

**DOCKET NO. 458-03-0796**

<b>TEXAS ALCOHOLIC BEVERAGE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>COMMISSION</b>	§	
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>STACY JOE ASH</b>	§	
<b>D/B/A ASH'S COCKTAILS</b>	§	
<b>PERMIT NOS. MB-207198, LB-207199</b>	§	
<b>&amp; PE-207200</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>MCLENNAN COUNTY, TEXAS</b>	§	
<b>(TABC CASE NO. 601264)</b>	§	

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (the Commission) requested that the permits of Stacy Joe Ash d/b/a Ash's Cocktails (the Respondent) be canceled or suspended, alleging that on or about May 31, 2002, with criminal negligence, Respondent permitted a minor to possess and/or consume an alcoholic beverage on the premises, in violation of TEX. ALCO. BEV. CODE ANN. (Code) §106.13(a). The Respondent denied the Commission's allegation. This Proposal for Decision recommends that no action be taken against the Respondent's permits.

**I. Statement of the Case**

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

The hearing on the merits was convened on December 16, 2002, at 801 Austin Avenue, Suite 750, Waco, Texas, before Administrative Law Judge (ALJ) Suzan Shinder. The Commission appeared and was represented by its staff attorney, Dewey Brackin. The Respondent appeared and was represented by James Dunnam, Esq., and by its party representative, Stacy Joe Ash. Evidence and argument were heard, and the record closed the same day.

**II. The Statute**

In pertinent part, Code §106.04 (Consumption of Alcohol by a Minor) states that a minor commits an offense if he consumes an alcoholic beverage. In pertinent part, Code §106.05

(Possession of Alcohol by a Minor) states that, unless it is in the course and scope of the minor's employment,<sup>1</sup> a minor commits an offense if he possesses an alcoholic beverage.

In pertinent part, Code §106.13(a) states that a retail license or permit may be canceled or suspended if it is found that the permittee with criminal negligence permitted a minor to violate Code §§106.04 or 106.05 on the permitted premises.

### **III. Evidence**

The Commission called Shannon Byers as their only witness. The Respondent called two witnesses, Ronald Michael Easton and Kelly Loveridge. According to the Commission's only exhibit, a Mixed Beverage Permit, MB-207198, a Mixed Beverage Late Hours Permit, LB-207199, and a Beverage Cartage Permit, PE-207200, were issued to Stacy Joe Ash, doing business as Ash's Cocktails, at 2716 East Industrial, Waco, McLennan County, Texas, by the Texas Alcoholic Beverage Commission, on May 5, 1989, and these permits have been continuously renewed.

It was uncontested that Shannon Byers was working at Ash's Cocktails (the bar) on May 31, 2002. Shortly after leaving work, the vehicle that she was driving was involved in an accident, a result of which was the above-the-elbow amputation of Ms. Byers left arm.

#### **A. Testimony of Shannon Byers:**

At the hearing, Shannon Byers appeared to be a young woman, consistent with her stated age of 19 years. According to Ms. Byers, when she applied for work at the bar, her written application for employment included her correct date of birth of January 27, 1983, and Stacy Joe Ash was aware that she was less than 21 years old. Ms. Byers was hired as a "waitress/ bartender," and she had only worked at the bar for two or three weeks prior to the above described motor vehicle accident. She made friends with a co-worker, Kelly Loveridge, who was working at the bar with Ms. Byers on the night of the accident. Although Mr. Ash was there earlier that day, no one else was working in the bar that evening, during which they had approximately fifteen customers. Ms. Loveridge, who was working behind the bar most of the time, was less than 21 years old at the time. Ms. Loveridge was aware that Ms. Byers was less than 21 years old.

