

8/2

BEFORE THE LIQUOR CONTROL COMMISSION  
OF THE STATE OF OREGON

In the Matter of the	)	
Proposed Suspension of the	)	
Dispenser Class A (DA)	)	
License held by:	)	FINAL
	)	FINDINGS OF FACT,
Copperstone Restaurant & Lounge, Inc.	)	CONCLUSIONS OF LAW,
THE OUTRIGGER	)	AND ORDER
264 E. Main Street	)	
Hillsboro, Oregon 97123	)	
- - - - -	)	
Washington County	)	

A hearing in the above matter was held on the 8th day of September, 1983, in Portland, Oregon, before Hearings Examiner Douglas Crumme'. The Licensee appeared in person and was represented by Stephen F. English, Attorney at Law. The Commission was represented by legal counsel.

The Hearings Examiner, having considered the record of the hearing, the applicable law and regulations and being fully advised, issued a Proposed Order dated May 15, 1984.

No Exceptions were filed to the Proposed Order within the fifteen (15) day period specified in OAR 845-03-050.

RECORD OF PREVIOUS VIOLATIONS

<u>DATE</u>	<u>OFFENSE</u>	<u>DISPOSITION</u>
1-5-81	Employee consumed on duty; sale to visibly intoxicated person; disorderly premises	\$450 fine
11-19-81	Failed to immediately transmit service permit application with fee	\$300 fine
2-9-83	Failure to meet minimum food service requirements	Letter of Reprimand

Now, therefore, the Commission hereby adopts the Proposed Order of the Hearings Examiner as the Final Order of the Commission, and enters the following:

FINDINGS OF FACT

1. Copperstone Restaurant and Lounge, Inc. held a Dispenser Class A (DA) license at THE OUTRIGGER, 264 E. Main Street, Hillsboro, Oregon, at all dates relevant to the Findings of Fact below.

2. The Commission has charged the Licensee with the violation of ORS 472.180(8) (knowingly sold alcoholic liquor to visibly intoxicated persons).

3. James Baker and Stephen Van Metre were in the Outrigger from about 7:15 a.m. to 8:15 a.m. on September 19, 1981.

4. When they entered the Outrigger, Mr. Baker and Mr. Van Metre had been awake for about 24 hours. Mr. Baker had consumed a large amount of beer, consumed some hard liquor and used marijuana during this period. Mr. Van Metre had consumed a similar amount of alcohol. Mr. Baker felt intoxicated when he entered the premises.

5. Linda Dillenburg was on duty as a bartender in the Outrigger when Mr. Baker and Mr. Van Metre were there from 7:15 a.m. to 8:15 a.m. on September 19, 1981. She was the only employee on duty in the lounge during this time.

6. There were about four other customers in the Outrigger besides Mr. Baker and Mr. Van Metre.

7. Mr. Baker's and Mr. Van Metre's eyes were widely dilated when they entered the Outrigger. Ms. Dillenburg noticed that their eyes looked "like saucers". Commission's Exhibit E.

8. Mr. Baker and Mr. Van Metre each ordered a beer from Ms. Dillenburg shortly after they entered. They consumed these beers near the bar over about a 15-minute period.

9. Mr. Baker and Mr. Van Metre each ordered a shot of tequila and a glass of beer after finishing their first beers. They consumed the tequila in one swallow, had some beer and began playing pool.

10. Mr. Baker's and Mr. Van Metre's pool table was about 12 to 15 feet from where Ms. Dillenburg was standing behind the bar.

11. After playing pool with each other, Mr. Baker and Mr. Van Metre each played a game of pool with a third patron, John Earl.

12. During his pool game with John Earl, Mr. Baker played much more poorly than normal. He is normally a skilled pool player.

13. Mr. Baker's manner of walking at the pool table suggested he had been drinking but did not show intoxication, as evidenced by the reported testimony of John Earl.

14. While Mr. Baker was playing pool with Mr. Earl, Mr. Van Metre ordered himself and Mr. Baker double shots of bourbon. These were the last drinks Linda Dillenberg served them.

Mr. Baker walked to the bar, drank some of the bourbon and drank some more of his second beer as a chaser.

15. Mr. Baker and Mr. Van Metre were not noisy and did not cause any disturbances in the Outrigger. Mr. Baker did not speak with bartender Linda Dillenburg.

16. Mr. Baker and Mr. Van Metre left the Outrigger in a motor vehicle. Mr. Baker drove. Mr. Baker blacked out. A traffic accident occurred at about 8:30 a.m.

17. Mr. Baker's vehicle contained a half-full bottle of distilled liquor when the accident occurred. The record does not show whether Mr. Baker consumed any of this hard liquor between leaving the Outrigger and the occurrence of the accident.

18. Mr. Baker's blood contained approximately 0.24 percent alcohol at 11:01 a.m. and 0.22 percent at 12:01 p.m. on September 19, 1981.

19. It is likely that Mr. Baker was under the influence of the stimulant phenylpropanolamine when in the Outrigger from 7:15 a.m. to 8:15 a.m. on September 19, 1981, as evidenced in part by the testimony of Dr. William J. Brady. It is likely that phenylpropanolamine would have masked to some degree the casually observable symptoms of alcohol intoxication that Mr. Baker would have otherwise shown, as evidenced by the testimony of Dr. William J. Brady and Dr. George Olsen.

20. Mr. Baker possessed pills containing phenylpropanolamine, ephedrine and caffeine at the time of the accident. Three of the pills contained enough of these stimulants to potentially completely mask the gross observable symptoms that Mr. Baker would otherwise show from the alcohol in his system at the time of the accident.

