



COMMISSION HEARING

TORONTO, ONTARIO – MARCH 25, 2013

NOTICE OF DECISION

IN THE MATTER OF THE RACING COMMISSION ACT, S.O. 2000, c.20;

AND IN THE MATTER OF THE RENÉ ALLARD APPEAL

René Allard appealed against Ruling Number SB 44969.

Date of Hearing: March 25, 2013

ORC Panel Members: Chair Rod Seiling
Vice Chair Anthony Williams
Commissioner Daniel Nixon

Counsel for the Appellant: Robert B. Burgess, Q.C.

Counsel for the Administration: Jennifer Friedman

The Panel denied the appeal.

The Panel's Reasons for Decision is attached to this Notice.

DATED at Toronto this 25th day of June 2013.

Steven Lehman
Executive Director

REASONS FOR DECISION

Overview

1. René Allard (“Allard”) appealed to the Ontario Racing Commission (“ORC”), against a Ruling by the judges which imposed a \$500 fine and a 7 day full suspension against Allard for a Class V positive test for the drug furosemide.
2. Grounds of appeal:
 - (i) that the testing process for the drug was unreliable;
 - (ii) that the horse was an outlier;
 - (iii) that he exercised due diligence in compliance with the trainer responsibility rule;
 - (iv) that the penalty was too severe.
3. The appeal was denied.

The Reasons follow.

Background

4. On November 13, 2012, Veal Marsala, a standardbred racehorse, tattoo #9BB93, won the eighth race at Georgian Downs Raceway. Veal Marsala was trained by Allard, licence # Y93199. The blood sample collected from the horse following the race resulted in a Certificate of Positive Analysis of an Official Sample for the drug furosemide, quantified at 116 ng/mL.
5. Furosemide (trade name lasix) is a drug prohibited by the Uniform Classification Guidelines for Foreign Substances, by the Association of Racing Commissioners International Inc.
6. The Canadian Pari-Mutuel Agency (“CPMA”) set a quantitative limit of 85 ng/mL in blood for furosemide for horses which have been approved for a controlled medication program, the Standardbred Exercise Induced Pulmonary Haemorrhage (“EIPH”) Program. (CPMA, Schedule of Drugs, 2011, page 114)
7. A trainer of a horse which has displayed symptoms of EIPH may apply for certification of the horse to race within the Program.
8. Veal Marsala was certified for the Program.
9. Following certification, the horse must be presented at a retention facility at the track where the horse is racing at least four hours and fifteen minutes prior to post time. (Rules of Standardbred Racing (“SB Rules”) 2012, effective July 31, 2012, Chapter 35, pages 90 to 93, Rules 35.01.01 to 35.07.07)
10. “Under this controlled program, the administration of the drug must be done by a CPMA authorized person at the track where the horse is to race that day, 4 hours plus or minus 15 minutes before the race. Once approved for the EIPH program, a horse must stay on the EIPH program for a minimum of 100 days.” (Walter Whelan v. ORC, Ruling Number COM SB 055/2010, page 2, para 4, November 18, 2010, Ex. 2, Factum of ORC Administration, tab 2, para 4)
11. A veterinarian or his designate shall intravenously administer to the horse a dosage of furosemide which is no less than 150 mg. and no more than 250 mg. (SB Rules 35.07.04)
12. A positive test for the drug furosemide, for a horse on the EIPH Program, constitutes a Class V equine drug offence for the purposes of the Penalty Guidelines (“Guidelines”). (Ex. 1, Book of

Chronology

13. The judges issued their Ruling on December 22, 2012.

- (i) purse to be returned and redistributed (SB Rule 9.13);
- (ii) driver/trainer fees to be returned and redistributed (SB Rule 18.08.01);
- (iii) horses not owned but trained by Allard may be transferred to another trainer with the judges' approval (SB Rule 26.08);
- (iv) any horse owned in whole or in part by Allard is ineligible to be entered to race (SB 6.13.01);
- (v) \$500 fine;
- (vi) 7-day full suspension, from December 30, 2012 to January 5, 2013, inclusive.

