

DOCKET NO. 588993

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
VS.	§	
	§	
MARIE'S DRIVE INN, LLC	§	
D/B/A MARIE'S DRIVE INN,	§	ALCOHOLIC
Respondent	§	
	§	
PERMITS NO. MB633037, LB & PE	§	
	§	
ECTOR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-11-0253)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of December, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge (ALJ) Tanya Cooper presiding. The hearing convened on March 10, 2011 and the SOAH record closed on May 13, 2011. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on May 24, 2011. The PFD was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. Exceptions were filed by Petitioner on June 15, 2011 and Respondent replied on July 8, 2011. On July 26, 2011, the ALJ filed a response indicating she did not wish to revise the PFD.

Petitioner takes exception to the ALJ's statement, in the Analysis portion of the PFD, that:

Ultimately, the ALJ finds that Respondent should not be held accountable for serving an intoxicated person, if that person is not making any outward manifestation of impairment to alert Respondent or Respondent's employee of that person's intoxicated condition.

I agree with Petitioner that this sentence incorrectly states the law as it applies to the administrative application of Code §11.61(b)(14). To state that a permit cannot be suspended or cancelled under Code §11.61(b)(14) unless the intoxicated person to whom alcohol is served manifests his impairment to the permittee imposes a requirement that the Legislature did not include. The Legislature knows how to impose a required mental state when it chooses to do so.

In Code §§61.71(a)(5), 61.74(a)(14), 106.03 and 106.13(a), the Legislature imposed the criminal negligence standard. Thus, unless a permittee or licensee acts with criminal negligence, there is no liability (criminal or administrative) under these provisions for the sale of alcohol to a minor or for allowing a minor to possess or consume alcohol. In addition, as Petitioner notes, the Legislature limited liability under Code §2.02(b) to situations where it was apparent to the provider that the person being sold, served or provided with alcohol “was obviously intoxicated to the extent that he presented a clear danger to himself and others”. But the Legislature did not impose any required mental state for a violation of Code §11.61(b)(14) regarding sales to an intoxicated person.

Because this incorrect statement of the law in the analysis is apparently reflected in proposed Conclusion of Law No. 4, that Conclusion of Law is **deleted and the following Conclusion of Law No. 4 is substituted in its stead:**

4. Based on Finding of Fact No. 12, neither Respondent nor Respondent’s employee sold an alcoholic beverage to an intoxicated person in violation of Tex. Alco. Bev. Code §11.61(b)(14) on February 6 or 7, 2009.

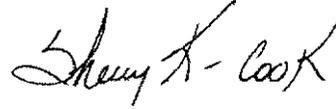
This change is made pursuant to Texas Government Code §2001.058(e)(1). It reflects my understanding that the ALJ, in weighing the credibility of the witnesses and the evidence presented, was not persuaded by Petitioner’s case. As noted in the Analysis portion of the PFD, “Failing to establish [Mr. Morris’s] timeline is critical to TABC Staff’s proof in this case in the ALJ’s opinion.” Moreover, “No documentary evidence, such as a credit card receipt or bar tab was presented to establish the quantity of alcoholic beverage purchased by Mr. Morris at Marie’s.” Thus, Petitioner did not meet the required burden of proof.

Therefore, after review and due consideration of the Proposal for Decision, the Exceptions and Reply, and the ALJ’s response, and **with the exception of Conclusion of Law No. 4 noted above**, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

THEREFORE, IT IS ORDERED that **NO ACTION** be taken against Respondent’s permits in this proceeding.

This Order will become final and enforceable on the 29th day of December, 2011, unless a Motion for Rehearing is filed **BEFORE** that date.

SIGNED this the 5th day of December, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 5th day of December, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Tanya Cooper
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6777 Camp Bowie Blvd. Ste. 400
Fort Worth, TX 76116
VIA FACSIMILE: (512) 322-0473

Marie's Drive Inn, LLC
d/b/a Marie's Drive Inn
RESPONDENT
1618 N. TX Dr.
Odessa, TX 79761
VIA REGULAR MAIL

Nickolas Todaro
ATTORNEY FOR RESPONDENT
24 Smith Road, Ste. 400
Midland, TX 79702
VIA REGULAR MAIL
AND VIA FACSIMILE: (432) 686-7743

