

**BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON**

IN THE MATTER OF:) FINAL FINDINGS OF FACT
) CONCLUSIONS OF LAW
) AND ORDER
STOCKMAN’S #1, INC.) OLCC-09-V-034
WEIMING HE,)
PRES/DIRECTOR/STKHLDR)
SHAOMEI “SUZIE” HE,)
DIRECTOR/STKHLDR)
DBA STOCKMAN’S BAR)

HISTORY OF THE CASE

On March 4, 2009, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Stockman’s #1, Inc., Weiming He, President/Director/Stockholder, Shaomei Suzie” He, Director/Stockholder, dba Stockman’s Bar (Licensee). The OLCC alleged that Shaomei “Suzie” He knowingly sold, served, or otherwise made alcoholic liquor available to a visibly intoxicated person in violation of ORS 471.410(1) or, in the alternative, that Shaomei “Suzie” He knowingly allowed a visibly intoxicated person to consume an alcoholic beverage on the licensed premises in violation of ORS 471.412(1). The OLCC proposed that Licensee’s license be suspended for 32 days or that Licensee pay a civil penalty of \$4,950 in lieu of 30 days of the suspension and serve a mandatory two-day suspension.

Licensee made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings on April 17, 2009. The case was assigned to John Mann, Senior Administrative Law Judge (ALJ). A contested case hearing was held on September 15, 2009 in Baker City, Oregon, before ALJ Mann. Licensee was represented by Floyd Vaughn, attorney at law. OLCC was represented by Becky Voelkel, Case Presenter. Witnesses for OLCC were: Lawrence Brown, Terry Hutton, Crystal Carpenter, and Michael Upmeyer. Witnesses for Licensee were: Shaomei “Suzie” He, Brandon Koontz, and Aaron Miller.¹ The record closed on October 6, 2009 after the parties filed written closing statements.

Victor Leo interpreted in Cantonese for Licensee’s corporate principals, Weiming He and Suzie He. Mr. Leo is qualified to interpret Cantonese.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed November 13, 2009. Staff filed Comments on the Proposed Order on December 8, 2009.

¹ Corporate principal Weiming He was present for the hearing, but did not testify.

On February 18, 2010, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES

1. Whether Licensee violated ORS 471.410(1) by selling, giving, or otherwise making available, alcoholic liquor to a person who was visibly intoxicated.
2. Whether Licensee violated ORS 471.412(1) by knowingly allowing a person to consume alcoholic beverages on the licensed premises after observing that the person was visibly intoxicated.

EVIDENTIARY RULINGS

Exhibits A1 through A5, offered by the OLCC, and Exhibits P1 through P3, offered by Licensee, were admitted into the record without objection.

CREDIBILITY DETERMINATION

The parties offered conflicting testimony regarding the events in question. All witnesses agreed on the following events that took place on December 17, 2008:

- 1) Shaomei "Suzie" He sold two mixed drinks and a beer to Brandon Koontz sometime after 10:00 p.m.
- 2) Mr. Koontz attempted to pay for the drinks using a credit card that belonged to another patron, Forest.
- 3) Ms. He told Mr. Koontz that Forest had been cut-off and could not have additional alcohol.
- 4) Ms. He agreed that Forest could pay for drinks that would be consumed by others.
- 5) Forest's credit card was declined and Mr. Koontz paid for the drinks with cash.

The witnesses' recollection of subsequent events vary somewhat. The OLCC offered testimony from Inspectors Brown and Hutton. Inspector Brown testified, consistent with his written report, that he saw Mr. Koontz hand a beer to Forest, and that when he turned around to see what Ms. He was doing, she had her back to the gentlemen. He also testified that, although Forest made no attempt to hide his beer, Ms. He did not appear to notice him with it because she was more concerned with serving other customers.

Inspector Hutton testified that Ms. He saw Mr. Koontz hand a beer to Forest. Inspector Hutton then added that Ms. He shrugged her shoulders before she turned away to process the credit card. Inspector Hutton testified that Ms. He made no effort to confiscate the beer. Inspector Hutton's written report, dated January 26, 2009, does not mention that Ms. He observed Forest with a beer. The report states that Ms. He told Mr. Koontz that Forest was cut-off and could not drink anymore. It also stated that Ms. He "completed the sale and the man [Mr. Koontz] handed Carson a beer in a bottle." (Ex. A3 at 1.)

