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

AB-9413

File: 48-405424 Reg: 13079023

SPORTSBARS ENTERPRISES, INC.,
dba The Sportsman
11133 Los Alamitos Boulevard, Los Alamitos, CA 90720,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 4, 2014
Los Angeles, CA

ISSUED JANUARY 9, 2015

Sportsbars Enterprises, Inc., doing business as The Sportsman (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] that revoked, with revocation conditionally stayed for three years, and concurrently suspended its license for 30 days pursuant to section 24200(a) and (b) for knowingly permitting multiple sales and/or negotiations for sale of a controlled substance, in violation of section 24200.5(a) of the Business and Professions Code and sections 11350, 11352, and 11360(a) of the Health and Safety Code.

Appearances include appellant Sportsbars Enterprises, Inc., through its counsel, Roger Jon Diamond, and the Department of Alcoholic Beverage Control, through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated February 14, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 13, 2004. Appellant's license was subject to prior discipline for unrelated conduct in 2007, when it paid a fine in lieu of a five-day suspension for violations of the Business and Professions Code, the Health and Safety Code, and the Penal Code involving refilled and/or contaminated alcoholic beverage bottles.

On August 9, 2013, the Department instituted a sixteen-count accusation against appellant charging that, in a number of transactions spanning four separate dates, appellant's agent or employee sold or facilitated the sale of controlled substances within the licensed premises in violation of section 24200.5(a) of the Business and Professions Code and sections 11350, 11352, 11357, and 11360(a) of the Health and Safety Code.

At the administrative hearing held on December 11, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Slavco Arsovski, a forensic scientist with the Orange County Crime Laboratory; by Nicole Gomez, Jennifer Gardea, Benjamin Delarosa, and Bryan Rushing, Department agents; and by Douglas Brown and Terry Bryant, appellant's president and vice president, respectively.

Counts 1 through 4

______Testimony established that on April 6, 2012 at approximately 4:00 p.m., Agents Gomez and Delarosa entered the premises in an undercover capacity to investigate illegal narcotics sales. The agents took seats at the fixed bar. Gomez and Delarosa ordered a beer from the individual working behind the fixed bar, later identified as Tara Biller. After Biller served their beers, Gomez and Delarosa had a conversation with a

patron identified as “Anthony.” Anthony told the agents he could get them medical-grade marijuana. Gomez asked Biller if she knew Anthony, and Biller said she did. When Gomez told Biller that Anthony was supposed to “hook them up,” Biller stated that Anthony and his friends smoked weed out back all the time. The agents remained at the premises for two and a half hours, then left.

The agents returned to the premises on April 16, 2012 at approximately 4:15 p.m. Biller and another individual, later identified as Marisol Torres, were working behind the fixed bar. Gomez ordered a beer and was served.

Gomez observed ten patrons in the premises, but Anthony was not among them. Gomez asked Biller about Anthony and told her that he was supposed to “hook her up.” Biller told Gomez that Anthony had been there earlier, but that there was someone else in the premises who could hook her up. After Gomez said okay, Biller approached a male patron sitting at the bar, later identified as Michael Castorena, and spoke to him. Biller then returned and asked Gomez how much she wanted. When Gomez told Biller that she wanted forty dollars’ worth, Biller asked if that was it because it was really good “shit.” Biller asked again if Gomez wanted forty, sixty, eighty, or one hundred. During this exchange, Biller did not speak softly. She spoke loudly enough that bartender Torres and other patrons could hear. Gomez ultimately asked for eighty dollars’ worth, and placed eighty dollars on the bar counter.

Biller yelled out “eighty”; shortly thereafter, Castorena left the premises through the rear entrance. When Gomez asked Biller where Castorena was going, Biller acknowledged that he was going to get some weed and that he would be back shortly. Later, Torres asked Gomez if the eighty dollars she had placed on the bar counter was for her tab. Gomez told her no, that it was for Biller, who was getting her some stuff.

After Castorena returned to the premises through the rear door and sat at the fixed bar, Gomez picked up the eighty dollars sitting on the counter and handed the money to Biller. Biller took the money, walked over to where Castorena sat and handed him the money. Castorena handed a clear plastic baggie to Biller containing a green leafy substance. Biller took the baggie, walked back to where Gomez was sitting, and handed the baggie to Gomez. Torres was behind the fixed bar and in a position to see what was taking place. Torres, however, said nothing and did nothing to stop the illegal transaction.

