

STATE OF NEW JERSEY
NEW JERSEY RACING COMMISSION

OAL Docket No. RAC 13660-14
Agency Docket No. NJRC-16-H-14-MD

DARRAN CASSAR,)
Petitioner,)
v.)
NEW JERSEY RACING COMMISSION,)
Respondent.)

FINAL DECISION

In an April 20, 2017 Initial Decision, the Administrative Law Judge ("ALJ") concluded that Petitioner, Darran Cassar, violated the Commission's rules when Machapelo, a standardbred horse trained by him, tested positive for morphine and hydromorphone after winning the second race at the Meadowlands racetrack on March 22, 2014. The facts of the case are largely undisputed and the Commission adopts the ALJ's findings of fact except as expressly indicated herein.

The facts set forth in this Final Decision are taken from the Initial Decision unless otherwise indicated with a citation to the record. On April 1, 2014, Truesdail Laboratories, Inc. reported that urine sample D3912, which proved to be the post-race urine sample taken from Machapelo after the March 22, 2014 race, tested positive for morphine and for hydromorphone. Exhibit J2. Petitioner requested that a split sample be sent to the Veterinary Diagnostic Laboratory at Iowa

State University. Exhibit J8. In a report dated May 27, 2014, the Iowa State lab confirmed the presence of morphine at a level of 963 ng/mL and hydromorphone at a level of 10.6 ng/mL. Initial Decision at 8; Exhibit J8. The morphine and hydromorphone were not present in the horse's blood sample at a level that was scientifically defensible. T2:14-9 to -15.¹

The Commission's Board of Judges conducted a hearing and determined that Petitioner had violated N.J.A.C. 13:71-7.29(a)(13), -23.1, -23.6 and -23.7. Exhibit J1. The Board of Judges imposed a 1-year suspension and \$1,000 fine, disqualified the horse and ordered the redistribution of the purse. Initial Decision at 2; Exhibit J1. Petitioner appealed and the matter was transmitted to the Office of Administrative Law ("OAL") as a contested case.

Morphine and hydromorphone ("Dilaudid") are both listed on the Association of Racing Commissioners International's ("ARCI") Uniform Classification Guidelines for Foreign Substances and Recommended Penalties ("ARCI Guidelines") as Class 1 drugs. Exhibit P1 at 12. The ARCI defines Class 1 drugs as "[s]timulant and depressant drugs that have the highest potential to affect performance and that have no generally accepted medical use in the racing horse." Ibid.

At the hearing, several witnesses testified that hydromorphone is a metabolite of morphine in humans and that this was probably the case in horses also. See Initial Decision at 4, 8. No scientific study establishes that

¹ The symbol T2:14-9 refers to the transcript of the December 22, 2016 hearing, page 14, line 9.

hydromorphone is a metabolite of morphine in horses. Id. at 8. However, the ALJ found that this must be the case and the Commission believes that it is constrained to accept this finding of fact based upon the record before us. See T2:107-1 to T2:109-5.

The ALJ makes two other findings of fact which the Commission cannot accept. First, the Commission rejects the ALJ's finding that "[t]he 963 ng/mL of morphine was the result of feed contaminated with morphine. . . ." Initial Decision at 8. The record is devoid of any evidence that this morphine positive resulted from contaminated feed. There is no indication that the feed was ever tested. No witness testified that the morphine was present in the horse's feed and no documentary evidence of such was entered. Moreover, Dr. Fontana testified that the concentration of morphine in a urine sample which results from a feed contaminant is typically less than 100 ng/mL. T1:77-12 to -13.² As a result, the Commission must reject this finding of fact.³

Second, the Commission rejects the ALJ's finding that "neither drug had

² The symbol T1:77-12 refers to the transcript of the October 24, 2016 hearing, page 77, line 12.

³ At the OAL hearing, Dr. Fenger, Petitioner's expert, testified that the morphine positive was the result of the horse's urine sample being contaminated after collection. T2:101-5 to -8, In finding that "[t]he 963 ng/mL of morphine was the result of feed contaminated with morphine," the ALJ rejected Dr. Fenger's assertion that the sample was contaminated after collection. The Commission also rejects Dr. Fenger's assertion and finds that the urine sample was not contaminated after collection based upon the testimony of Robert Cosden, Dr. Norman Hester and Dr. Anthony Fontana regarding the documentation of the chain of custody for this sample. See also Exhibit J5.

any pharmacological effect on Machapelo on the day of the race.” Ibid. In finding this fact, the ALJ accepted the testimony of Dr. Fenger. According to the ALJ, it was Dr. Fenger’s “considered opinion . . . that the trace amount of morphine (and hydromorphone) had no pharmacological effect on Machapelo the day of the race.” Ibid.