Ms. He testified that she did not see what Mr. Koontz did with the drinks. Mr. Koontz and another patron, Aaron Miller, testified that Mr. Koontz purchased the beer for another friend, Toby Jones, and that Mr. Koontz gave the beer to Mr. Jones. Both Mr. Koontz and Mr. Miller denied that Mr. Koontz gave a beer to Forest. Mr. Koontz testified that he consumed approximately four mixed drinks between 7:30 p.m. and 10:30 p.m. Mr. Miller testified that he drank two mixed drinks in that same period. Both conceded that there were some details that they could not remember clearly because the events happened so long ago.

Inspector Hutton's testimony, while apparently sincere, was not in this instance reliable. He was the sole witness who testified to having observed Ms. He react when Mr. Koontz handed a beer to Forest. That testimony appears to be inconsistent with Inspector Brown's written report on the most significant factual dispute at issue, and, more importantly, was not consistent with Inspector Hutton's own written report. Inspector Hutton's report did not record the most significant fact in dispute for this violation. His testimony nine months after the incident about a crucial fact not contained in the report cannot now be considered reliable.

The testimony of Mr. Koontz and Mr. Miller was likewise unreliable. Both gentlemen were relying upon their memory of events that took place approximately nine months prior to the hearing on a night when both of them had been drinking. While their testimony appeared to be sincere, it is unlikely that they would remember, in such detail, the events of a minor alcohol purchase in the distant past. Indeed, when questioned, Mr. Koontz was unable to recall many details of the events of December 19, 2008 (two days after the night in question), when Mr. Koontz had been accused of criminal behavior. It is unlikely that Mr. Koontz's memory of the events of December 17, 2008 would be clearer than the events that happened to him two days later.

The most reliable evidence in the record was the testimony and written report of Inspector Brown. Inspector Brown's testimony was consistent with the report he prepared a little more than a month after the events in question. Inspector Brown's report, in contrast to the report authored by Inspector Hutton, is extremely detailed and appears to be an objective narrative of events. Significantly, the report includes information, such as the assertion that, from his vantage point, he did not see that Ms. He observed Mr. Koontz hand the beer to Forest, which is unhelpful to the OLCC's case. Indeed, it is actually consistent with Ms. He's testimony that she did not know what happened to the drinks after she sold them to Mr. Koontz. There is no reason to suspect that the report is anything other than Inspector Brown's honest attempt to reconstruct the events that occurred on the night in question. Thus, Mr. Brown's report and testimony provides the most reliable evidence concerning all matters in dispute.

FINDINGS OF FACT

1. Stockman's #1, Inc. has held a Full On-Premises Commercial (F-COM) at 2028 Main Street in Baker City, Oregon since September 10, 2005. Stockman's #1, Inc. is owned and operated by Weiming He, President, Director, and Stockholder, and by Shaomei "Suzie" He, Director and Stockholder. (Ex. A1.)

2. On January 20, 2008, Licensee was cited by the OLCC for failing to verify the age of a person appearing under the age of 26 in violation of OAR 845-006-0335(1). Licensee paid a fine of \$1,980 for the violation. (Ex. A1.) This was a Category III violation under OLCC rules. (Test. of Brown.)

3. On December 17, 2008, OLCC Inspectors Lawrence Brown and Terry Hutton conducted an undercover observation at the licensed premises in response to reports from local law enforcement of potential violations of Oregon liquor laws. The inspectors initially visited the premises in the early evening and did not observe any violations. The inspectors left for a brief period and returned at approximately 9:30 p.m. local time.² When the inspectors returned to the licensed premises, they sat at the bar and faced each other so that they could view different parts of the bar. (Test. of Brown.)

4. Crystal Carpenter was on-duty as the bartender prior to 10:00 p.m. (Test. of He.) Ms. Carpenter told Shaomei "Suzie" He (one of Licensee's owners) that she had cut-off service to a customer named Forest, and asked him to leave, because he was visibly intoxicated. Forest left for a period of time and returned to the bar prior to 9:30 p.m.³ (Test. of He; test. of Carpenter.)