After leaving the premises that day, Gomez and Delarosa went to the Cerritos Enforcement Office where the plastic baggie containing the green leafy substance was photographed and a presumptive test was performed. The baggie and its contents were then booked into the evidence locker. The Orange County Crime Lab later examined the evidence and determined that the green plant material weighed 7.48 grams and contained marijuana.

<u>Counts 5 through 8</u>

Agents Garcia and Delarosa returned to the premises on April 23, 2012 at approximately 5:00 p.m. Gomez texted Biller beforehand and ordered eighty dollars' worth of marijuana — the same amount she had purchased on her prior visit. Upon entering the premises, Gomez noticed that there were about ten patrons in the premises, and that Biller and Torres were again tending the bar. Biller approached Gomez and told her that she had texted Castorena, but that Castorena had not responded. Biller then picked up her cell phone and texted someone. Gomez later asked Biller if Castorena had responded, and Biller replied that she would try again.

Gomez later saw Castorena enter the premises through the rear door. When

Biller asked Castorena if he could get them the same thing, Castorena asked who it was for. Biller pointed to the agents and said it was for them. Castorena looked at the agents and gave Biller an affirmative nod. Biller told the agents, "You're good." Biller spoke loudly and her conversation could be heard across the premises. Gomez placed eighty dollars on the bar counter, and Biller picked it up. Biller then handed the money to Castorena, who pocketed it, finished his beer, and exited the premises through the rear door.

When Castorena later returned to the premises, Biller was in the office. When Biller came out of the office and saw that Castorena was back, she approached him. Castorena handed Biller a clear plastic baggie containing a leafy green substance. Biller then returned to where Gomez sat and handed the plastic baggie to her. While this took place, Torres stood behind the fixed bar. Again, Torres said nothing and did nothing to stop the illegal transaction.

After the transaction was complete, Biller told Gomez that if she ever wanted anything, that she also dealt in "Molly" (a street name for MDMA/ecstasy) and "coke" (i.e., cocaine).

After leaving the premises that night, the agents went to the Special Ops Unit in Cerritos where the plastic baggie containing the leafy green substance was photographed and a presumptive test was performed. The baggie and its contents were then booked into the evidence locker. The Orange County Crime Lab later analyzed the contents of the plastic baggie and determined that the green plant material weighed 4.99 grams and contained marijuana.

Counts 9 through 13

Agents Gomez and Delarosa returned to the licensed premises on April 30, 2012

at approximately 3:30 p.m. Gomez texted Biller beforehand and ordered forty dollars' worth of cocaine and eighty dollars' worth of marijuana. Upon entering the premises, Gomez noticed that there were about ten patrons in the bar and that both Biller and Torres were working behind the bar. Gomez sat at the fixed bar and ordered a beer, which she was served. Biller later came out from behind the fixed bar to the public side and handed Gomez a clear plastic baggie containing a white powdery substance. Gomez accepted the baggie and placed forty dollars on the bar counter. Biller picked up the forty dollars and placed the money in a tin container situated behind the bar. Torres stood behind the fixed bar while this transaction took place.

Gomez later saw Castorena enter the premises and sit at the fixed bar close to Gomez. Gomez asked Biller if Castorena had the "stuff." Gomez then placed eighty dollars on the bar counter. Biller took the eighty dollars, walked over to Castorena, and handed him the money. While this took place, Torres stood behind the fixed bar. Castorena took the money and moved to the west end of the bar, where Biller and Castorena had a conversation. Biller returned to where Gomez sat and handed her a plastic package that was open at the top and contained a leafy green substance. Because the package was open, Gomez asked Biller if she had an extra plastic baggie. Biller gave Gomez a plastic baggie. Gomez placed the open package containing the leafy green substance in the new baggie and handed it to Delarosa.

After leaving the premises that night, the agents went to the Santa Ana District office where both the plastic baggie with the leafy green substance and the plastic baggie with the white powdery substance were photographed and presumptive tests were performed. Both baggies and their contents were then booked into the evidence locker. The Orange County Crime Lab later analyzed the contents of the baggie with

the green leafy material and determined that it weighed 5.10 grams and contained marijuana. The Crime Lab also analyzed the contents of the plastic baggie with the white powdery substance and determined that the white powder weighed 831 milligrams and contained cocaine.