11/10/2011 12:52 PM

David T. Duncan Jr.
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA EMAIL
DAVID.DUNCAN@TABC.STATE.TX.US

SOAH DOCKET NO. 458-11-0253

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	OF
	§	
MARIE'S DRIVE INN LLC D/B/A	§	
MARIE'S DRIVE INN	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff (Petitioner) brought this action against Marie's Drive Inn, LLC d/b/a Marie's Drive Inn (Respondent/Marie's) alleging that Respondent, its agent, servant, or employee, sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14). The Administrative Law Judge (ALJ) finds Petitioner failed to prove the allegation by a preponderance of the evidence and recommends no action be taken against Respondent's permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the Proposed Findings of Fact and Proposed Conclusions of Law sections of this Proposal without further discussion here.

On March 10, 2011, a hearing convened before ALJ Tanya Cooper at a facility for the State Office of Administrative Hearings (SOAH), located at the Ector County Administration Building, Commissioners' Courtroom, 1010 E. 8th Street, Suite 510, Odessa, Texas 79761. Petitioner was represented at the hearing by David Duncan, TABC Staff Attorney. Respondent appeared in person and was represented by its attorneys, Nickolas Todara and Hal Brockett. The record closed on May

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 2

13, 2011.¹

II. APPLICABLE LAW

The commission or its administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee² sold, served, or delivered an alcoholic beverage to an intoxicated person.³

III. EVIDENCE AND ALP'S ANALYSIS

A. Background Information

Respondent holds a Mixed Beverage Permit, MB-633037, which includes a Beverage Cartage Permit, and Mixed Beverage Late Hours Permit, for the premises known as Marie's Drive Inn, located at 1618 N. Texas, Odessa, Texas 79761. The permit was issued by TABC on July 7, 2006, and has been continuously renewed. Respondent's administrative violation history was admitted into evidence which includes, in part, the following:

Violation date	Violation description	Disposition
10-25-08	Failure to Report Breach of the Peace	Written Warning
11-10-07	Cash Law	Written Warning

B. Petitioner's Evidence

Petitioner presented the testimony of TABC Agent Jonathan Simcik, Sgt. Chris Primeaux,

¹ TABC Staff timely submitted the written deposition of Geronimo Mungua, III, which is admitted into evidence. The parties timely filed written arguments prior to the record closing on May 13, 2011.

² Permittee means a person who is the holder of a permit provided for in this code, or an agent, servant, or employee of that person. TEX. ALCO. BEV. CODE ANN. § 1.04(11).

³ TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 3

Shari Renee Rambo-Doty, and Rachel Maxwell. In addition, Staff presented documentary evidence including Respondent's permit and violation history, Cody Lynn Morris' medical records and photograph,⁴ and an Odessa Police Department Crash Report.

Rachel Maxwell is Cody Morris' mother. She testified that Cody had been with her earlier on February 6, 2009. According to Ms. Maxwell, Cody consumed no alcoholic beverages prior to 6:00 p.m. on that day when he left for dinner with his girlfriend, Sarah Slaton, and Ms. Slaton's family. Ms. Maxwell stated that she spoke to Cody at around 10:30 p.m. February 6, and he sounded fine to her at that time. She next saw Cody at the hospital after the crash on February 7, 2009.

Sgt. Chris Primeaux, Odessa Police Department, testified he was dispatched to investigate a motor vehicle crash at approximately 1:55 a.m. on February 7, 2009. When he arrived at the dispatched location, he saw a motorcycle driven by Mr. Morris had left the roadway and struck a gas meter. Mr. Morris was severely injured after having been ejected from the motorcycle. Mr. Morris was not wearing a helmet at the time of the crash. After his investigation into the crash, Sgt. Primeaux concluded the accident was caused by Mr. Morris' failure to control the speed of his motorcycle and that Mr. Morris was under the influence of alcohol at the time of the crash.

Shari Renee Rambo-Doty testified that she knew Cody Morris and saw him at Respondent's licensed premises on February 6, 2009. According to Ms. Rambo-Doty, she arrived at Marie's at around 6:00 p.m. and left around 10:30 p.m. or 11:00 p.m. She said that Cody arrived at Marie's after she did, but she did not see him there when she left. While at the licensed premises, Ms. Rambo-Doty said she saw Cody consume a beer and one shot, and sing karaoke. Cody did not appear intoxicated in Ms. Rambo-Doty's opinion; nor was she intoxicated while she was at Marie's. Ms. Rambo-Doty stated there was only one bartender, Rae Lynn Lujan, on duty at Marie's on that day.