In testifying that the morphine and hydromorphone would not have any pharmacological effect on a horse, Dr. Fenger stated that the levels are “an order of magnitude away from the amount that I would expect to see in urine if there was a pharmacological effect . . . [or] more like several orders of magnitude lower.” T2:95-15 to -25. She clarified that several orders of magnitude would be “a hundred times lower than the amount that I would expect to see of any remote pharmacologic effect.” T2:96-3 to -5.

In offering this testimony, Dr. Fenger did not cite any scientifically based equine studies measuring the impact of morphine on a horse’s performance. Instead, Dr. Fenger appears to have largely relied upon the Substance Abuse and Mental Health Service Administration’s (“SAMHSA”) guidelines for humans -- citing the 2,000 ng/mL threshold for pilots and the 300 ng/mL threshold for parolees. T2:96-6 to 99-16. However, there are no SAMHSA guidelines for horses and Dr. Fenger offered no other scientifically based support for her opinion. As a result, the Commission rejects her opinion and the ALJ’s finding as speculative.

In prosecuting a drug positive, the Commission need not prove that the drug affected the horse’s performance. New Jersey law bans the administration of

all drugs and foreign substances on race day except for Lasix which is allowed under strict regulatory conditions and the levels are carefully monitored. When a horse tests positive, New Jersey law imposes strict liability on trainers regardless of whether the drug affected the horse's performance. Our courts have recognized this "strict and close regulation . . . as highly appropriate [to ensure] that horse racing activities be conducted in a manner deserving of public confidence" since one essential purpose of the Racing Act, N.J.S.A. 5:5-22 et seq., "is to prevent persons from tampering with race horses." Dare v. State, 159 N.J. Super. 533, 537 (App. Div. 1978). As recognized by the United States Supreme Court in Barry v. Barchi, 443 U.S. 55, 64, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365, 375 (1979), "the State's interest in preserving the integrity of the sport and in protecting the public from harm" is most acute when, like here, a race horse has been exposed to drugs.

The racing industry is damaged every time a horse tests positive for a drug regardless of whether the drug actually affects the horse's performance. Although this Commission may disqualify a horse after the test results become available, we cannot do anything to help the wagering public -- the damage is done. Once the race becomes official, the wagers are paid based upon that order of finish. At the OAL, Presiding Judge John Tomasello, who has been employed by the Commission as a race official for 22 years, testified about this damage to the industry from the public's loss of confidence. T1:18-16 to T1:19-14.

Machapelo won the race. Every person who wagered in that race on a horse other than Machapelo, either to win or in exotic combinations, lost his or her

wager. The public then learns that Machapelo tested positive for morphine and hydromorphone. This fact may convince some of them to cease wagering altogether because of the appearance that horse racing is unfair, or worse, corrupt -- rigged by trainers seeking unfair chemical advantage.

Wagers placed on horse races are essential to the well being of the racing industry as a certain percentage of these wagers are dedicated to purse money at future races. The larger the wagering handle, the higher the purses at that track. A racetrack offering larger purses will attract more and better quality horses, trainers and drivers which will, in turn, generate more interest from the wagering public and larger wagering handles. A racetrack that cannot attract the wagering public will spiral downward if it cannot offer a competitive product.

At the hearing, neither attorney presented evidence as to whether the morphine positive actually did impact Machapelo's performance on March 22, 2014. As is the case with most professional sports, the horse racing industry carefully records and documents the performance of its athletes. The past performance of our equine athletes is readily available to, and routinely relied upon by, numerous horse racing fans and the wagering public.

The United States Trotting Association ("USTA") is a "not-for-profit association of Standardbred owners, breeders, drivers, trainers, and officials organized to provide administrative, rulemaking, licensing and breed registry services to its members." See <http://www.ustrotting.com/about.cfm>. One of its primary purposes is to "maintain the racing and breeding records of more than

700,000 Standardbreds” Ibid. The USTA’s Pathway’s database “forms the backbone of the records of the sport and is an unparalleled research resource.” Ibid.