Counts 14 through 16

Agents Gomez and Delarosa returned to the licensed premises on May 14, 2012 at approximately 3:00 p.m. There were approximately seven patrons inside. Gomez texted Biller beforehand and ordered eighty dollars' worth of marijuana. Gomez sat at the fixed bar and ordered a Bud Light beer, which she was served. Biller spoke with Gomez and told her she knew Castorena's source and could get Gomez some really good stuff next time. When Gomez asked Biller about Castorena, Biller told her that he would be there later.

Castorena later entered the premises and took a seat at the fixed bar next to Agent Delarosa. Castorena handed Delarosa a plastic baggie containing a leafy green substance. Delarosa placed the baggie in his pocket. After Gomez placed eighty dollars on the bar counter, Delarosa took the money and passed it to Castorena, who placed the money in his pocket. Both bartenders, Biller and Torres, stood behind the fixed bar while this drug transaction took place. However, the evidence did not establish that Marisol Torres was actually aware that Castorena was in possession of a controlled substance or that she actually knew that an illegal drug sale was taking place.

Agent Jennifer Gardea was part of the arrest team that entered the licensed premises on May 14, 2012. She went to the premises to execute an arrest warrant for Tara Biller and Michael Castorena. While questioning Tara Biller, Gardea asked Biller if

she had anything on her that they should know about. Biller responded that she had cocaine in her tote bag, which was on the desk in the office. Biller retrieved her tote and took out a small bag made of jean material. The bag contained a small plastic baggie with a white powdery substance inside and a business card from the licensed premises. When Biller was asked if that was the cocaine, she responded that it was. The Orange County Crime Lab later analyzed the contents of the plastic baggie and determined that the white powder weighed 2.51 grams and contained cocaine.

After leaving the premises that night, the agents went to the Santa Ana District office where the plastic baggie with a leafy green substance was photographed and a presumptive test was performed. The baggie and its contents were then booked into the evidence locker. The Orange County Crime Lab later analyzed the contents of the plastic baggie and determined that it weighed 6.64 grams and contained marijuana.

After the hearing, the Department issued its decision which dismissed counts 14 and 16 — the only counts stemming from bartender Torres' conduct — and determined that the remaining charges were proven and no defense was established. The decision imposed a penalty of revocation, conditionally stayed for three years provided no cause for disciplinary action arise during that time, and concurrently suspended the license for 30 days.

Appellant filed a timely appeal contending (1) it had no knowledge of the sale of controlled substances on the premises, and that knowledge of an employee's illegal acts should not be imputed to an employer; and (2) that the penalty is unfair.

DISCUSSION

I

Appellant concedes the fact of the illegal sales, but contends that the element of knowledge was not proven because neither of appellant's corporate partners were directly aware of the drug transactions. Appellant acknowledges the doctrine of constructive knowledge, but objects that it violates the 14th Amendment of the United States Constitution and is a "fiction that must be rejected." (App.Br. at p. 9.) Moreover, appellant argues that the related doctrine of *respondeat superior* is intended to compensate parties injured in tort, and does not apply here. (App.Br. at pp. 9-10.) Appellant complains that the economic climate in California, which it characterizes as employee-friendly, means that they are "being sued all the time by employees." (App.Br. at p. 8.) It points out that "[e]mployers are fleeing the State of California because of the difficulty involved in the operation of a business." (*Ibid.*) Ultimately, appellant pleads with this Board to discard the "irrational" doctrine of constructive knowledge and hold that innocent corporations cannot be disciplined for the conduct of their employees. (App.Br. at p. 11.)

We will first address counts 3, 7, and 12, all of which were brought under section 24200.5, subdivision (a). That statute provides, in relevant part:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
>
> (a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. *Successive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission*.

(Bus. & Prof. Code § 24200.5(a), emphasis added.)