21. Alcohol can cause dilation of the eyes. However, dilated pupils are not a common effect of alcohol use, as evidenced by the testimony of Dr. George Olsen. Other substances can also cause dilation of the eyes. Eye pupil size varies widely between individuals.

#### DISCUSSION

1. The record does not contain evidence that Stephen Van Metre showed signs of visible intoxication in the Outrigger prior to the last service of alcohol to him, other than that his eyes were abnormally dilated. The only evidence concerning possible intoxicated behavior prior to the sale of the last drinks involved Mr. Baker.

2. Does the evidence establish that Mr. Baker was visibly intoxicated in the Outrigger prior to the last sale of alcohol to him?

The evidence of those who observed the condition and behavior of James Baker prior to the last drink served to him included the testimony, reported testimony, and written statement

of bartender Linda Dillenberg, the reported testimony of James Baker, the reported testimony of patron John Earl, and the reported testimony, deposition and other statements of patron Nellie Earl.

Linda Dillenberg's testimony and statements did not indicate any behavior or condition that showed Mr. Baker to be visibly intoxicated. She noticed his eyes were widely dilated. However, other evidence showed that pupil dilation is not a reliable sign of intoxication. Pupil size varies among individuals. Pupil dilation can be caused by other drugs or substances besides alcohol. The evidence does not show that only intoxicating substances cause pupil dilation.

James Baker's reported testimony did not show he was visibly intoxicated in the Outrigger prior to service of the last drink. He did testify that he felt intoxicated. But he did not particularly recall how he was walking or acting, other than not playing pool up to his usual level. Commission's Exhibit A, pages 405, 408 and 410.

John Earl's reported testimony did not show Mr. Baker was visibly intoxicated prior to service of the last drink to Mr. Baker. Mr. Earl testified that Mr. Baker's behavior at the pool table showed signs he had been drinking, but did not show intoxication. Commission's Exhibit A, page 816. Mr. Earl's reported testimony did not show that he noticed any signs of intoxication in Mr. Baker or Mr. Van Metre until they were

leaving, after service of the last drinks to them. Commission's Exhibit A, page 816.

The reported testimony, deposition and other statements of Nellie Earl do not establish that Mr. Baker was visibly intoxicated prior to the last drink served to him because Mrs. Earl has made entirely inconsistent statements on this point. In her reported testimony from a 1982 civil trial, Mrs. Earl stated she observed Mr. Baker being sold and served alcohol while he was staggering. In a deposition in September, 1983, Mrs. Earl stated she saw Mr. Baker stagger in the Outrigger, but not before the last drink sold to him. Commission's Exhibit B. In an interview with private investigator Sue Curry in October, 1981, Mrs. Earl stated she did not notice anything unusual about the behavior of Mr. Baker or Mr. Van Metre in the Outrigger. She stated there were no signs of intoxication, and that there was no commotion, no staggering, and no slurring of speech. Mrs. Earl was asked at her September, 1983 deposition about the October, 1981 conversation with Ms. Curry. Mrs. Earl did not recall the conversation. When a witness is unsure of or does not remember having made a particular prior inconsistent statement, the witness may be impeached by evidence of having made the statement. State v. Van Gorder, 56 Or. App. 83,89, 641 P2d 584 (1982); petition for review denied, 293 Or 146 (1982). Because of her inconsistent statements, it is not possible to determine which of Mrs. Earl's statements reflect what

she really believes she saw. She is not a credible witness. Her statements and testimony concerning the behavior and condition of Mr. Baker should be given no weight.

In sum, then, the most that the evidence reasonably establishes concerning Mr. Baker's behavior and observable physical condition before service of the last drink is that his eyes were dilated, his pool game was below his normal high skill level and his behavior at the pool table showed he had been drinking, but did not show intoxication. No reliable witness expressed the opinion that Mr. Baker was visibly intoxicated prior to the last drink served to him. No reliable witness stated that Mr. Baker staggered, slurred his speech or did anything else showing visible intoxication before the last drink served to him. The reliable statements in the record of persons at the Outrigger that morning do not reasonably establish visible intoxication.

#### ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission may cancel or suspend any license granted, or impose a monetary penalty in lieu of or in addition to suspension as provided by ORS 472.187, if it finds that the licensee knowingly has sold alcoholic liquor to persons under 21 years of age or to persons visibly intoxicated at the time of sale. ORS 472.180(8).

The record did not establish by a preponderance of the evidence that James Baker or Stephen Van Metre were visibly intoxicated at the times of sale of alcohol to them in the Outrigger on September 19, 1981. Visible intoxication has not

been established by the statements in the record of the persons who were at the Outrigger that morning. See Discussion Nos. 1 and 2 above. We cannot conclude Mr. Baker was visibly intoxicated in the Outrigger simply by inference from his blood alcohol level later that morning. Mr. Baker was likely under the influence of stimulant drugs capable of wholly masking visible signs of intoxication. The charges under ORS 472.180(8) should therefore be dismissed.

FINAL ORDER

It is hereby ordered that the charges against the Copperstone Restaurant and Lounge, Inc. at the Outrigger, 264 E. Main Street, Hillsboro, Oregon, for the violation of ORS 472.180(8) be DISMISSED.

It is further ordered that due notice of such action, stating the reasons therefor, be given as provided by law.

Dated this 4th day of June, 1984.

Douglas Crumme  
Douglas Crumme  
Hearings Examiner  
Hearings Division

William A. Thomas for C. Dean Smith  
C. Dean Smith  
Administrator  
OREGON LIQUOR CONTROL COMMISSION

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