

Mailing Date: September 3, 2008

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 07-0351  
BUREAU OF LIQUOR CONTROL :  
ENFORCEMENT :

v. :

OPC MINING COMPANY, INC. : License No. R-19541  
T/A BANANA MAX BAR & GRILL :  
2650 Eastern Blvd. :  
York, PA 17402-2904 :

Counsel for Licensee: L.C. Heim, Esquire  
345 East Market Street  
York, PA 17403

Counsel for Bureau: Andrew J. Lovette, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
3655 Vartan Way  
Harrisburg, PA 17110

OPINION

OPC Mining Company, Inc. ("Licensee") appealed from the Adjudication and Order of Administrative Law Judge Flaherty ("ALJ"), wherein the ALJ sustained Citation No. 07-0351 ("citation"), imposed a fine of one thousand two hundred fifty dollars (\$1,250.00), and ordered Licensee's compliance with section 421.1 of the Liquor Code, pertaining to

Responsible Alcohol Management and to be certified by the Pennsylvania Liquor Control Board's Bureau of Alcohol Education, as being in compliance within ninety (90) days of the mailing date of the order.

The citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. § 4-493(1)] in that, on January 12, 2007, Licensee, by its servants, agents, or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated male patron.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his discretion, or if his decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

On appeal, Licensee contends that the ALJ abused his discretion, in that the Findings of Fact were against the weight of credible evidence, and, in

that, although the testimony of the Commonwealth's witnesses and Licensee's witnesses were diametrically opposed, the ALJ failed to consider the fact that both of the Commonwealth's witnesses were under the influence of alcohol at the time of the alleged incident.

As to the citation, on January 11, 2007 Bureau O11, 2007 Bureau Officer Hackenberg, along with Bureau Officer Dountas, made an undercover visit to the licensed premises at approximately 11:40 p.m. (N.T. 8-9, 28). After paying a cover charge, the two (2) officers went into the interior of the licensed the dance floor. (N.T. 10, 28). The attention of the officers were drawn to a patron ("Smitty") on the dance floor that was dancing in an uncoordinated manner and was stumbling. (N.T. 11, 16-17, 29). Smitty was swaying back and forth and from side to side. (N.T. 11, 29). Smitty approached a female patron who was on the dance floor and tried to dance with her in a very intimate way. (N.T. 11, 29). Smitty bumped into her on several occasions and took stutter steps in an attempt to maintain his balance. (N.T. 11, 29). The female patron became very agitated and went to another part of the dance floor to get away from him. (N.T. 29).

Another male patron approached Smitty and led him towards the outside bar area; Smitty was staggering as he was being led to that area. (N.T. 11, 29-30). Officer Hackenberg followed Smitty to the bar and

observed Smitty stumbling forward and backwards; occasionally Smitty would hold the bar to keep his balance as he stood at the bar with the other patron. (N.T. 12). Both officers then went to the bar where Smitty was standing. Officer Hackenberg stood next to Smitty and Officer Dountas stood directly to the right of Officer Hackenberg. (N.T. 13, 30). While at the bar, Smitty would stagger and occasionally bump againonally bump against Officer Hackenberg. (N.T. 13, 30). Smitty placed an order with the bartender at the outside bar for two (2) drinks, one (1) for him and one (1) for his friend. (N.T. 13). The bartender poured Jagermeister liquor and two (2) other lir. (N.T. 13, 31). The bartender then poured the contents of the mixer into two (2) shot glasses, and brought the two (2) shot glasses to Smitty. (N.T. 13, 31). Officer Hackenberg asked Smitty three (3) times what drink he had ordered, and Smitty tried and Smitty tried to tell the officer, but his speech was so slurred that the officer could not understand him. (N.T. 14). Smitty's friend explained to the officer the name of the drink was a "surfer on acid." (N.T. 14). Smitty then offered to buy Offic of the drinks. (N.T. 14). The officer declined the drink, but Smitty ordered the officer a drink anyway and the bartender served the officer the same drink as the two (2) patrons had. (N.T. 14). Officer Hackenberg drank the drink, and the officer was able to taste the Jagermeister liquor in the drink. (N.T.

15). After finishing his drink, Smitty staggered as he exited towards the dance floor area. (N.T. 15, 31).

While the officers were at the bar, another patron who exhibited signs of intoxication came to the bar, and the bartender did not serve this patron. (N.T. 15-16, 32).

Officer Hackenberg consumed one (1) Miller Light beer during his visit to the licensed premises in addition to the afore-mentioned drink. (N.T. 16). Officer Hackenberg purchased a second Miller Light at the licensed premises, but did not drink it. (N.T. 16, 19). Officer Hackenberg visited two (2) other licensed establishments earlier in the evening. (N.T. 18). At the first establishment Officer Hackenberg consumed one (1) bottle of Miller Light, and did not consume any food. (N.T. 18). At the second establishment Officer Hackenberg did not consume any alcohol. (N.T. 19). Officer Hackenberg did not consume any alcohol prior to going to the first establishment. (N.T. 19).

Officer Dountas consumed almost two (2) Miller Lights during his visit to the licensed premises. (N.T. 32). Officer Dountas visited three (3) other licensed establishments earlier in the evening, and one (1) of the licensed premises was closed. (N.T. 33). At the first establishment, Officer Dountas consumed one (1) ten (10) ounce Miller Light draft. At the second

establishment, Officer Dountas consumed approximately three quarters (3/4) bottle of Miller Light. (N.T. 33).

Elizabeth Wolfe, a bartender at licensed premises, was the bartender on duty the night of the citation. (N.T. 43-45). Ms. Wolfe said that Smitty ordered three (3) drinks at the bar. (N.T. 45). She made two (2) shots and one (1) juice, and the juice was for Smitty because he was intoxicated. (N.T. 45). The juice was a pineapple and cranberry mixture, and she used a container to mix the juice at the other end of the bar. (N.T. 48). Ms. Wolfe said she did not put Jagermeister in a shaker because it is already cold, and there is no reason to chill it. (N.T. 45). However, she did say that if you are mixing Jagermeister with something else, you may mix it with “something” to incorporate the other ingredients, if the other ingredients are not already cold. (N.T. 47).

As to the merits of the citation, section 493(1) of the Liquor Code provides in pertinent part that “[i]t shall be unlawful...[f]or any licensee...or any employe, servant or agent of such licensee...to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated....” [47 P.S. § 4-493(1)].

Licensee contends that the ALJ abused its discretion, in that the Findings of Fact were against the weight of credible evidence and, in that, although the testimony of the Commonwealth's witnesses and Licensee's witnesses were diametrically opposed, the ALJ failed to consider the fact that both of the Commonwealth's witnesses were under the influence of alcohol at the time of the alleged incident. The Pennsylvania Supreme Court in Hainsey v. Pennsylvania Liquor Control Bd. defined an abuse of discretion as "not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused." Hainsey v. Pennsylvania Liquor Control Bd., 529 Pa. 286, 602 A.2d 1300, 1305 (1992).

In the instant case, it is clear there is substantial evidence of record that the Bureau officers observed a patron being served alcohol despite the fact that the patron exhibited slurred speech, exhibited lack of balance and coordination while walking, bumped into a female patron while attempting to dance on the dance floor, and exhibited lack of balance and coordination while standing at the bar counter.

Based upon review of the evidence presented, the ALJ determined that the testimony offered by the Bureau officers corroborate each other, and was

the more credible and, accordingly, the ALJ found that the licensed premises served a visibly intoxicated person on January 12, 2007.

It is well-settled law that matters of witness credibility are the sole prerogative of the ALJ and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984).

Further, the Board finds that the ALJ did not abuse its discretion or commit an error of law in rendering its decision in this matter.

Based on the foregoing, the ALJ's decision in this matter is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee must adhere to all other conditions set forth in the ALJ's

Order with mailing date June 26, 2008.

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Board Secretary