In *Endo*, the court of appeals interpreted the latter sentence of section 24200.5(a) as a "statutory presumption that [successive] sales over any continuous period of time shall be deemed evidence of such permission" and therefore furnished substantial evidence "that the licensee did 'knowingly permit' the illegal sale of narcotics upon her licensed premises." (*Endo v. State Bd. of Equalization* (1956) 143 Cal.App.2d 395, 399 [300 P.2d 366], internal quotations omitted.) In a footnote, it emphasized that section 25200.5(a) "is in form at least a *legislative* mandate," one that the Board may not even have authority to review under the California constitution. (*Id.* at p. 399, fn., emphasis in original.) Ultimately, the court held that a statutory presumption — as opposed to an inference — cannot be "dispelled by evidence produced by the opposite party." (*Id.* at p. 400, citing *Engstrom v. Auburn Auto. Sales Corp.* (1938) 11 Cal.2d 64, 70 [77 P.2d 1059].)

In *Kirchhubel*, on the other hand, the court did allow that "[t]he presumption is not made conclusive but merely evidence of permission which may be overcome by a contrary showing." (*Kirchhubel v. Munro* (1957) 149 Cal.App.2d 243, 249 [308 P.2d 432].) Though the petitioners in that case presented evidence which created a conflict with the presumption, "[t]he resolving of that conflict was a matter for the Department of Alcoholic Beverage Control, whose action thereon cannot be upset . . . if there is substantial evidence to support it." (*Ibid.*, citing *Covert v. State Bd. of Equalization* (1946) 29 Cal.2d 125 [173 P.2d 545].)

The *Kirchhubel* court also noted the substantial policy justifications for such a presumption:

> Having in mind that the power to regulate the liquor business is a very broad one, there is a natural and rational evidentiary relationship between

> a showing that there have been successive sales of narcotics over a continuous period on licensed premises and the very natural conclusion that the sales could not have continued without the implied or express consent of the licensee. Moreover, a licensee holds his liquor license with the knowledge that he must effectively police his premises against successive sales of narcotics thereon . . . . Such a situation cannot occur if the licensee is vigilant in protecting his license and is at least as interested in protecting the public welfare and morals as he is in making money.

(*Ibid.*)

In sum, the legislature has obviated the need for reliance on the doctrine of constructive knowledge by providing, in the second sentence of section 24200.5(a), a statutory presumption that successive sales of controlled substances on a licensed premises establishes permission.

Appellant presented little evidence to counter this presumption. It is true that Biller was terminated following the violation (Findings of Fact at ¶ 23), but termination after the fact does nothing to show lack of permission beforehand. It is also true that the "Employee Handbook states that no drugs are allowed on the premises,"[2] and this does suggest some minimal prohibitive effort. (Findings of Fact ¶ 23.) Indeed, Brown testified that employees were required to sign the handbook. (RT at p. 179.) However, nothing in the record shows that appellant attempted to verify its bartenders actually *reviewed* the book before signing it, let alone comprehended its contents.[3] Ultimately, there is nothing in Bryant's testimony, in Brown's testimony, or in the evidence to

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[2]This statement is based on testimony alone. The Employee Handbook was not received in evidence.

[3]Bryant testified that premises employees are verbally reminded that drugs are not allowed. (RT at p. 163.) However, he also testified that he lives in Colorado, only visits the premises monthly, and has never personally reminded an employee of any drug policy. (RT at p. 162-163, 172.) Brown's testimony made no reference to verbal reminders.

suggest that appellant's bartenders received any active training whatsoever regarding alcoholic beverage law.[4]

This case is precisely the sort of circumstance the presumption of permission in section 24200.5(a) was intended to remedy — a licensee who takes minimal preventative measures and then defends against repeated narcotics sales on its premises by pleading base ignorance.[5] We must therefore conclude that permission was implicitly given and affirm counts 3, 7, and 12.

We turn, then, to the remaining eleven counts, all of which emerge from violations of one of three provisions of the Health and Safety Code prohibiting the sale of controlled substances. (See Health & Saf. Code §§ 11350, 11352, and 11360(a).) Grounds for suspension or revocation, however, derive not from these provisions directly, but from section 24200, subdivisions (a) and (b), of the Business and Professions Code:

> The following are the grounds that constitute a basis for the suspension or revocation of licenses:
>
> (a) When the continuance of a license would be contrary to public welfare and morals. However, proceedings under this subdivision are not a limitation upon the department's authority to proceed under Section 22 of Article XX of the California Constitution.
>
> (b) Except as limited by Chapter 12 (commencing with Section 25000), the violation or the causing or permitting of a violation by a licensee of this division, any rules of the board adopted pursuant to Part 14 (commencing with Section 32001) of Division 2 of the Revenue and Taxation Code, any

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[4]Indeed, Brown seemed more concerned about his bikini-clad bartenders' use of profanity than whether they were obeying alcoholic beverage laws. (See RT at p. 194.)