When handicapping a race, the wagering public readily relies upon the USTA past performance records and we take notice of these records as “propositions of generalized knowledge which are capable of immediate determination by resort to [this] source whose accuracy cannot reasonably be questioned.” See N.J.R.E. 201; N.J.R.E. 202. Anyone checking the USTA past performance records for Machapelo may readily conclude that the morphine had a positive impact on the horse’s performance and caused him to win the race as the USTA records for this horse could be read to suggest a startling reversal of form in its March 22, 2014 race. See Expanded Horse Chart for Machapelo for 2014, https://pathway.ustrotting.com/online-reports/horse/a_rchart_exp.cfm?horse_id=949737&year=2014&gait=P. After Petitioner started training this horse, Machapelo raced in the following 1 mile races at these tracks, which were all fast tracks (except where noted), with the following post positions, placements and times of finish:

February 4, 2014	Yonkers Raceway	PP8	2 nd place	1:56.3	
February 21, 2014	Yonkers Raceway	PP6	2 nd place	1:56.2	(good)
March 1, 2014	Yonkers Raceway	PP1	3 rd place	1:54.2	
March 22, 2014	Meadowlands	PP1	1st place	1:51.2	
March 29, 2014	Meadowlands	PP6	9 th place	1:53.3	(sloppy)
April 5, 2014	Yonkers Raceway	PP5	3 rd place	1:54.0	
April 19, 2014	Yonkers Raceway	PP3	5 th place	1:55.0	
May 3, 2014	Yonkers Raceway	PP3	5 th place	1:54.2	
May 10, 2014	Yonkers Raceway	PP4	4 th place	1:56.0	
May 17, 2014	Yonkers Raceway	PP7	6 th place	1:55.1	

Ibid. In checking these past performance records, the public would see that in the March 22, 2014 race, the horse raced from 2.1 to 5.1 seconds faster than it did in

numerous races before and after the Meadowlands' race at issue. Racing fans might easily conclude that this horse won the race because it was drugged.

In taking notice of these past performance records, the Commission wishes to be clear. We do not use these records to make any finding of fact or law. We do not find that the morphine actually did enhance Machapelo's performance in the race.⁴ We take notice of these past performance records to make a point. Drug positives devastate the integrity of this sport. The mere appearance, even if speculative, that the morphine may have enhanced the horse's performance can be enough to deter the public from wagering. Public perception is vital to the continued viability of horse racing and this Commission must maintain zero tolerance for drug positives in this highly-regulated industry.

The Commission adopts the ALJ's conclusions that Petitioner violated N.J.A.C. 13:71-23.6 for failing to protect the horse from the administration of morphine, N.J.A.C. 13:71-23.1 for failing to protect the integrity of the race and for failing to guard the health of the horse and N.J.A.C. 13:71-7.29 for conduct detrimental to the sport. Initial Decision at 9. The Commission also adopts the ALJ's conclusion that the horse should have been disqualified and the purse redistributed under N.J.A.C. 13:71-23.7. Ibid. However, the Commission does not agree with the ALJ's conclusions concerning the discipline to be imposed.

In determining the appropriate penalty, the ALJ rejected the 1-year

⁴ The Meadowlands, which is a 1 mile racetrack, is likely a faster racetrack than Yonkers Raceway, which is a one-half mile racetrack. This may not be apparent to those reading the horse's past performance records.

suspension and \$1,000 fine imposed by the Commission's Board of Judges and concluded that Petitioner should only serve a 15-day suspension and pay a \$500 fine. In doing so, the ALJ relied exclusively upon the penalty recommended by the ARCI in the ARCI Guidelines for an unintentional administration of morphine.⁵ The ALJ did so despite the fact, clearly established in the record before him, that this Commission has never adopted the ARCI Guidelines and its recommended penalties. As a result, the Commission rejects the ALJ's conclusion that a 15-day suspension and \$500 fine should be imposed and we independently determine the appropriate penalty based upon the record.

At the OAL hearing, Mr. Tomasello testified regarding the Commission's procedure for imposing penalties and the factors that must be considered and weighed. See T1:13-17 to T1:21-15. Mr. Tomasello stated that the Commission's