⁴ Mr. Morris died from injuries sustained in a motorcycle crash on February 7, 2009. Prior to the crash, Mr. Morris consumed alcoholic beverages at Respondent's licensed premises. His medical records concerning his treatment after the motorcycle crash on February 7, 2009, reflect a high amount of alcohol along with a positive result for the presence of opiates in his system.

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 4

Geronimo Munguia, III testified that he knew Cody Morris and saw Mr. Morris at Marie's on February 6, 2009. Mr. Munguia said that he, Cody and another person known as "Cowboy Larry" left Marie's at the same time. He opined that it was approaching or shortly after closing time when the three of them left. Mr. Munguia stated that did not have a vehicle at the licensed premises, so the bartender had called him a cab. According to Mr. Munguia, Cody had consumed some alcoholic beverages while at Marie's, but that Cody did not appear intoxicated in his opinion. Had he thought Cody was intoxicated, Mr. Munguia said he would have tried to get Cody to park his motorcycle and share the cab with him and Cowboy Larry.

Agent Jonathan Simcik investigated Respondent's serving alcoholic beverage to Mr. Morris after being contacted by Rachel Maxwell. During the course of that investigation, he interviewed witnesses, including Ms. Rambo-Doty, Ms. Lujan, and Mr. Manguia.⁵ Ms. Rambo-Doty and Mr. Manguia were the only witnesses he located that confirmed Mr. Morris' presence at the licensed premises on February 6 or 7, 2009. Ms. Lujan, Respondent's bartender, did not recognize Mr. Morris or recall seeing him at Marie's on either date.

According to Agent Simcik, Ms. Rambo-Doty told him she left Marie's at approximately 12:30 a.m. on February 7, and saw Mr. Morris take 2 shots and consume a beer while at the licensed premises. During Mr. Manguia's interview, Mr. Manguia did not recall specific times when Mr. Morris was present at Respondent's licensed premises, but said that he and Mr. Morris left the licensed premises together. Mr. Manguia told Agent Simcik that he took a taxi home from Marie's because of the amount of alcoholic beverage he had consumed. He said that he tried to get Mr. Morris to take the taxi with him, but Mr. Morris declined Mr. Manguia's offer to share the taxi and left on his motorcycle. Agent Simcik testified, however, that Mr. Manguia never stated Mr. Morris was intoxicated at the time they left from Respondent's licensed premises.

Agent Simcik testified Mr. Morris's medical records indicate that shortly after he was

⁵ Agent Simcik testified that several witnesses provided written statements during his investigation; however, these documents have apparently been lost and were not presented at the hearing.

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 5

admitted to the hospital, he was grossly intoxicated. Mr. Morris' blood alcohol level was 0.307, which is roughly three times over the legal limit for operating a motor vehicle. Agent Simcik opined that anyone should have noted Mr. Morris' impairment, and that certainly a trained bartender with dwindling patrons at a licensed premises nearing closing time would have recognized a person displaying that level of impairment. Nevertheless, Agent Simcik conceded that Ms. Lujan had not been charged with selling alcoholic beverage to an intoxicated person in this case.

C. Respondent's Evidence

Respondent presented the testimony of the following witnesses: Sarah Slaton, Alisha Slaton, Samuel Leon Greear, Mark Harper, Larry Dominguez, John Minor, and Ms. Lujan. The following documents were admitted into evidence for Respondent: John Minor's Curriculum Vitae; AT & T call records for cell phone number 432-940-8991; and a tower mapping summary for this cell phone's activity from February 6, 2009 through February 7, 2009.

Sarah Slaton testified that she was Cody Morris' girlfriend at the time of his death. On February 6, 2009, she and Cody were at her family's home for dinner. According to Ms. Slaton, no alcoholic beverage was consumed by Mr. Morris while at her family's home. At approximately 9:30 p.m., Ms. Slaton left to take her daughter to her residence shared with Cody; and Cody went to get a tattoo from Ms. Slaton's brother. Ms. Slaton stated that Cody had a prescription of hydrocodone, but she did not see him take any of his medication; nor did he seem impaired to any degree while they were together that evening. Ms. Slaton did not speak to Cody again, but tried to call him several time on his cell phone beginning around 11:30 p.m. Ms. Maxwell notified her about the crash around 2:30 a.m. on February 7, 2009, and she went to the hospital where Cody was being treated.