[5]*Endo* held that the doctrine of constructive knowledge provided an alternative ground for affirming discipline under the same facts. (*Endo*, *supra*, 143 Cal.App.2d at p. 401-402.) With regard to these three counts, we agree, but like the *Endo* court, we rely instead on section 24200.5(a)'s presumption of permission.

> rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

(Bus. & Prof. Code § 24200.)

Facially, knowledge is not an element of either subdivision of this section. Subdivision (a) goes to the root of the Department's disciplinary authority — whether continuance of the license would be contrary to public welfare and morals. (See Cal. Const. art. XX, § 22; Bus. & Prof. Code § 23001.) The Department's legislative mandate is *not* to guarantee an income for licensees; it is to safeguard the welfare and morals of the citizens of California. Where the Department determines for good cause that continuance of a license would be contrary to that aim, suspension or revocation is justified under section 24200, subdivision (a). (Cal. Const., art. XX, § 22.) Cases interpreting subdivision (a), however, have generally read permission as a necessary element of the Department's burden of proof. (See, e.g., *McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8].)

Subdivision (b), on the other hand, explicitly employs the term "permitted," though it establishes no presumption of permission akin to that provided by section 24200.5(a). Generally, case law holds that actual knowledge is not necessary to establish permission. (See, e.g., *McFaddin*, *supra*, at pp. 1389-1390; *Munro v. Alcoholic Bev. Control Appeals Bd.* (1957) 154 Cal.App.2d 326, 329 [316 P.2d 401]; *Mercurio v. Dept. of Alcoholic Bev. Control* (1956) 144 Cal.App.2d 626, 629-631 [301 P.2d 474]; see also *Swegle v. State Bd. of Equalization* (1954) 125 Cal.App.2d 432 [interpreting section 58 of the Alcoholic Beverage Control Act]; *Mantzoros v. State Bd.*

of Equalization (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657].) As the court of appeals stated in *McFaddin*,

> It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. [Citation.] Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*. [Citations.]

(*McFaddin*, *supra*, at pp. 1389-1390, internal quotations omitted, emphasis in original.)

The policy reasons for this general rule are evident: otherwise, a licensee could escape discipline simply by absenting himself from the premises and maintaining a practiced state of ignorance. In a case involving after-hours sales, the court of appeals observed:

> The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensee would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature.

(*Mantzoros*, *supra*, at p. 144.) It would defy reason and the mandate of the state constitution to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises.

Beginning with *McFaddin*, however, the cases begin to allow for an exception. The *McFaddin* court noted:

> We have not found a case where a licensee's preventative actions were sufficient to find the licensee did not permit its premises to be used in a manner contrary to the public welfare and morals.[fn.] However, *Harris*, *supra*, implies that such a situation may exist if a licensee takes the requisite preventative actions. (See also *Kershaw v. Dept. Alcoholic Bev. Control* (1957) 155 Cal.App.2d 544, 548 [318 P.2d 494] [finding licensee permitted prohibited behavior at least in part because licensee took no measures to curb or prevent behavior]; but see *Reilly v. Stroh* (1984) 161 Cal.App.3d 47, 54 [207 Cal.Rptr. 250] [in cases where a licensee has

> knowledge of underage drinking and does not prevent it "'abstaining from preventative action,' . . . means abstaining from the action that *in fact prevents*, . . ."].) We conclude that where a licensee does not reasonably know of the specific drug transactions and further has taken all reasonable measure to prevent such transactions, the licensee does not "permit" the transactions.

(*McFaddin*, *supra*, at p. 1390, emphasis in original.) The licensee in *McFaddin* had taken profound steps to prevent drug trafficking, including rules in the employee handbook, employee polygraph tests to ensure compliance, undercover personnel to monitor employees' activities, signs offering a reward for information leading to the arrest and conviction of anyone involved in drug transactions, and a survey of the restrooms every ten minutes for drug activity. (*Id.* at pp. 1390-1391.) Ultimately, *McFaddin* held that the licensee's "diligent efforts to control drug trafficking coupled with its lack of knowledge of the specific drug transactions is inconsistent with finding [the licensee] permitted the drug transactions." (*Id.* at p. 1392.)