14. Allard filed a Notice of Appeal.

15. Allard was granted a stay of penalty until his appeal was heard.

16. Notice was provided to the parties as to their hearing date before the Commission.

17. A panel of the ORC, comprised of the Chair Rod Seiling, the Vice Chair Anthony Williams and Commissioner Daniel Nixon, was convened to hear the appeal.

The Hearing

18. A "trial de novo" or new trial, was heard by this panel on March 25, 2013.

19. Robert B. Burgess, Q.C., ("Burgess"), represented Allard as counsel.

20. Jennifer Friedman ("Friedman"), represented the Administration ("Administration") of the ORC as counsel.

21. Nine exhibits were entered during the evidence.

22. Friedman called three witnesses for the Administration:

- (i) Evelyn O'Reilly, Test Inspector;
- (ii) John Dorion, Track Judge, ORC;
- (iii) Dr. Adam Chambers ("Chambers"), DVM, Commission Veterinarian for the ORC, Manager of Veterinary Services, ORC, and Research Manager for CPMA at Jerseyville, Ontario.

23. Burgess called three witnesses for the defence:

- (i) René Allard ("Allard");
- (ii) Dr. Alison Moore ("Moore"), DVM, DVSc, DACVIM, Equine Internal and Sports Medicine;
- (iii) Dr. Kenneth Armstrong, ("Armstrong"), DVM.

24. Chambers, Moore and Armstrong were qualified to give opinion evidence, as experts, in equine veterinary medicine. Chambers was qualified to give opinion evidence in relation to the control, testing, classification, administration, elimination and withdrawal times of drugs used on horses.

25. After the evidence was heard, both Friedman and Burgess gave closing submissions to the panel.

26. The panel reserved decision.

The Rules of Engagement

27. I. The Standardbred Rules

Trainer Responsibility Rule

(i) All reasonable precautions

26.02.01 A trainer shall be responsible at all times for the condition of all horses trained by him/her. The trainer must safeguard from tampering each horse trained by him/her and must exercise all reasonable precautions in guarding, or causing any horse trained by him/her to be guarded, from the time of entry to race until the conclusion of the race. No trainer shall start a horse or permit a horse in his/her custody to be started if he/she knows, or, if by the exercise of a reasonable degree of care having regard to his/her duty to safeguard their horse from tampering, he/she might know or have cause to believe, the horse is not in a fit condition to race or has received any drug that could result in a positive drug test. Without restricting the generality of the foregoing, every trainer must guard, or cause to be guarded by the exercise of all reasonable standards of care and protection, each horse trained by him/her so as to prevent any person from obtaining access to the horse in such a manner as would permit any person not employed by or not connected with the owner or trainer from administering any drug or other substance resulting in a pre-race or post race positive test. Every trainer must also take all reasonable precautions to protect the horse and guard it against wrongful interference or substitution by anyone in connection with the taking of an official sample.

(ii) Positive test - absolute liability

26.02.03 Notwithstanding 26.02.01, the Commission and all delegated officials shall consider the following to be absolute liability offences:

(a) Any trainer whose horse(s) tests positive for any substances determined to be non-therapeutic;

(c) Any trainer whose horse(s) tests positive resulting from testing in accordance with or under the *Pari-Mutuel Betting Supervision Regulations*;

(iii) Offence

26.02.02 Any trainer who fails to protect or cause any horse trained by him to be protected and a positive test thereby results or who otherwise violates this rule shall be guilty of an offence. (SB Rules July 31, 2012, Page 79)

28. II. The Burden of Proof

Did it happen?

The burden of proof was upon the Administration to prove the violation.