5. Sometime prior to 9:30 p.m., Ms. He observed Forest in the bar with a beer in his hand. Ms. He removed the beer from Forest, reminded him that he had been cut-off, and poured out the beer. Ms. He asked Forest to leave the premises. Forest told Ms. He that he would leave after he used the restroom. (Test. of He.)

6. At approximately 10:00 p.m., Ms. He began working behind the bar. Weiming He was working in the kitchen and one security guard was working on the premises. There were no other employees on-duty at the time. (Test. of He.)

7. At approximately 10:20 p.m., Brandon Koontz, a customer, approached the bar and ordered two mixed drinks and a bottle of beer. Mr. Koontz handed a credit card to Ms. He to pay for the drinks. Ms. He asked if the card belonged to Forest. Mr. Koontz told her that it did. Ms. He told Mr. Koontz that Forest was too drunk and could not have more alcohol. Inspector Brown, who was seated at the bar, thought he heard Ms. He say "Carson can have no more"

² Baker City is on Pacific Time. Inspector Hutton is from Nyssa, Oregon which is on Mountain Time. Inspector Hutton's report reflects Mountain Time, rather than local time at Baker City. Inspector Brown is from Bend, Oregon, which is on Pacific Time. His report thus correctly reflects local time.

³ The Inspectors' reports refer to the visibly intoxicated patron as "Carson." Licensee asserted that the person identified as Carson is actually named Forest. OLCC staff did not object and conceded that the patron's name may have been Forest.

several times. Mr. Koontz then asked if Forest could buy drinks for others, even if he could not drink himself. Ms. He told Mr. Koontz that he could. Ms. He then turned around and tried to process payment with the credit card. While Ms. He had her back turned, Mr. Koontz handed the beer to Forest. Ms. He could not see the exchange. Ms. He then turned and told Mr. Koontz that the credit card had been declined. Mr. Koontz then paid with cash. (Test. of Brown; Ex. A2 at 4-5.)

8. On January 21, 2009, Inspector Brown prepared a report recording his December 17, 2008 observations at Stockman's Bar. In that report, Inspector Brown wrote "[Ms.] He did not appear to ever notice [Forest] with the beer." (Ex. A2 at 5.) Although Forest did not appear to make any effort to conceal his drink, Inspector Brown believes that Ms. He was more focused on serving customers and taking payments and thus did not pay attention to Forest. (Test. of Brown.)

9. Approximately 15 minutes after Ms. He sold the drinks to Mr. Koontz, a fight broke out between Forest and another patron in a game room at the rear of the bar. Charles Bulger, the security guard on duty, and a second security guard, Michael Upmeyer, who was on the premises playing pool, intervened and broke up the fight. (Test. of Upmeyer.) At the time, Forest had a beer in his hand. Ms. Carpenter, who was still on the premises, told the security guards that Forest had been cut-off. Mr. Bulger confirmed this with Ms. He, and then removed the beer from Forest's hand. (Test. of Brown.) Ms. He does not know how Forest got the beer. (Test. of He.)

CONCLUSIONS OF LAW

1. Licensee did not violate ORS 471.410(1) by selling, giving, or otherwise making available, alcoholic liquor to a person who was visibly intoxicated.

2. Licensee did not violate ORS 471.412(1) by knowingly allowing a person to consume alcoholic beverages on the licensed premises after observing that the person was visibly intoxicated.

OPINION

On December 17, 2008, Forest, a patron at Stockman's Bar, was involved in a fight with another patron. At the time, Forest was holding a bottle of beer. OLCC staff alleged that corporate principal Shaomei "Suzie" He knowingly provided that beer to Forest when he was visibly intoxicated in violation of ORS 471.410(1). Alternatively, staff asserts that Ms. He knowingly allowed Forest to consume alcohol on the licensed premises after observing that he was visibly intoxicated in violation of ORS 471.412(1). As the proponent of these contentions, the Commission bears the burden to prove this allegation by a preponderance of the evidence. ORS 83.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are

more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

1. Violation of ORS 471.410(1)

ORS 471.410(1) provides:

No person shall sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated.