It is *Laube*, cited by both parties, which ultimately read knowledge into the assessment of permission. (*Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779].) While accepting the definition of "permit" supplied in *McFaddin*, the *Laube* court rejected "the notion that the passive conduct of permitting something by failing to take measures to prevent it does *not* require knowledge of the thing permitted." (*Id.* at p. 373, emphasis added.) "The concept that one may permit something of which he or she is unaware," said the court, "does not withstand analysis." (*Ibid.*) It emphasized that "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly."

In the end, the court expressly held that "a licensee must have knowledge, either actual or constructive, before he or she can be found to have 'permitted' unacceptable conduct." (*Id.* at p. 77.) Notably, this holding does not demand *actual* knowledge on the part of appellant's corporate officers. It explicitly allows for *constructive* knowledge.

It is well-settled in alcoholic beverage case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Indeed, earlier in *Laube*, the court observed that the factual discussion not subject to review on appeal included "the element of the licensee's knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge *or constructive knowledge imputed to the licensee from the knowledge of his or her employees.*" (*Id.* at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123] and *Endo*, *supra*, 143 Cal.App.2d at pp. 401-402].)

Appellant urges this Board to reject the doctrine of constructive knowledge outright as a judicially manufactured fiction that is "clearly wrong." (App.Cl.Br. at pp. 2-3.) It argues that a "competitor could totally undermine another business by having somebody sell drugs at that location for the purpose of taking advantage of the imputation doctrine." (*Id.* at p. 3.) Appellant ignores that fact that imputation must be from an *employee's* knowledge, and the employer is in the best position to screen and supervise employees. Elimination of the constructive knowledge doctrine would simply encourage licensees to be cavalier in hiring the very people responsible for handling

and selling alcoholic beverages, and negligent in overseeing their conduct on the job. Such an outcome hardly serves the welfare and morals of California's citizens. We therefore affirm the applicability of the constructive knowledge doctrine, despite appellant's objections.

In the decision below, the ALJ correctly cited *Laube's* observation that knowledge may be imputed from appellant's employees. (Legal Basis for Decision and Conclusions of Law ¶ 9.) He found that "[s]ince the evidence established that Biller was the Respondent's employee, Biller's on-premises knowledge and misconduct are imputed to the Respondent." (Findings of Fact ¶ 22.) Moreover, other factual findings support constructive knowledge: the transactions took place while Biller was on-duty (Findings of Fact ¶¶ 3-7, 9-12, 14-15; 17-19); Biller kept her drugs in the premises' back office (Findings of Fact ¶ 19); the money and drugs were exchanged across the fixed bar (Findings of Fact ¶ 7, 10-11, 14-15, 18); and the transactions were conducted loudly and were audible across the premises. (Findings of Fact ¶¶ 6, 10.)

Appellant's defense to constructive knowledge, on the other hand, is characterized largely by absence. Bryant testified that he lives out of state and only visits the premises monthly. (RT at p. 162.) He did not know the name of the manager hired to operate the premises, nor did he know what hours she worked or whether she was still employed there. (RT at pp. 169-170.) He testified that he never personally did any training, and that he did not create the employee handbook. (RT at pp. 171-172.) Bryant's chronic absence from the licensed premises is precisely the sort of circumstance the constructive knowledge doctrine is intended to guard against.

Bryant, however, characterized Brown as the "hands-on manager" of the premises (RT at p. 168), and Brown agreed with this characterization. (RT at p. 175.)

Brown, for his part, testified that a woman identified as Mary Block — who did not testify — would "help [him] out once in a while" if he wasn't going to be at the premises. (RT at pp 177-178.) When asked on cross-examination if he had hired Block to help out, Brown's answer suggested a far more casual arrangement: "Her and I have been friends for 13 years now, and she would just help me out once in a while when I needed it." (RT at p. 187.) Brown testified that he was at the premises four or five days a week, though he was unable to give any concrete statement regarding hours or time of day. (RT at pp. 190-191.) He estimated he was present on "day shifts" for a "[c]ouple hours, if that" or "an hour," but that he spent more time there at night. (RT at p. 191.) He stated that he was present at the premises on the day the arrests took place, for "about an hour and a half, hour and 45 minutes," but that he left the premises less than five minutes before the arrests took place. (RT at p. 189.) He did testify that when he was not present, either Mary Block or Darren Salzer would close the premises, and that the bartenders had no authority to do so. (RT at p. 192.) Neither Block nor Salzer testified.