Alisha Slaton, Sarah Slaton's mother, also said that she did not see Cody take any medications or consume alcoholic beverage from between around 6:00 p.m. until 10:30 p.m., when Cody left to go with her son and get a tattoo. Cody did not exhibit any impairment in her opinion, and there had been no discussion about going to Marie's or any other bar that she heard while in Cody's presence. She testified that she also begin trying to call Cody on his cell phone after Sarah

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 6

called her and said she could not locate Cody.

Samuel Leon Greear testified that he was working at Marie's on February 6 and 7, 2009. He was employed by the bartender, Ms. Lujan, to help her maintain order and walk her out to her car after the licensed premises closed. Mr. Greear said he had known Cody Morris for several years and saw Cody at Marie's that night. Mr. Greear observed that Cody drank two beers, sang karaoke, and left around 11:00 p.m. According to Mr. Greear, Cody wanted to go to another bar where there was karaoke and asked Mr. Greear if he wanted to go with him. Mr. Greear did not leave with Cody because he was working with Ms. Lujan. Mr. Greear said that he had seen Cody intoxicated on other occasions, but that Cody was not intoxicated when he left Marie's. Mr. Greear said he was in Marie's parking lot when Cody left. He said that Cody had a new motorcycle; and as Cody rode the bike from the parking lot, he did a donut in the parking lot and a wheelie as he entered the roadway. Mr. Greear opined that Cody must have had all of his faculties about him when he left Marie's or he would not have been able to complete these types of driving maneuvers without incident.

Larry Dominguez stated he knew Cody Morris and saw him at Marie's on February 6, 2009. Mr. Dominguez said he and Mr. Munguia left the bar together at closing time, but believed that Cody had already left. He testified that he saw Cody drink a couple of beers, but did not believe Cody was intoxicated when he left.

Ms. Lujan confirmed that she was most likely the bartender at Marie's on February 6 and 7, 2009. She worked alone on these days, except for Mr. Greear, who she employed to assist her in the event she had to cut off alcohol service to a customer. Ms. Greear said that she was TABC seller/server certified and had refused to sell alcoholic beverages to persons in the past that she deemed intoxicated. She recalled speaking to Agent Simcik after learning about Mr. Morris' death, but she did not remember Mr. Morris being at the licensed premises prior to the crash. Ms. Lujan testified she no longer works at Marie's because it closed a couple of months after this incident. She has not been charged with wrongdoing in relation to this matter.

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 7

John B. Minor testified that he is a forensic consultant and expert witness in cell phone signal analysis. He was employed by Respondent to obtain and analyze cell phone records of a cell phone registered to Rachel Maxwell, but believed to be in Cody Morris' possession during time period relevant to this incident. Mr. Minor stated from his analysis of the phone's usage, Mr. Morris was not at Marie's as of 11:39 p.m. on February 6, 2009, but the towers handling call traffic with Mr. Morris' cell phone were consistent with the phone being in an area where several other licensed premises were located.

D. Analysis

This case was brought as a result of a fatal motorcycle crash involving Cody Morris. This crash occurred at approximately 1:55 a.m. on February 7, 2009. Hospital records reveal Mr. Morris' blood alcohol content when tested at the hospital was 0.307, which is over three times the statutory level for deeming a person intoxicated.

TABC Staff bears the burden of proof in this matter alleging that Respondent sold, served, or delivered alcoholic beverage to Mr. Morris when he was intoxicated. It is undisputed that Cody Morris was at Respondent's licensed premises, Marie's, on February 6, 2009, however, establishing a definite timeline for Mr. Morris' arrival and departure from the premises is not clear in the ALJ's assessment of the evidence. Witnesses' accounts of the evening vary. Witnesses place Mr. Morris' arrival at Marie's between 10:00 p.m. and 11:00 p.m., and his departure between 11:00 p.m. and closing time. Failing to establish this timeline is critical to TABC Staff's proof in this case in the ALJ's opinion. Some witnesses were candid in stating that it had been some time since this incident, and their recollection was not as clear as it would have been shortly afterward. Unfortunately, TABC Staff was unable to produce any of the witnesses' written statements that were taken just after this incident. This documentation could have been more definitive in establishing how long Mr. Morris was at Marie's on February 6 and possibly February 7, 2009.