On the night of the accident, Ms. Byers had worked from 10:30 a.m. until 9:00 p.m., when she went home on a break to eat. She denied drinking any alcohol during this break. She returned to work at approximately 11:00 p.m., and she worked until closing, at 2:00 a.m. According to Ms. Byers, during the 11:00 p.m. to 2:00 a.m. period, Ms. Loveridge served Ms. Byers several alcoholic

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<sup>1</sup>That is, while in the course and scope of the minor's employment, if the minor is an employee of a licensee or permittee and the employment is not prohibited by this code.

beverages, including liquor in a cola drink. She believed that she consumed approximately ten alcoholic beverages, served by Ms. Loveridge, during her shift, after 11:00 p.m., drinking them "one after the other."

At 2:00 a.m., when the bar closed, Ms. Loveridge drove her own vehicle and took Ms. Byers and a customer, Michael Easton, to a restaurant to get something to eat. When they were finished, Ms. Loveridge drove Ms. Byers and Mr. Easton back to their respective vehicles. According to Ms. Byers, Mr. Easton was aware that Ms. Byers was highly intoxicated. He was concerned about her safety, and asked her if she wanted him to call her a cab. When she rejected this idea, he made sure that she fastened her seatbelt before he let her drive away. Ms. Byers has no recollection of anything after she left the parking lot.

Ms. Byers was certain that there was no beer in her vehicle at the time of the accident and she denied drinking any alcohol at home on her break. Although she admitted to smoking marijuana two weeks prior to the accident, she denied using any drugs on the day of the accident. Ms. Byers was aware that a drug screen, administered to her at the time of the accident, was positive for marijuana, opiates, and "benzo," but she denied using these drugs. She was emphatic that the only drug in her system at the time of the accident was the alcohol served to her at the bar that evening and early morning. Ms. Byers emphasized this by relating that she had stopped smoking marijuana prior to this incident because she was on probation for stealing a shirt from a Penny's store.<sup>2</sup>

During cross-examination, Ms. Byers admitted that, more than one year ago, a criminal complaint was filed against Mr. Ruben Randall, as a result of Ms. Byers accusation that Mr. Randall had kidnaped her. He was indicted for aggravated kidnaping, and served 18 months in a county jail while he was awaiting trial. At the time of the trial, Ms. Byers testified that her complaint against Mr. Randall was not true, and these charges were dismissed.

## **B. Testimony of Michael Easton**

Michael Easton is a retired arson investigator for the city of Waco, Texas. He worked for the Waco Fire Department for 27 years before he retired. Mr. Easton is currently employed by an insurance company, and investigates fires.

Mr. Easton was in the bar from shortly after 10:45 p.m., until closing, on the day of the incident; he was drinking, watching television, and playing "8-line" machines. He observed Ms. Byers drinking a "cola appearing" drink from a short "hurricane glass," but he did not see her drinking anything that he knew to be alcohol at any time. He was not paying much attention to Ms. Byers that evening, but he did see her "working the floor," and "working some behind the bar."

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<sup>2</sup>She received a deferred adjudication for this, and because she successfully completed her probation, this is not considered to be a "conviction."

After the bar closed, Ms. Loveridge took Mr. Easton and Ms. Byers to Neighbor's Truck Stop on Interstate Highway 35, where they stayed for an hour or more, eating and drinking coffee. He saw no sign that Ms. Byers was intoxicated at any time. Although she complained of feeling ill before she got into her vehicle, he thought that this might be secondary to the food she ate at the truck stop, because he had become ill from food that he had eaten at Neighbor's Truck Stop in the past. When Ms. Byers got into her vehicle, Mr. Easton saw a bottle of beer in the beverage carrier in the console in her vehicle. He took the bottle out of her vehicle and placed it on the ground. Because Ms. Byers complained of feeling ill, Ms. Loveridge offered to take Ms. Byers home. Mr. Easton also offered to call her a cab, but Ms. Byers rejected both of these offers.