⁵ The ARCI Guidelines considered by the ALJ was outdated. At the December 22, 2016 hearing, Petitioner's attorney offered ARCI Guidelines, Version 12, into evidence. T2:41-24 to T2:42-19. See Exhibit P1. Version 12, upon which the ALJ relied, recommended a Class B penalty for a morphine positive with a footnote stating that "[p]enalty class 'A' recommended if regulators can prove an intentional administration." Exhibit P1 at 12. However, previously, on December 9, 2016, the ARCI had revised the ARCI Guidelines by changing the penalty recommended for a morphine positive from a Class B penalty to a Class A penalty. See ARCI Guidelines, Version 13.01 at pages 12, 33 and 35, at <http://arcicom.businesscatalyst.com/model-rules---standards.html>. The ARCI now takes the position, in a footnote, that "[i]f it is determined . . . that the finding of cocaine or morphine was unintentional and not based on an attempt to affect the outcome of a race, the Stewards or Racing Authority may elect to assign a Class B penalty to the trainer." Id. at 12 (emphasis added). For the first offense in a Class A penalty, the ARCI recommends a "[m]inimum one-year suspension absent mitigating circumstances" and a "[m]inimum fine of \$10,000 or 10% of the total purse (greater of the two) absent mitigating circumstances" and "for any further action deemed necessary by the Commission." Id. at 28. The Commission finds the ALJ's reliance on Version 12 of the ACRI's Guidelines is immaterial as this Commission has not, in any event, adopted them.

Board of Judges does consult the ARCI Guidelines regarding its classification of drugs and recommended penalties. T1:13-17 to T1:15-15. However, Mr. Tomasello's testimony was clear. The Commission has not adopted the ARCI Guidelines and these penalty recommendations are used solely as guidelines. T1:14-9 to -11.

While the Commission has adopted other ARCI documents, see N.J.A.C. 13:71-23.1(b)(14)(incorporating the thresholds in the ARCI's Controlled Therapeutic Medication Schedule by reference) and N.J.A.C. 13:71-23.7(c)(adopting the ARCI's Model Rule ARCI-025-02B(13), Multiple Medication Violations, by reference), we have consciously decided not to adopt the ARCI Guidelines. Although the ARCI Guidelines can be a useful tool, the Commission has not adopted them, in large part, because it does not agree with many of the recommended penalties.

For example, in our final decision issued in New Jersey Racing Commission v. Elliot, 96 N.J.A.R. 2d (RAC) 31, 1994 N.J. AGEN Lexis 692 (January 6, 1994), aff'd New Jersey Racing Commission v. Elliot, 290 N.J. Super. 140 (App. Div. 1996), the Commission rejected the ALJ's imposition of a penalty recommended by the ARCI in connection with multiple Fenspiride positives, which the ALJ determined would be a Class 3 drug. Pointing out that "the ARCI Guidelines have never been adopted by this Commission as a standard with which to judge penalties," the Commission explained that "generally we did not believe the penalties for Class I and II drugs, as defined in the ARCI guidelines, were high enough." Id. at 13. The Commission went on to reject the ALJ's imposition of a 6-month suspension and instead ordered a 18-month suspension for the first Fenspiride positive and a 12-month suspension for each additional Fenspiride positive. Id. at 25-26.

The Commission must reach the same conclusion here. We do not agree that a Class B penalty should be imposed for the Class 1 drug morphine even if the administration of the morphine was unintentional. At the OAL hearing, there was no evidence that Petitioner intentionally administered the morphine to the horse. It is often the case that the Commission cannot prove whether a drug was administered intentionally or not. As is the case here, the trainer and his staff often deny any knowledge as to how the drug made its way into the horse. Unless a perpetrator is caught in the act of administering the drug, he or she can easily profess innocence and the Commission can seldom prove otherwise.

However, the Commission need not prove that Petitioner administered morphine to the horse. It is enough for the Commission to consider what Petitioner did not do. He did not protect the horse under his care. In New Jersey, N.J.A.C. 13:71-23.6(d) clearly establishes the trainer's obligation "to protect and guard the horse against administration of any drug or substances foreign to the natural horse." N.J.A.C. 13:71-23.1(b) mandates that "no horse entered to start in any race shall carry in its body any drug and/or substance foreign to the natural horse" except as otherwise allowed by certain medication rules. Pursuant to N.J.A.C. 13:71-23.6(a), "[a] trainer shall be the absolute insurer of and is responsible for the condition of a horse within his care and custody."

The intent of the Commission's rules is "to protect the integrity of horse racing, to guard the health of the horse, and to safeguard the interests of the public and racing participants. . . ." N.J.A.C. 13:71-23.1. The Commission's regulations protect the wagering public and ensure that horse racing occurs in a manner which

is fair and safe to the race participants. Nothing undermines the public's confidence in racing more than learning a race horse has been drugged. It is, therefore, imperative that the Commission carefully monitor the conditions of race horses and hold licensees strictly liable if a horse under their care tests positive. Trainers must be deterred from failing to guard their horses. The Commission must be vigilant in bolstering the public's confidence that they will get what they pay for -- a race fairly conducted with all horses performing without the assistance of drugs and foreign substances.