Licensee did not dispute that Forest was visibly intoxicated at the time of the alleged violation. Indeed, Ms. He and the OLCC inspectors all agreed that Ms. He told Mr. Koontz that Forest could not have alcohol. Ms. He testified that she would not sell alcohol to Forest because he had been cut-off by the prior bartender, Ms. Carpenter. Ms. He also provided undisputed testimony that she had removed a beer from Forest's hand earlier in the evening precisely because she knew he was intoxicated.

However, Ms. He contends that she did not "sell, give, or otherwise make available any alcoholic liquor" to Forest. Ms. He testified that she did not know what Mr. Koontz did with the three drinks that she sold to him. In past cases the Commission has held that to constitute a violation of ORS 471.410(1) a server must know that the patron was visibly intoxicated and must also know that the patron intends to consume the alcohol. In *Justin Scriber* (OLCC, Final Order 04-V-050, August 2005) the Commission noted as follows:

The "knowingly" standard requires a state of mind in which the server is aware or conscious of who will be consuming the purchased drink. A savvy bartender will ask (and arguably has a duty to ask) the purchaser who the drink is for, but the negligent failure to ask that question does not establish that the server "knowingly" made alcohol available to a visibly intoxicated person if the server credibly denies knowing the intended consumer of the drink.

Id. at 7. Likewise, in *Cabana Club Café and Grill*, (OLCC, Final Order, 04-V-066, October 2005) the Commission concluded that a licensee did not violate ORS 471.410(1) when the licensee sold a beer to a visibly intoxicated patron because the licensee reasonably believed that the patron was purchasing the beer for another customer.

In this case, the most reliable report of events came from Inspector Brown who testified that, prior to serving alcohol to Mr. Koontz, Ms. He repeatedly told him that Forest could not have any more to drink.⁴ Mr. Koontz asked if Forest could purchase the drinks for others and

⁴ Ms. He testified that she told Forest to leave the premises but he did not do so. In light of subsequent events, it would have been advisable for Ms. He to take greater steps to remove Forest from the premises. However, she was not legally obligated to do so. ORS 471.410(8) provides:

Nothing in this section prohibits any licensee under this chapter from allowing a person who is visibly intoxicated from remaining on the licensed premises so long as the person is not sold or served any alcoholic liquor.

Ms. He agreed that he could. Ms. He's response was consistent with the result in *Cabana Club Café and Grill*. This exchange, combined with Ms. He's earlier removal of a beer from Forest, demonstrates that Ms. He reasonably believed that Forest would not be consuming the beer. Ms. He acted as a "savvy bartender" and specifically advised Mr. Koontz that Forest could not drink. Inspector Brown further testified that he did not observe Ms. He see or show signs of seeing Mr. Koontz hand the beer to Forest.

Inspector Hutton testified that Ms. He observed Mr. Koontz hand the beer to Forest, shrug her shoulders, and turn away to process the payment. As explained above, that testimony cannot now be considered reliable. Inspector Hutton's written report, written more closely in time to the events in questions, does not mention this observation. Furthermore, Inspector Hutton's testimony appears to be inconsistent with the more thorough report offered by Inspector Brown. Other than Inspector Hutton's testimony, there is no evidence in the record to support the conclusion that Ms. He knew that Forest would consume the beer that Ms. He sold to Mr. Koontz. The evidence thus did not establish, more likely than not, that Licensee violated ORS 471.410(1).

2. Violation of ORS 471.412(1)

In the alternative, Commission staff alleged that Licensee violated ORS 471.412(1) which provides:

No licensee or permittee shall knowingly allow a person to consume or to continue to consume alcoholic beverages on the licensed premises after observing that the person is visibly intoxicated.