### **C. Testimony of Kelly Loveridge**

Kelly Loveridge, who was 20 years old at the time of the incident, worked from 4:00 p.m., until 2:00 a.m., on that date. She had been employed at the bar for approximately one and one-half years at that time. Ms. Loveridge and Ms. Byers were the only two employees working in the bar that evening; but Mr. Ash, the manager, was in and out that night. Ms. Loveridge remembers Ms. Byers taking a break at 9:00 p.m., and returning after 11:00 p.m., working until closing, at 2:00 a.m. When Ms. Loveridge took Ms. Byers and Mr. Easton to the Neighbor's Truck Stop, to get something to eat, they remained at the truck stop for between thirty minutes and one hour. After she took Ms. Byers and Mr. Easton back to their vehicles, Ms. Byers mentioned that she did not feel well. Ms. Loveridge did not see anything in Ms. Byers vehicle.

Ms. Loveridge denied serving Ms. Byers any alcohol while they were at the bar that evening and early morning, but did serve her some "Dr. Pepper." She did not see Ms. Byers make any drinks for herself, and did not see her consuming any alcohol at any time. Ms. Byers never appeared to be intoxicated.

## **IV. Discussion**

Both parties agreed that the predominant matter controlling the outcome of this hearing was the credibility of the witnesses. Ms. Byers' and Ms. Loveridge's testimony cannot be reconciled. Additionally, no witness' demeanor was more credible than that of any other witness, and all of the witnesses had some interest in the outcome of this case, to a greater or lesser degree. Ms. Byers' suffering was very real. The terrible tragedy that this young girl has had to endure, no matter what the cause of the tragedy, and notwithstanding the credibility of any witness, makes Ms. Byers a very sympathetic witness. However, Ms. Byers' history of dishonesty and her incongruent statements stand out in comparison to the other witnesses, making her testimony the least credible.

Mr. Easton and Ms. Loveridge are consistent in their assertions that Ms. Byers did not appear intoxicated, but only complained of feeling ill. Ms. Byers insisted that she had consumed a large quantity of alcohol, and that she was highly intoxicated.

While Ms. Byers denies that there were any containers of alcohol in her vehicle, Mr. Easton removed a bottle of beer from the beverage carrier of Ms. Byers' vehicle. The appearance that Ms. Byers was comfortable with drinking alcohol in her vehicle raises the possibility of consumption of alcohol somewhere other than the permitted premises; specifically, she may have consumed alcohol on her break and after work, after she left the permitted premises.<sup>3</sup>

Ms. Byers' stated that she had stopped using marijuana because she was on probation for stealing a shirt at a Penny's Department store. This conflicts with the positive result for this drug, as well as opiates and "benzo," in Ms. Byers' system at the time of the accident. Further, Ms. Byers stated that she drank alcoholic beverages "one after the other," in large quantities on that evening, and drove while intoxicated. This seems incongruous with her assertion that she had discontinued her use of illegal drugs because she wanted to stay within the terms and conditions of her probation.

Also important in an evaluation of her credibility, it was revealed that in District Court, Ms. Byers recently recanted her kidnaping complaint against Mr. Ruben Randall. Assuming that her testimony in District Court was true, her earlier misrepresentation of the facts lead to Mr. Randall's incarceration for 18 months for aggravated kidnaping before Ms. Byers' untimely recantation resulted in the dismissal of the case.

Based on all of the above, Ms. Byers' testimony in the instant case was not as credible as that of Ms. Loveridge and Mr. Easton; therefore, more likely than not, while Ms. Byers was on the Respondent's premises, she did not consume an alcoholic beverage, and she did not possess an alcoholic beverage, except in the course and scope of her employment.

### **Findings of Fact**

1. Stacy Joe Ash, d/b/a Ash's Cocktails (the Respondent) is the holder of a Mixed Beverage Permit, MB-207198, a Mixed Beverage Late Hours Permit, LB-207199, and a Beverage Cartage Permit, PE-207200, issued by the Texas Alcoholic Beverage Commission (the Commission) for the premises known as Ash's Cocktails, located at 2716 East Industrial, Waco, McLennan County, Texas.
2. On November 5, 2002, the Commission sent its Notice of Hearing to the Respondent's last known mailing address. This Notice of Hearing informed the Respondent that the hearing on the merits was set for December 16, 2002, at 9:30 a.m., 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.

