

The Exhibits consisted of the Administrative Record of the Idaho State Police consisting of a Report of telephone interviews conducted by Sergeant, Rocky Gripton, written statements from Leona Benson and Anthony Bryson and the medical records of Leona Benson. Additionally, a recording of interviews by Clearwater County Sheriff Deputy Barlow of Leona Benson and Robin Estes was made part of the Record.

Written closing arguments were submitted simultaneously by Counsel on behalf of the parties.

IDENTIFICATION OF THE ISSUES

The Elk Horn Bar, Inc. does business as the Elk Horn Bar located in Weippe, Idaho. The Elk Horn Bar holds License Number 3155 and is identified by premise number 6C-3.

On August 7, 2012 an Idaho State Police Alcohol Beverage Control investigator was contacted by Leona Benson claiming that she had been over served at the Elk Horn Bar on July 21, 2012. Leona Benson reported to the Idaho State Police that she arrived at the Elk Horn Bar on July 21, 2012 at approximately 11:00 a.m. Robin Estes was the bartender on duty and present at the bar at that time were several other Weippe residents who were not called to testify.

What happened after 11:00 a.m. on July 21, 2013 in the Elk Horn Bar is subject to substantial dispute.

The Idaho State Police Alcohol Beverage Control and the Elk Horn Bar indicate that it is up to this Hearing Officer to determine whether Ms. Benson was over served by attempting to resolve the differences in the testimony of Leona Benson and the four people who had physical contact with Leona Benson after 11:00 a.m. on July 21, 2013.

The standard for determining whether the Elk Horn Bar violated its statutory duties requires a showing by the Idaho State Police Alcohol Beverage Control by a preponderance of

the evidence that Ms. Benson was over served on July 21, 2012. I have characterized this question for purposes of this decision as: is it more likely than not that Robin Estes sold or allowed Leona Benson to consume alcoholic beverages while Leona Benson was actually, apparently or obviously intoxicated.

FINDINGS OF FACT & MEMORANDUM DECISION

Leona Benson is a 71 year old individual who has experience in bartending, having tended bar in the 1970's in a number of bars in Ada County. For these purposes I have determined that Ms. Benson is an experienced drinker who usually drinks beer, who does not usually drink hard liquor, does not usually drink blended drinks, but when she does, she likes her blended drinks light because she enjoys the taste of the mix more than she does the taste of the liquor.

Ms. Benson ordered a margarita soon after her arrival at the Elk Horn Bar at 11:00 a.m. on July 21, 2012. That margarita was prepared by the Elk Horn's bartender Robin Estes. Robin Estes was familiar with and considered herself a friend of Leona Benson. It was not unusual for Leona Benson to be at the Elk Horn Bar during the day.

Robin Estes usually works from 10:00 a.m. to 5:00 p.m. several days a week and had never seen Leona Benson intoxicated prior to July 21, 2012. Robin Estes poured the first margarita into a 16 ounce ice filled glass, pouring an ounce of tequila and topping off the glass with margarita mix. Leona Benson indicates that she thought that the first margarita was very strong but she did not say anything to Robin Estes about the taste of the margarita. The glass, she indicated, was filled within an inch of the top of the glass with tequila. It is unlikely that Leona Benson based upon her experience and expressed tastes would not have said something about the taste of the first margarita if the margarita was really too strong. It is more likely than

not that the first margarita poured for Leona Benson did not contain any more alcohol than half of an ounce of tequila as testified to by Robin Estes.

Leona Benson was served a second margarita which Robin Estes prepared in the same fashion as the first margarita. Leona Benson thought that the second margarita was also strong.

Again Leona Benson did not say anything to Robin Estes about the second margarita being too strong.

Robin Estes prepared a third margarita for Leona Benson in the same fashion with a half an ounce of tequila on ice and the remainder of the glass topped off with margarita mix.

Linda Rauhala arrived at the Elk Horn Bar at approximately 12:30 to 12:45 p.m.

Leona Benson told Linda Rauhala that she was really feeling drunk and asked for a ride Home from Linda Rauhala. Linda Rauhala called her roommate Terry Dill, who lives within a block or two of the Elk Horn Bar to take Leona Home.

Linda Rauhala did not believe that Leona Benson was over served and observed Leona Benson to be shaking which she described as a Parkinson's kind of shake. Leona Benson had previously told Linda Rauhala her shaking was a result of Leona Benson's medication. Linda Rauhala did not indicate that Ms. Benson was displaying any signs of intoxication other than being giggly.

Terry Dill arrived as requested approximately ten minutes later and confirmed that Ms. Benson was a little wobbly and was talking loud and was laughing. Mr. Dill believed that Robin Estes was behind the bar when he got there, however, Linda Rauhala indicated that Robin Estes was in the bathroom at the time Terry Dill arrived to take Ms. Benson Home.

