

STATE OF NEW JERSEY  
NEW JERSEY RACING COMMISSION

OAL Docket No. RAC 08693-2014S  
Agency Docket No. NJRC-11-H-14-FR

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THOMAS FANNING, )  
Petitioner, )  
v. ) FINAL DECISION  
NEW JERSEY RACING COMMISSION, )  
Respondent. )

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In an December 22, 2017 Initial Decision, the Administrative Law Judge ("ALJ") concluded that Petitioner, Thomas Fanning, violated the Commission's rules when a standardbred race horse trained by him tested positive for Dextrorphan after finishing second in the third race at Freehold Raceway on April 12, 2014. The facts of the case are largely undisputed and the Commission adopts the ALJ's findings of fact except as indicated herein. The facts in this Final Decision are taken from the Initial Decision unless otherwise indicated with a citation to the record.

On or about April 22, 2014, Truesdail Laboratories, Inc. reported that urine sample F1786, which proved to be the post-race urine sample taken from "Jump the Shark" after the April 12, 2014 race, tested positive for Dextrorphan at an estimated level of 15 ng/mL. Exhibit J6; T:24-7 to -11.<sup>1</sup> Petitioner requested

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<sup>1</sup> The symbol T:24-7 to -11 refers to the transcript of the October 11, 2017 hearing, page 24, line 7 to line 11.

that a split sample be sent to the New York Drug Testing and Research Program which confirmed that the split sample from urine sample F1786 was positive for the presence of Dextrophan at a level of 11 ng/mL. Initial Decision at 3; Exhibit J7; T:134-23 to -24.

The Commission's Board of Judges conducted a hearing and determined that Petitioner had violated N.J.A.C. 13:71-23.1, -23.6(a)(b)(c)(d) and -23.7 and imposed a 15-day suspension and \$500 fine, disqualified the horse and ordered the redistribution of the purse. Exhibit J8. Petitioner appealed and the matter was transmitted to the Office of Administrative Law ("OAL") as a contested case.

At the OAL, Petitioner did not dispute that the horse tested positive for Dextrophan which is a metabolite of Dextromethorphan. See Initial Decision at 3, 10. The Commission adopts the ALJ's conclusions that Petitioner violated N.J.A.C. 13:71-23.1 and 23.6 for failing to protect the horse from the administration of a foreign substance. Id. at 9-10. 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 penalty.

In determining the appropriate penalty, the ALJ rejected the 15-day suspension and \$500 fine imposed on the trainer by the Commission's Board of Judges and concluded that Petitioner should instead only pay a \$500 fine. The ALJ did so based upon her acceptance of the testimony of Petitioner's expert that the positive was "most likely a result of environmental contamination." Id. at 11. Noting that "it is impossible for a trainer to investigate such a defense [of

environmental contamination] due to the timing of the service of the test results,” the ALJ pointed out that this was Petitioner’s first drug related offense. Ibid. Finding these factors “should mitigate the penalty imposed,” the ALJ concluded that “the suspension was excessive and should be reversed.” Ibid. According to the ALJ, “the \$500 fine and loss of purse were not so disproportionate to the offense as to be shocking to one’s sense of fairness.” Ibid.

After reviewing this record, the Commission independently determines the appropriate penalty. At the OAL hearing, John Tomasello, Presiding Judge at the Meadowlands, testified that the appropriate penalty for this Class 4 drug positive is a 15-day suspension, \$500 fine, disqualification of the horse and loss of purse. T:95-7 to T:96-17. Mr. Tomasello testified that the judges concluded that this was the appropriate penalty after considering Petitioner’s penalty history, which was “fairly clean.” T:98-2 to T:99-2. He explained that the judges consider a 15-day suspension, \$500 fine, disqualification of the horse and loss of purse to be the minimum penalty for this Class 4 drug. Ibid. Pointing out that this penalty is necessary to deter drug use or the failure to protect the horse, Mr. Tomasello stressed that the 15-day suspension “is meaningful” because the trainer is denied access to all grounds under the Commission’s jurisdiction during that period of time. T:99-5 to -18. A fine alone would not be a meaningful deterrent. Initial Decision at 4.