The evidence did not establish that Licensee "knowingly" allowed Forest to consume alcoholic beverages after he was cut-off. To the contrary, Inspector Brown's testimony and report stated that Ms. He did not appear to notice that Forest had a beer. Despite the lack of evidence of any actual knowledge that Forest was drinking, the Commission contends that there were a number of "flag factors" sufficient to establish a violation. In *TJ's Fireside Dining*, (OLCC, Final Order 00-V-074 and 01-V-006, October 2001) the Commission announced that it would consider "flag factors," such as low lighting, under staffing, and having too few staff to monitor patrons while performing other job duties, as part of its analysis of violations under ORS 471.410(1) and ORS 471.412. *TJ's Fireside Dining* at 16-17, fn 4. The Commission noted:

A licensee cannot escape the duty to comply with the liquor laws of this state by turning a blind eye and not monitoring compliance, or by maintaining conditions which make effective monitoring of compliance difficult or impossible. When either is done, licensee assumes the risk that violations will occur and may not claim those same conditions excuse liability for the foreseeable violations that do occur. When there is a conflict with convenient business practices and compliance, compliance has priority.

Id. On the night in question, Ms. He was the only bartender on duty and was apparently not focusing on Forest for the 15 minutes between the time she sold drinks to Mr. Koontz and the time that Forest was involved in the altercation. Because Ms. He was focusing on other job duties, it was more difficult for her to monitor Forest's activities.

However, the rule announced in *TJ's Fireside Dining*, as applied to an alleged violation of ORS 471.412, is not applicable in this case. In that case, the Commission specifically noted that it would consider the "flag factors" as creating a "presumption of observation under ORS 471.412." *Id.* ORS 471.412 prohibits a Licensee to knowingly allow a patron to consume alcohol "after observing that the person is visibly intoxicated." (Emphasis added.) Thus, the presumption of "observation" in *TJ's Fireside Dining* refers to the statutory requirement that the licensee observe that a patron is visibly intoxicated. There is no dispute in this case regarding that element. Ms. He conceded that Forest was visibly intoxicated and that she refused service to him on that basis. However, *TJ's Fireside Dining* did not extend the use of flag factors to the statutory element that the licensee acted "knowingly" for purposes of ORS 471.412. Nor would the use of such factors be appropriate.

In *Cheers to You*, (OLCC, Final Order 00-V-070, October 2001), issued contemporaneously with *TJ's Fireside Dining*, the Commission applied the "flag factors" to establish a violation of ORS 471.410(1). However, similar to *TJ's Fireside Dining*, the Commission used those factors to establish licensee's knowledge that the patron was visibly intoxicated. The Commission noted that the factors consisted of "knowledge of circumstances from which knowledge of visible intoxication could be properly inferred." *Cheers to You* at 15. In other words, the Commission could establish that the licensee acted with actual knowledge by inference if there were sufficient flag factors. Thus, the existence of flag factors does not alter the requirement of actual knowledge; it merely provides a method to prove such knowledge by inference rather than by direct evidence. The Commission did not hold that a violation of ORS 471.410(1) could be established merely because a licensee "should have known" that the patron was intoxicated.

ORS 471.412(1) includes a specific element that a licensee act knowingly. The Commission's rules and precedents do not alter that requirement. While that element may be met where the evidence is sufficient to infer actual knowledge, the element may not be met solely by a showing of negligence. *See, e.g., Aloha Station*, (OLCC, Final Order 99-V-034, August 1999) ("knowing" is not synonymous with "should have known.") The fact that Ms. He could have seen Forest with the beer had she paid attention is insufficient, by itself, to allow an inference of actual knowledge. Where, as in this case, the evidence established that a licensee did not know that a visibly intoxicated person was consuming alcohol, there is no violation of ORS 471.412(1).⁵

⁵ In *Cabana Club Café and Grill*, the Commission applied the flag factors in finding a violation of ORS 471.412(1). However, in that case the evidence established that the licensee spoke with the patron as the patron drank a beer. There is no evidence of such actual observation in this case.

FINAL ORDER

The Commission orders that the March 4, 2009 Notice of Proposed License Suspension/Civil Penalty issued to Stockman's #1, Inc., Weiming He, President/Director/Stockholder, Shaomei "Suzie" He, Director/Stockholder, dba Stockman's Bar be dismissed.

It is further ordered that notice of this action, including the reasons for it, be given.

Dated this 4th day of March, 2010.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 4th day of March, 2010.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.