There is some question as to whether there was a fourth margarita prepared by Robin Estes. Leona Benson does not recall anything after the third margarita or her conversation with Linda Rauhala.

Linda Rauhala thought that Robin Estes must have gotten a to go cup out and placed it on the bar and that either Linda Rauhala or Leona Benson poured the fourth margarita into the to go cup and that Leona Benson left with that fourth margarita. Terry Dill confirmed that Leona Benson had something in a to go cup when he drove her Home because the cup spilled in his car.

Robin Estes had gone to the bathroom prior to Terry Dill's arrival. Robin Estes was surprised to find after coming out of the bathroom that Leona Benson had taken Robin Estes' water cup which was a to go cup when Leona Benson left the bar. Robin Estes did not see Leona leave the bar with Terry Dill.

Additionally, Robin Estes did not see Terry Dill at the bar and was irritated that Terry Dill had been called because she believed that Terry Dill was "sleeping off" the night before and shouldn't be driving.¹

Terry Dill then drove Leona Benson Home. Leona Benson lives in the residence of Anthony Bryson for whom she serves as his care provider which is 7 or 8 miles away from the Elk Horn Bar and can take as long as a half an hour to get to from the Elk Horn.

Terry Dill drove Leona Benson to her residence where she walked into her residence. Leona Benson asked that Anthony Bryson to retrieve her car which was at the Elk Horn Bar. Anthony Bryson rode in the car with Terry Dill and retrieved Leona Benson's car.

Anthony Bryson was not able to specify what time Leona Benson arrived Home, how long he was gone or what happened when he was away from his house.

Upon returning to his Home Anthony Bryson called the Clearwater County 911 Operator reporting that Leona Benson had passed out and had vomited on herself. This call was made at 6:49p.m. There is no testimony in the Record as to what occurred between approximately 1:30

¹ Interestingly enough Terry Dill thought that Robin Estes had Linda Rauhala call him to get Leona Home because Robin Estes was concerned about Leona's condition.

p.m. when Terry Dill delivered Leona Benson at Anthony Bryson's residence and Anthony Bryson's call to 911 at 6:49p.m.

Leona Benson was transported to the Clearwater County Hospital by ambulance continuing to be non-responsive. At approximately 8:45 p.m. the medical records of Clearwater County Hospital indicate that Ms. Benson's blood alcohol was .14. Leona Benson's Emergency Room Report indicates her statement that she was given a number of very stiff drinks at the Elk Horn Bar, reporting that she thought she was poured too strong of a drink by someone who does not like her at the local bar.

Leona Benson stated in her telephonic statement to Rocky Gripton that she must have been poured at least four shots in each of the drinks that she had been served by Robin Estes. Leona Benson then testified that she must have been served at least 8 shots of tequila in each of the margaritas in order for her to have the blood alcohol content reported by the Hospital. It is difficult to believe that if Leona Benson was really served four or eight ounces of tequila in each of the margaritas that she consumed, that she would have continued to drink them and would not have said anything to Robin Estes.

It is just as likely that Robin Estes served a half ounce of tequila in each one of the margaritas. The only people who saw Leona Benson at the Elk Horn Bar at approximately 12:45 to 1:00 p.m. were Linda Rauhala who did not believe that Leona had been over served and Terry Dill who did not have an opinion as to whether Leona Benson had been served too much alcohol.

The Idaho State Police Alcohol Beverage Control, in order to meet its burden must show that Leona Benson was "actually, apparently or obviously intoxicated." The Idaho State Police Alcohol Beverage Control sought through the testimony of Sergeant Gripton to offer a Retrograde Extrapolation argument for purposes of demonstrating how much alcohol Leona

Benson would have had to have been served earlier in the day in order to have a blood alcohol content of .14 at 8:45p.m.

The difficulty with this argument is that there is no Idaho Case Law which accepts retrograde extrapolation as a means of demonstrating what someone's blood alcohol is at a time other than of the time of testing. The only reported Idaho case deals with a Prosecutor's unsuccessful attempt to show what the blood alcohol content would have been at the time of the operation of a motor vehicle in the context of a driving under the influence prosecution (*State v Daniel, 132 Idaho 701, 979 P.2d 103, 1999*).

I am reluctant to adopt the use of retrograde extrapolation to conclude what Leona Benson's blood alcohol would have been at the time that she left the Elk Horn at approximately 1:00 p.m. on July 21, 2012 without the Idaho Court having recognized the appropriateness of Retrograde Extrapolation. Additionally, there is no evidence of what occurred between the almost 6 hours between the time that Ms. Benson leaves the Elk Horn Bar and the time Anthony Bryson calls Clearwater County 911. Even if I were persuaded that retrograde extrapolation could be used to demonstrate what the blood alcohol might have been at approximately 1:00 p.m. in the Elk Horn Bar, the State has not met its burden to demonstrate that Ms. Benson was actually intoxicated when she was served alcohol by Robin Estes.