Witnesses' testimony also establishes that Mr. Morris consumed alcoholic beverages, beer

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 8

and possibly liquor shots, while he was at the licensed premises. However, none of the witnesses who observed Mr. Morris consuming alcoholic beverage thought that Mr. Morris was intoxicated at the time they observed him. Mr. Morris reportedly visited with several people while at the licensed premises, sang karaoke, and showed off on his new motorcycle in the licensed premises' parking lot. The bartender, the only Marie's employee that was on duty at this time, did not recall serving Mr. Morris any alcoholic beverages that evening. No documentary evidence, such as a credit card receipt or bar tab was presented to establish the quantity of alcoholic beverage purchased by Mr. Morris at Marie's.

Ultimately, the ALJ finds that Respondent should not be held accountable for serving an intoxicated person, if that person is not making any outward manifestation of impairment to alert Respondent or Respondent's employee of that person's intoxicated condition. To do so would create strict liability upon any licensed premises for the conduct of a patron after leaving said premises where Respondent has no control over that patron's further actions; actions which could include further consumption of alcoholic beverages from unknown sources. Respondent's licensing record does not reflect any pattern of over-serving alcoholic beverages or any other type of improper selling conduct in the management of its business affairs. Consequently, the ALJ recommends that no action be taken against Respondent's permits.

IV. FINDINGS OF FACT

1. Marie's Drive Inn, LLC d/b/a Marie's Drive Inn (Respondent/Marie's) holds Mixed Beverage Permit, MB-633037, which includes a Beverage Cartage Permit, and Mixed Beverage Late Hours Permit, issued by the Texas Alcoholic Beverage Commission (TABC/Petitioner). Marie's is located at 1618 N. Texas, Odessa, Texas 79761.
2. Respondent's permits were issued by TABC on July 7, 2006, and have been continuously renewed; Respondent's licensing history does not reflect any pattern for engaging in over-serving its patrons.
3. On September 27, 2010, Petitioner issued its notice of hearing to Respondent.
4. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 9

- to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. On March 10, 2011, a hearing convened before Administrative Law Judge (ALJ) Tanya Cooper at a facility for the State Office of Administrative Hearings (SOAH), located at Odessa, Texas. Petitioner was represented by David Duncan, TABC Staff Attorney. Respondent appeared and was represented by attorneys, Nickolas Todaro and Hal Brockert. The record closed on May 13, 2011, after the parties submitted additional evidence and written argument.
 6. On February 6, 2009, Cody Morris was a patron at Marie's for an undetermined amount of time; estimates range for his arrival time at Marie's between 10:00 p.m. and 11:00 p.m., and his departure time ranges from 11:00 p.m. and closing time on February 7, 2009.
 7. Although Mr. Morris consumed some alcoholic beverage at Marie's, beer and possibly some liquor shots, it is unclear how many drinks he may have consumed.
 8. While at Marie's, Mr. Morris visited with friends and other patrons, sang karaoke, and showed off his new motorcycle.
 9. Persons in contact with Mr. Morris while he was at Marie's did not believe Mr. Morris was intoxicated while at the licensed premises.
 10. Respondent's only employee at Marie's on that evening, a bartender named Rae Lynn Lujan, did not recall seeing Mr. Morris at the licensed premises or selling, serving, or delivering any alcoholic beverage to Mr. Morris at the licensed premises.
 11. On February 7, 2009, at approximately 1:55 a.m., Mr. Morris was fatally injured in a motorcycle crash; hospital records show his blood alcohol concentration was 0.307 at the time of his treatment, which is above the legal limit for intoxication in the State of Texas.
 12. The record in this case does not establish that Respondent or Respondent's employee sold, served or delivered an alcoholic beverage to Mr. Morris while Mr. Morris was intoxicated.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015.
2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

SOAH DOCKET NO. 458-11-0253

PROPOSAL FOR DECISION

PAGE 10

3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on Findings of Fact Nos. 6 – 10, Respondent or Respondent's employee did not sell alcoholic beverage to an intoxicated person, in violation of the Texas Alcoholic Beverage Code, TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).
5. No action should be taken against Respondent's permits.

SIGNED May 24, 2011.


TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS