute, because the evidence shows, and Staff stipulated, that Ms. Harris was a TABC-certified server on June 24, 2003. In fact, all of Rack Daddy's employees held valid seller-server training certificates on June 24, 2003, so the second prong of the "safe harbor" provision is satisfied even if an employee in addition to Ms. Harris served Mr. Haines.

The third prong of the "safe harbor" statute is satisfied because there is no evidence that Respondent directly encouraged Ms. Harris to serve intoxicated persons or minors, and insufficient evidence to prove Respondent indirectly encouraged Ms. Harris to serve intoxicated persons or minors. Respondent's policy, as set forth in its employee handbook, at monthly meetings, and in memos to location managers, is that all employees are to be TABC-certified sellers, and that intoxicated persons and minors are not to be served alcoholic beverages. Employees attended monthly meetings in which they were educated regarding Respondent's policies and procedures. During the time Mr. Bigley was Respondent's area supervisor, from approximately May 2002 through July 2003, employees whose seller-server certifications expired were suspended from work until their certifications were renewed.<sup>52</sup> Yet, despite training to the standards of the TABC, despite written policies, despite enforcement of those policies, and despite the possibility of criminal

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<sup>52</sup> Mr. Bigley testified that his own certification was expired from December 2002 through April 2003, and that he was demoted in July 2003 for failure to maintain a current seller certification. However, the ALJ finds that there is no evidence that servers were aware of the expiration of the certification of Mr. Bigley, an area supervisor, or that the expiration of his certification indirectly encouraged them to serve minors or intoxicated persons in contradiction of Respondent's procedures and policies.

sanctions, Ms. Harris failed to act in accordance with the law and Respondent's policies.<sup>53</sup> For the above-stated reasons, the ALJ finds that Respondent neither directly nor indirectly encouraged its employee Ms. Harris to serve an intoxicated person or minor.

Because Respondent meets the requirements of TEX. ALCO. BEV. CODE ANN. § 106.14, the sale of alcoholic beverages to a minor and intoxicated person by Respondent's employee Ms. Harris at Rack Daddy's on June 24, 2003, should not be attributed to Respondent. The ALJ concludes that Respondent's permits should not be canceled.

## VI. FINDINGS OF FACT

1. Speeds Plus, Inc. d/b/a Rack Daddy's (Respondent) is the holder of a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and Beverage Cartage Permit, all issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 1779 Wells Branch Parkway Nos. 103 and 107, Austin, Travis County, Texas.
2. On June 24, 2003, Rodney Bustamante, Paul Fugett, Steven Austin Haines, Alycia Kraemer, Nicholas Neville, Justin Wharton, and Travis Wharton met at Rack Daddy's.
3. Justin Wharton was the first to arrive sometime after 9 p.m. on June 24, 2003.
4. Mr. Fugett and Ms. Kraemer arrived at Rack Daddy's between 9:30 p.m. and 9:40 p.m. on June 24, 2003, followed in a separate car by Mr. Haines, Mr. Neville, and Travis Wharton.
5. Mr. Fugett, Ms. Kraemer, Mr. Haines, Mr. Neville, and Travis Wharton were not asked to show proof of their ages when they entered Rack Daddy's through the south door, or at any other time on June 24, 2003.
6. Mr. Bustamante arrived at Rack Daddy's between 10:20 p.m. and 11:30 p.m. and was carded by a male bartender when he entered Rack Daddy's through the north door.
7. Mr. Haines, who was born on March 5, 1984, was 19 years old on June 24, 2003, and Travis Wharton, who was born on December 16, 1984, was 18 years old on June 24, 2003.
8. Respondent's employee, Lindsie Rose Harris, worked at Rack Daddy's from 7 p.m. until close on June 24-25, 2003, and served Mr. Haines and the rest of the group from the time they arrived until they left.
9. Ms. Harris provided alcoholic beverages to Mr. Haines and Travis Wharton, both minors, on June 24, 2003.

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<sup>53</sup> Respondent's Brief, at 7.