Further, the evidence is not persuasive as to whether it is more likely that Ms. Benson was apparently or obviously intoxicated. It is just as likely that Ms. Benson either had a health condition whose symptoms approximated intoxication or that Ms. Benson was simply not intoxicated while she left the Elk Horn Bar.²

² There would also be a basis to conclude accepting the testimony of Terry Gill, that Robin Estes had done the right thing by having Terry Gill called for purposes of getting Leona Benson Horne.

Further, Robin Estes had never seen Leona Benson under the influence or intoxicated and did not observe physical conditions or behavior which she would have attributed to someone who was too intoxicated to be served.

In attempting to show that the witnesses who testified had changed their statements when testifying under oath, ISP ABC offers several explanations as to why the witnesses testifying might have been motivated to testify different than what was contained in their statements or reports developed in connection with their investigation. ISP ABC suggested that Linda Rauhala and Terry Dill had been influenced by the owners and operators of the Elk Horn Bar to testify as they did. However, other than the statements of Leona Benson and Robin Estes, there were no recorded statements which would permit me to review the questions and answers directed to the potential witnesses for purposes of determining whether their recorded statement was inconsistent with their testimony.

Further, there was no effort to impeach or treat as a hostile witness any of the Elk Horn Bar's owners, operators or customers to show that there indeed had been a change in their testimony or that the testimony was as a result of some bias or ill will felt toward Ms. Benson.

Ms. Benson suggests that Robin Estes overheard a conversation between Leona Benson and an Elkhorn Bar patron which would have offended Robin Estes. There is no evidence in the Record to support a finding that Robin Estes overheard such a conversation.

Ms. Benson had after this incident been "86'd" from the Elk Horn Bar, which means to me that she had been told not to come back into the Elk Horn Bar. It would be reasonable for a bar owner to tell a customer who had complained that they had been over served to indicate to that customer that they were not welcome to return. It would also be reasonable for the operator of the Elk Horn Bar to contact other bars to see if Ms. Benson had been 86'd from their bars as

well. Those actions do not indicate bias or ill will toward Ms. Benson, instead it would make good business sense for the Elk Horn Bar to not invite someone back into their premises who filed what they believed to be a false complaint against them.

ISP ABC only argues that people might be motivated to have changed their statements and leaves it to me to determine first whether the statements were different than their testimony and if so, that a reason for a change in statement suggests that at one time or another they were lying. Even if I were to determine that someone had testified differently than their statement, the ISP ABC would not be any closer to meeting their burden.

It is just not likely that Leona Benson was served nearly a fifth of tequila from 11:00 a.m. until 1:00 p.m. on July 21, 2012. It is also unlikely that Leona Benson would have not said something about the strength of a margarita after the first one, the second one, the third one or even the fourth one which she apparently thought enough of to take with her.

Unfortunately, this case is as much about relationships and personalities in a small town in rural Clearwater County than an allegation that someone was over served.

The State has not met its burden to show that Leona Benson was sold or allowed to consume an alcoholic beverage while actually, apparently or obviously intoxicated.

CONCLUSION

The State has not met its burden. A factual and legal basis does not exist to suspend the Retail Alcohol Beverage License of the Elk Horn Bar, Inc., for the alleged service of an alcoholic beverage to Leona Benson while actually, apparently or obviously intoxicated.

ORDER

It is therefore, the Preliminary Order of the Hearing Officer that the Retail Alcohol Beverage License No. 3155 for premises 6C-3 shall not be suspended and that this matter shall be and hereby is dismissed. A Notice of Preliminary Order is attached to this Order and made a part of this Order by this reference.

DATED this 3 day of October, 2013.

I DO HEREBY CERTIFY that a true
And correct copy of the foregoing
Document was:

Mailed by regular first class mail,
And deposited in the United States
Post Office

Sent by facsimile

Sent by Federal Express, overnight
Delivery

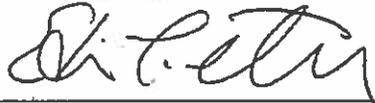
Hand delivered

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On this 3 day of October, 2013.



Edwin L. Litteneker

NOTICE OF PRELIMINARY ORDER

a. This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a motion for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

b. Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency. The service date of this Order is October 3, 2013.

c. If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee). The agency head (or designee) may review the preliminary order on its own motion.

d. If the agency head (or designee) grants a petition to review the preliminary order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

e. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or
- iv. The real property or personal property that was the subject of the agency action is located.

f. This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.