Testimony from Agent Gomez, however, suggests that the bartenders were frequently left unsupervised:

> [MS. CASEY] On any day that you were inside the premises, was there anyone other than Tara and Marisol in the premises who was an employee?
>
> A Yes.
>
> Q Who would that be?
>
> A She identified herself as Mary, and she informed us that she was the on-duty manager.
>
> THE COURT: And what date was that?

THE WITNESS: I believe on the 16th, the 3rd, and the 30th.

BY MS. CASEY:

Q And how long would Mary remain on the premises?

A Approximately an hour; usually not more than that.

(RT at pp. 81-82.) Indeed, testimony from Agent Gardea indicates that following Biller's arrest, Torres was the only remaining employee on the premises. (RT at p. 108.)

At oral argument, appellant's counsel urged us to make clear that *respondeat superior* and principles of strict liability applicable to ABC disciplinary actions against licenses did not mean absolute liability, a distinction he said the Department failed to grasp. We said in response, and reiterate here, that a number of our opinions have underscored the importance of this distinction, and when the Department has, in specific cases, seemed not to "get it" we have been diligent in providing further, necessary clarification. Indeed, in applying *Laube*, we have shown our willingness to accept that in some cases, the doctrine of constructive knowledge produces an unfair result. (See *Mainstreet Enterprises* (2013) AB-9323 [limited nature of conduct combined with licensee's extensive preventative measures militated against discipline]; *Zartosht, Inc.* (2013) AB-9295 [conduct extreme and unforeseeable].) Such an exception encourages licensees to take the strongest possible steps to prevent employee violations, but also acknowledges practical limitations.

Here, however, appellant's management style earns no praise. Uncontroverted evidence paints a picture of a largely unsupervised sports bar, where bartenders are frequently left alone — clad only in tiny bikinis — to run the show. To hold that there cannot be constructive knowledge is, in the facts animating this case, to hold that there can effectively never be knowledge, actual or constructive, and merely encourages

appellant's management to absent itself further. Appellant has an affirmative duty to maintain a lawful premises; it cannot use its deficient management as a defense against unlawful conduct. It was entirely reasonable for the ALJ to conclude that the knowledge of Tara Biller — appellant's bartender and, often, one of only two employees on the premises — was properly imputed to appellant itself.

Grounds for revocation therefore exists under section 24200, subdivisions (a) and (b), for violations of the Health and Safety Code, sections 11350, 11352, and 11360(a). In addition to counts 3, 7, and 12, discussed above, counts, 1, 2, 4, 5, 6, 8, 9, 10, 11, 13, and 15 are affirmed.

II

Appellant contends that the penalty of stayed revocation with a concurrent 30-day suspension is excessive. It argues that the suspension could cost appellant its business, and that a reasonable fine would be more appropriate.

The Appeals Board may examine the issue of an excessive penalty when raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, it will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

"Unless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors." (*People v. King* (2010) 183 Cal.App.4th 1281, 1322 [108 Cal.Rptr.3d 333]; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1318 [262 Cal.Rptr. 331].)

> Where, as here, the trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. "To be entitled to relief on appeal . . . it must clearly

> appear that the injury resulting from such wrong is sufficiently grave to amount to a manifest miscarriage of justice. . . . [Citations.]"

(*Mission Imports, Inc. v. Superior Ct.* (1982) 31 Cal.3d 921, 932 [647 P. 2d 1075].) "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [400 P.2d 745].)

Rule 144, which sets out the Department's penalty guidelines, recommends revocation for a violation of Business and Professions Code section 24200.5, or for any violation of the Health and Safety Code. (Penalty Guidelines, Cal. Code Regs., tit. 4, § 144.) While appellant may arguably suffer financial injury from its stayed revocation and 30-day suspension, it does not rise to the level of a "manifest miscarriage of justice." (See *Mission Imports*, *supra*.) Indeed, it is squarely within the penalty guidelines and entirely within the Department's discretion. We have neither authority nor cause to reconsider the penalty imposed.

ORDER

The decision of the Department is affirmed.[6]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6]This 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.