Strict regulation and strict liability are also essential to ensure the health, safety and welfare of the horses and drivers who race. A horse racing with drugs in its system can act unpredictably or even go down during a race. One horse can start a chain reaction involving the other drivers, horses and sulkies in the race and result in severe injuries or death. The racing industry must have zero tolerance for horses that test positive for drugs -- especially Class 1 drugs. The courts of this State have recognized that with the principles of "trainer responsibility" clearly established in law, "it is well within the authority and discretion of the Commission to impose severe sanctions for violations of those principles." New Jersey Racing Commission v. Elliot, *supra*, 290 N.J. Super. at 146.

Mr. Tomasello testified that the appropriate penalty for this morphine positive, where there is no indication that the drug was intentionally administered, is a 1-year suspension and \$1,000 fine. T1:13-11 to -16. The Commission's Board of Judges agreed with him. Exhibit J1. Citing the importance of the job of regulators to protect the horse and the betting public, Mr. Tomasello explained that the penalty

would have been much higher if it could be established that Petitioner intentionally administered the morphine to the horse. T1:16-22 to -24. He pointed out that one of the dangers of the Class 1 drug for which the horse tested positive is that it could mask lameness, hide a fracture and possibly result in a catastrophe. T1:16-7 to -17.

Mr. Tomasello explained that as a licensed trainer, Petitioner is obligated to protect the horse against the administration of drugs and that he obviously did not do so here. T1:16-24 to T1:17:-2. He indicated that the Board of Judges considered a suspension of 15 months or 18 months but ultimately decided that a 1-year suspension was appropriate for this positive. T1:17-24 to T1:18-1. Noting that a lower penalty would not be in the best interest of horse racing, he explained that this penalty would act as a deterrent to other trainers and let it be known that this "just cannot happen." T1:17-11 to-17. Mr. Tomasello added that the lowest suspension the Commission imposes for drug positives is 15 days which is reserved for certain medications that trainers are allowed to use prior to race day that test over the allowed threshold level on race day. T1:21-2 to -15.

Mr. Tomasello testified that he was not aware of any prior instances of morphine positives in New Jersey. T1:14-12 to -14. However, the Commission has recently imposed penalties for another Class 1 drug which are consistent with the penalties the Board of Judges believed appropriate here. In Wisher v. New Jersey Racing Commission, 2015 N.J. Agen. LEXIS 269 (April 30, 2015), adopted by the Commission in Ruling No. 15 TRH16 (July 17, 2015), the Commission imposed a 1-year suspension and \$1,000 fine on the trainer for a methylhexanamine positive which was also, allegedly, unintentionally administered to the horse in connection

with a race at the Meadowlands racetrack on May 20, 2013.

The 15-day suspension and \$500 fine imposed by the ALJ, which would be appropriate for a Class 4 medication overage, must be rejected. The ARCI defines Class 4 as “therapeutic medications that would be expected to have less potential to affect performance than those in Class 3.” Exhibit P1. Our rules impose a 15-day suspension and \$500 fine for an overage of the Class 4 drug flunixin or the Class 4 drug phenylbutazone. See N.J.A.C. 13:71-23.8(g)(1). Also, recently, in Cibelli v. New Jersey Racing Commission, 2016 N.J. Agen. LEXIS 963 (November 1, 2016), adopted by the Commission in Ruling No. 17TRN1 (January 25, 2017), the Commission adopted the ALJ’s imposition of a 15-day suspension and \$500 fine on a trainer in connection with the Class 4 drug methylprednisolone. See also Auciello v. New Jersey Racing Commission, 2016 N.J. Agen. LEXIS 764 (September 6, 2016), adopted by the Commission in Ruling No. 16TRH20 (November 22, 2016).

The Commission accepts the testimony of Mr. Tomasello and his opinion that a 1-year suspension and \$1,000 fine should be imposed in this case. In reviewing the transcript of the hearing, it is clear that when Mr. Tomasello and the Board of Judges imposed this penalty, they did not determine hydromorphone to be a metabolite of morphine as did the ALJ. As discussed above, several witnesses testified that hydromorphone is a metabolite of morphine in humans and that this was probably the case in horses. The ALJ found this to be a fact and the Commission believes that it is constrained to accept his finding based upon the record. Nevertheless, the record clearly established that the horse tested positive for morphine, a Class 1 drug, and a stringent penalty is therefore warranted.