The Commission finds that the 15-day suspension, \$500 fine, disqualification of the horse and loss of purse is the appropriate penalty for this Dextrorphan positive after giving due consideration to Petitioner’s penalty history and the circumstances presented here. In doing so, the Commission rejects the

ALJ's conclusion that the suspension is excessive.

Our determination of the appropriate penalty is based upon the Class 4 nature of the parent drug (Dextromethorphan), the level of the Dextrophan (15 ng/mL) in the original urine sample, the confirmation of the Dextrophan (11 ng/mL) in the split sample, the Petitioner's penalty history and the absence of any evidence that the trainer or his employees intentionally administered the drug to the horse, which would have increased the penalty.

In prosecuting a drug positive, the Commission need not prove that the drug was intentionally administered 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 often denies 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.

When a horse tests positive, New Jersey law imposes strict liability on trainers regardless of whether the drug was intentionally administered. 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). "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. Barry v. Barchi, 443 U.S. 55, 64, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365, 375 (1979).

Here, the Commission considers what Petitioner did not do. He did not “protect and guard the horse against administration of any drug or substances foreign to the natural horse” as required by N.J.A.C. 13:71-23.6(d). 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. Nothing undermines the public's confidence in racing more than learning a race horse has tested positive for a drug or foreign substance. The Commission must be vigilant in bolstering the public's confidence that races are conducted fairly, with all horses performing without chemical advantage or the appearance of chemical advantage.

The ALJ's conclusion that the 15-day suspension is excessive appears to be based upon her finding that the drug positive was a result of environmental contamination. Initial Decision at 7. In reaching this conclusion, the ALJ accepted the testimony of Petitioner's expert, Dr. Clara Fenger, that Dextromethorphan “could not have been administered for any performance enhancing effect,” and that “[t]he amount detected was so negligible that it was likely the result of the horse ingesting hay after someone who had a cough drop or taken cough medicine urinated in the stall.” Id. at 6.

We find the ALJ's reliance on the testimony of Petitioner's expert,

which is based almost entirely upon speculation, in reducing the penalty to \$500 to be misplaced. The record is devoid of any evidence that the horse ingested hay after someone who took a cough drop or cough medicine urinated in the stall. Although Petitioner alleged that there were some issues with two horses being exposed to cocaine in the receiving barn at Freehold Raceway on April 3, 2014, evidence at the hearing established that no other blood or urine sample taken from horses which raced at Freehold Raceway on April 12, 2014 tested positive for Dextrorphan or for any other drug or foreign substance. See Initial Decision at 5; T:47-11 to -20.

Moreover, in accepting the testimony of Petitioner's expert, the ALJ disregarded completely the testimony and expert report of Respondent's expert, Dr. Norman Hester, whom the ALJ also determined credible. See Initial decision at 7. Dr. Hester characterized the scenario advanced by Dr. Fenger as "extremely unlikely" and "rather far-fetched." See Exhibit R3 at 6. Dr. Hester testified that if the horse had consumed hay under the circumstances contended by Dr. Fenger, "you wouldn't see the levels we see here." T:42-16 to-22.

Dr. Hester explained that "[i]f a human was taking a therapeutic dose of dextromethorphan, the concentration of metabolite seen in the urine would be orders of magnitude lower than the concentration in tablets or syrup consumed" and that "the metabolite would be released over a few hours' period probably with multiple voids of urine." Exhibit R3 at 6. Dr. Hester pointed out that "[f]or Dr. Fenger's contention to be true, the horse would need to somehow consume the total volume of the human's urine produced over multiple hours and the consumption would have to be done all at one time. A scenario that is

extremely unlikely.” Ibid.; T:42-23 to T:44-14.