10. Ms. Harris provided a Crown and Coke and a beer to Mr. Haines after it should have been apparent to her that he was intoxicated, because his eyes were red and half-way shut, he was stumbling, he was yelling, and she had served him at least 10 alcoholic beverages over a three-hour period.
11. Ms. Harris provided a 12-ounce Bud Light to Mr. Haines after it should have been apparent to her that he was so obviously intoxicated as to present a clear danger to himself and others, in that she served him after he leaned forward to set a Crown and Coke on the pool table and dropped it in mid-air, his eyes were red and half-way shut, he was stumbling, he was yelling, she had served him at least 10 alcoholic beverages over a three-hour period, and immediately after being served, he dropped the beer.
12. Mr. Haines' intoxication was open to view, evident, and capable of being easily understood by Ms. Harris, who had been a waitress at Rack Daddy's for at least six months and who had attended TABC seller-server training.
13. It was apparent to Ms. Harris that Mr. Haines' state of intoxication would distort his perception, slow his reactions, impair his motor skills, and render him a clear danger to himself and others.
14. Minutes after Mr. Haines left Rack Daddy's just before 1 a.m. on June 25, 2003, his intoxication rendered him unable to drive his vehicle in full control on Wells Branch Parkway. He was speeding, the wheels hit the curb at least three times, and he lost control of the car, causing it to become airborne and collide with a tree.
15. Mr. Haines' intoxication and his resulting failure to keep his vehicle in control caused the accident and his death, and the serious injury of his passenger Mr. Neville.
16. There were no alcoholic beverages, open or unopened, in Mr. Haines' vehicle at the accident scene.
17. Mr. Haines' ethanol percentage at the time of death was 0.13 percent blood, heart; 0.19 percent vitreous, and 0.21 percent urine.
18. Mr. Haines was legally intoxicated at the time of his death.
19. Respondent required all its employees to obtain TABC-approved seller-server certificates prior to working their first shift, and to renew those certificates prior to expiration.
19. Ms. Harris held a currently valid seller-server training certificate on June 24, 2003, having received her TABC-approved seller-server training on April 10, 2003.
20. All of Respondent's employees held valid seller-server training certificates on June 24, 2003.

21. On June 24, 2003, Rack Daddy's did not have any policies and procedures posted regarding the sale of alcoholic beverages to minors or intoxicated persons.
22. All of Respondent's employees attended monthly meetings in which Respondent's policies against serving minors or intoxicated persons and procedures for preventing service to minors and intoxicated persons, such as carding patrons and "cutting off" patrons, were discussed, so employees were aware of Respondent's policies and procedures.
23. Respondent made a reasonable effort to prevent its employees from serving intoxicated persons or minors, so did not directly or indirectly encourage the provision of alcohol to intoxicated persons or minors.
24. On April 30, 2004, TABC sent its Notice of Hearing to Respondent informed the Respondent that the hearing on the merits was set for September 8, 2004, and it contained: a statement of the location and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and the relief sought by the Commission.
25. The hearing on the merits was convened on September 8, 2004, at the State Office of Administrative Hearings, William P. Clements State Office Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas, before Administrative Law Judge Sharon Cloninger. The Commission appeared by staff attorney Dewey Brackin, and by its party representative, Evidence and argument were heard, and the record closed October 15, 2004, after the parties briefed the "safe harbor" statute issue.

## VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. §11.63; and 1 TEX. ADMIN. CODE §155.55.
4. Although on June 24, 2003, Respondent's employee with criminal negligence sold an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. § 106.13(a), and to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14), and to an obviously intoxicated person who presented a clear danger to himself and others, with the intoxication being a proximate cause of the damage suffered, in violation of TEX. ALCO. BEV. CODE ANN. § 2.02, the actions of Respondent's employee are not attributable to Respondent pursuant to TEX. ALCO. BEV. CODE ANN. § 106.14.

5. Based on Conclusion of Law No. 4, cancellation of Respondent's permits is not warranted.

**SIGNED December 13, 2004.**

  
**SHARON CLONINGER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**