

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8678

File: 41-370064 Reg: 06061730

ISMAEL PEREZ MORA, MARIA MORA, EDUARDO ENRIQUE MORALES, and MARIA
EUGENIA MORALES, dba Las Marias
1445 N. Hacienda Boulevard, La Puente, CA 91744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 7, 2008
Los Angeles, CA

ISSUED MAY 30, 2008

Ismael Perez Mora, Maria Mora, Eduardo Enrique Morales, and Maria Eugenia Morales, doing business as Las Marias (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 30 days, with 10 days stayed for a probationary period of one year, for appellants' employee selling or giving to patrons, and permitting the consumption of, alcoholic beverages between the hours of 1:00 a.m. and 6:00 a.m., violations of Business and Professions Code sections 23804, 25631, and 25632.

Appearances on appeal include appellants Ismael Perez Mora, Maria Mora, Eduardo Enrique Morales, and Maria Eugenia Morales, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated December 21, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine eating place license was issued on October 19, 2000. On January 31, 2006, the Department instituted a four-count accusation against appellants charging that on October 15, 2005, their employee or agent, Leonel Gavino-Lopez, sold or gave to patrons, and permitted the consumption of, alcoholic beverages between the hours of 2:00 a.m. and 6:00 a.m., in violation of Business and Professions Code² sections 25631 and 25632 (counts 1 & 2); and sold, and permitted the consumption of, alcoholic beverages after 1:00 a.m., actions prohibited by conditions on their license, in violation of section 23804.

At the administrative hearing held on November 15, 2006, documentary evidence was received and testimony concerning the violations charged was presented by Department investigators Enrique Alcala and William Armantrout.

The investigators, in an undercover capacity, entered the licensed premises at 1:45 a.m., and Alcala ordered a Bud Lite beer, which was served to him a few minutes later. At about 2:10 a.m., Alcala ordered another beer, but after consulting with Lopez, who was also working at the premises, the waitress told Alcala he could not have another beer because it was after 2:00 a.m. Shortly thereafter, all the beer bottles were cleared from the tables, and Lopez began serving customers red plastic cups containing an amber fluid topped with white foam that appeared to be beer. After about 20 minutes of observing customers being served and consuming from the red plastic cups, the investigators identified themselves and seized two red cups from patrons, taking samples of the fluid from each.

²Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

The parties stipulated that the samples were analyzed by the Sheriff's Department laboratory and found to contain alcoholic beverages.

Documentary evidence showed that appellants previously stipulated to five counts of violating the same condition and statutes they were charged with in the present action. Those violations occurred on July 14, 2002, and were stipulated to on March 9, 2003.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation were proved. Appellants then filed an appeal contending that the findings are not supported by substantial evidence.

DISCUSSION

Appellants contend that substantial evidence is lacking for findings that the waitress was an employee of the licensees, that a Bud Lite was served to Alcalá, and that the beer served in the plastic cups came from the licensed premises.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of

the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

Appellants' assertion that the waitress was not shown to be an employee is inapposite, because none of the findings state the waitress was appellants' employee. Finding of Fact 6 says that "the investigators were greeted by a female who was *acting in the capacity of a waitress.*" (Emphasis added.)

Even if the finding had been that the waitress was an employee, substantial evidence supports such a conclusion. The evidence showed that the waitress was working in appellants' premises, serving drinks and clearing tables. Where a person is performing work for another, prima facie evidence of employment is shown and that person is presumed to be an employee in the absence of evidence to the contrary. (*Robinson v. George* (1940) 16 Cal.2d 238, 242 [105 P.2d 914]; *Woodall v. Wayne Steffner Productions, Inc.* (1962) 201 Cal.App.2d 800, 808-809 [20 Cal.Rptr. 572]; *Pierson v. Holly Sugar Corp.* (1951) 107 Cal.App.2d 298, 301 [237 P.2d 28].) Appellants presented no evidence to the contrary; therefore, the waitress would properly be considered appellants' employee.

Appellants also argue that no evidence was presented showing the bottle of Bud Light served to Alcalá contained an alcoholic beverage. The Appeals Board has addressed this type of contention before, and has concluded that "Bud Light is so

'universally known' to be beer and an alcoholic beverage, that it was sufficient for the Department to prove that Bud Light was sold." (*Circle K Stores, Inc.* (2004) AB-8102; *Patel* (2000) AB-7449; Cf. *Godoy* (1999) AB-6992 [Olde English not universally known as an alcoholic beverage, unlike Budweiser].) Appellants have raised no question about Alcalá's bottle containing Bud Light; therefore, the Department was justified in determining that the bottle contained an alcoholic beverage.

Lastly, appellants contend substantial evidence is lacking for the finding that alcoholic beverages were served and sold in the red plastic cups because there is no evidence about where the beer in the cups came from. They speculate that it could have been brought in by patrons.

Appellants' burden on appeal is to show that no substantial evidence exists in support of the finding. The investigators' testimony raised a reasonable inference that the beer in the cups was poured from appellants' stock of beer. Speculation about a possible alternate source of the beer is not sufficient to carry appellants' burden. They must present some evidence in support of their contention to make this an effective argument.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.