Dr. Hester stressed that “[w]hile it is theoretically possible for the levels observed in the horse [which is approximately 11 to 15 ng/mL] to be the result of a horse consuming a couple of tablets or a couple of spoonfuls of over the counter cough medication, it is rather far-fetched that such quantities can get into the horse without the assistance of the trainer or the trainer’s staff.” Exhibit R3 at 6. He pointed out that this is true, “[p]articularly since there is no legitimate reason for such medications to be within the area where a horse preparing to race is being stabled.” Ibid.

The ALJ’s conclusion that the 15-day suspension is excessive also appears to be based, in part, upon the mistaken belief that the Commission has adopted or is otherwise bound by the penalties recommended by the ARCI in the Uniform Classification Guidelines for Foreign Substances and Recommended Penalties (“Uniform Guidelines”). See Exhibit R4. After correctly finding that the Board of Judges have the authority and “discretion to impose fines or suspensions or both” for rule infractions, the ALJ improperly circumscribed their discretion because “according to ARCI, mitigating circumstances may be considered in penalty considerations.” Initial Decision at 10-11.

While the Commission has adopted other ARCI documents,<sup>2</sup> we have not adopted the Uniform Guidelines. The Classification Criteria for the drugs and foreign substances and the Classification Categories within the Uniform

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<sup>2</sup> 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).

Guidelines are valuable tools. However, there are instances when the Commission does not agree with the recommended penalties or, as is the case here, with the ALJ's interpretation of the recommended penalties.

The ARCI recommends a Category B penalty for Dextromethorphan which is the parent drug of Dextrorphan, its metabolite. A Category B penalty for a first offense is a "minimum 15-day suspension absent mitigating circumstances [with] the presence of aggravating factors could be used to impose a maximum of a 60-day suspension," a "minimum fine of \$500 absent mitigating circumstances [with] the presence of aggravating factors could be used to impose a maximum of \$1,000," disqualification and loss of purse. Exhibit R4 at 38.

Mr. Tomasello testified that the Board of Judges determined that considering Petitioner's penalty history, the appropriate penalty for this Dextrorphan positive, where there is no indication that the drug was intentionally administered, which would be considered an aggravating factor, is a 15-day suspension, \$500 fine, disqualification and loss of purse. The Commission's Board of Judges agreed with him. Exhibit J8. 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 substance to the horse. T:16-22 to -24.

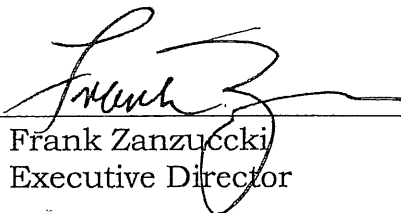
Disregarding this testimony, the ALJ took this appropriate penalty, which would have been much higher with evidence that the drug was intentionally administered to the horse, and mitigated it down to a \$500 fine because there was no evidence that the drug was intentionally administered to the horse. Id. at 11. We do not agree,



The Commission concludes that the 15-day suspension and \$500 fine, including disqualification and loss of purse, imposed by the Board of Judges is the appropriate penalty for this Class 4 substance under the circumstances presented here when there is no evidence of intentional administration. This determination is consistent with our handling of other Class 4 drugs. See, e.g., N.J.A.C. 13:71-23.8(g)(1)(imposing a 15-day suspension and \$500 fine for an overage of the Class 4 drug flunixin or the Class 4 drug phenylbutazone).

Based upon the Commission's expertise within this highly-regulated industry, it is our judgment that this penalty is appropriate and necessary to protect the interests of the racing industry and the integrity of the wagering public, to guard the safety of race participants and to deter trainers from failing to protect the race horses entrusted to their care from the administration of drugs or substances foreign to the natural horse.

NEW JERSEY RACING COMMISSION

By:   
Frank Zanzuccki  
Executive Director

Dated: March 28, 2018