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<sup>3</sup>There was no blood alcohol laboratory test admitted, but under these circumstances, any test result would not be critical to the outcome of this case.

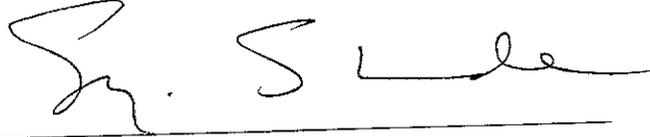
3. The hearing on the merits was convened on December 16, 2002, at 801 Austin Avenue, Suite 750, Waco, Texas, before Administrative Law Judge (ALJ) Suzan Shinder. The Commission appeared and was represented by its staff attorney, Dewey Brackin. The Respondent appeared and was represented by, James Dunnam, Esq., and by its party representative, Stacy Joe Ash. Evidence and argument were heard, and the record closed the same day.
4. On May 31, 2002, and the following early morning hours, Shannon Byers and Kelly Loveridge were employed by the Respondent, and were working on the Respondent's permitted premises.
5. At that time, Shannon Byers was less than twenty-one years old, and this was known by Stacy Joe Ash as well as by Kelly Loveridge.
6. At that time, the only alcohol possessed by Shannon Byers on the permitted premises, was alcohol that she handled as part of her job; for example, alcohol that she was serving to customers, or alcohol that she handled while clearing tables.
7. At that time, Shannon Byers may have consumed alcohol after she left the permitted premises, but she did not consume any alcohol on the permitted premises.
8. At that time, Shannon Byers had a bottle of beer in the beverage carrier, in the console of her vehicle, that was removed by Mr. Easton after Ms. Loveridge transported Ms. Byers from a restaurant to Ms. Byers vehicle.
9. Shannon Byers' statement that she had stopped using marijuana because she was on probation for stealing a shirt at a Penny's Department store, conflicts with the positive result for this drug, as well as opiates and "benzo," in Ms. Byers' system at the time of the accident.
10. In District Court, Shannon Byers' recently recanted her kidnaping complaint against Mr. Ruben Randall. Her earlier misrepresentation of these facts lead to Mr. Randall's incarceration for 18 months for aggravated kidnaping before Ms. Byers' untimely recantation resulted in the dismissal of the case.

### **Conclusions of Law**

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) 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. Based on Findings of Fact Nos. 2 and 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; Code §11.63; and 1 TEX. ADMIN. CODE §155.55.

4. At that time, the Respondent did not permit a minor to violate Code §§106.04 or 106.05 on the Respondent's permitted premises; therefore, the Respondent should not have its permits canceled or suspended, in that the Respondent was in compliance with Code §106.13(a).

Signed this 29th day of January, 2003.



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SUZAN MOON SHINDER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**DOCKET NO. 601264**

IN RE STACY JOE ASH	§	BEFORE THE
D/B/A ASH'S COCKTAILS	§	
PERMIT NO. MB-207198, LB-207199	§	
& PE-207200	§	TEXAS ALCOHOLIC
	§	
MCLENNAN COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-0796)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 10th day of February, 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. The hearing convened on December 16, 2002, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 29, 2003. This 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. No exceptions to the Proposal were filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, 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.

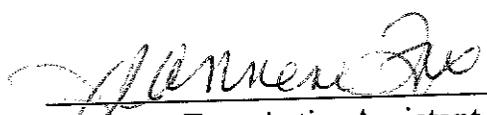
**IT IS THEREFORE ORDERED**, by the Acting Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED** with prejudice.

This Order will become final and enforceable on March 3, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

**WITNESS MY HAND AND SEAL OF OFFICE** on this the 10<sup>th</sup> day of February, 2003.

On Behalf of the Administrator,

  
\_\_\_\_\_  
Jeannene Fox, Acting Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

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Waco District Office  
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