29. III. The Standard of Proof

(i) "I think it is the time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities." F.H. v. McDougall, 2 October 2008 SCC (pp. 12-13 para. 40)

(ii) Translation: "More Likely Than Not"

"...the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred." F.H. v. McDougall, (p. 14 para 44)

(iii) Quality of Evidence: "Clear Convincing and Cogent"

"...evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." F.H. v. McDougall, (p. 44 para 46)

30. IV Due Diligence

(i) "As said Hill J. in *Canadian Tire, supra*, at para. 85:

In assessing the efficacy of a due diligence defence, the court must guard against the correcting, but at times distorting, influences of hindsight. In considering the defendant's efforts, the court "does not look for perfection" (*R. v. Safety-Kleen Canada Ltd.* (1997), 114 C.C.C. (3d) 214 (Ont. C.A.) at 224) nor some superhuman effort" on the defendant's part (*R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 (Ont. Prov. Ct.) at 77). If the facts suggest a discoverable causative flaw "could readily" have been remedied, due diligence will fail: *R. v. Rio Algom Ltd.*, supra at 249, 252.

It must not be forgotten that the standard to be applied in assessing due diligence is that of the reasonable person in like circumstances, not one of immediate perfection upon recognition of a problem." *Liat Podoloky ("EcoJustice") v. Cadillac Fairview Corp. et al.*, Reasons for Judgement Green M., O.C.J., at Toronto, February 11, 2012, pages 44-45, para 93

(ii) Negligent violators of the trainer responsibility rule fall within breach of due diligence standards. The absolute liability standard protects against those who wilfully disregard the drug and medication rules thereby cheating competitors, the wagering public and the public interest in the industry at large." *Brad Shakes v. ORC*, Ruling Number COM SB 031/2012, August 16, 2012, page 8, para 51

The Admissions

31. There was no issue taken with

- (i) the taking of the blood sample;
- (ii) the continuity of the sample;
- (iii) the integrity of the sample;
- (iv) the analysis of the sample for furosemide, quantified as 116 ng/mL of blood.

The Remaining Issues

32. The panel was required to address the remaining issues:

- (i) was the testing process for the drug unreliable?;
- (ii) was the horse an outlier?;
- (iii) did the appellant exercise due diligence in compliance with the trainer responsibility rule?;
- (iv) was the penalty too severe?

The burden of proof was upon the appellant, on a balance of probabilities, upon grounds (i), (ii), (iii).
The burden of proof was upon the Administration, on a balance of probabilities, upon ground (iv).

Analysis of Facts and Issues

Issue (i) Was the testing process for the drug unreliable?

33. The appellant took the position that there was a "clear demonstration (of) the ineffectiveness and unreliability of Ontario's furosemide testing process." (Ex. 3, Factum of Allard, Part B, page 4 of 5, para 1)

34. The appellant relied upon a letter submitted by counsel to the judges based upon a study that "plasma concentration can only be used in regulating the administration of furosemide to racehorse... Therefore it is clear that the post race analysis of lasix in a racehorse should only be used to confirm that lasix was administered NOT as a measure of the quantity given to a horse prior to the race." (Ex. 1, Book of Documents, tab 9, page 15)

35. This position was founded upon studies from 1992 and 1998, (Ex. 9 and 8 respectively). Both studies were accepted by the panel.

- (i) 1992 Study - caveat

“The wide variability in the plasma concentration of furosemide was probably due to differences in the excretion of furosemide possibly caused by the presence in plasma of undetected drugs capable of altering the excretion of furosemide, restricted water intake prior to racing, or undiagnosed renal dysfunction. The medical history of these horses was unknown except they were actively racing in both States (IL and PA) and, thus presumed to be in good health.” (Ex. 9, Plasma Concentration of Furosemide versus Specific Gravity of urine in Predicting Dose of Administration in Race Horses. Research Communications in Chemical Pathology and Pharmacology Vol. 77, No 2, August 1992, pages 201-218, Uboh C.E., Soma L.R., Sams R. at pages 212 and 216)

(ii) 1998 Study - caveat

“Furosemide has been used empirically and has been legally approved by the US racing industry for the control of exercise induced pulmonary haemorrhage (EIPH) or bleeding. Its use in horses for this purpose is highly controversial and has been criticized by organizations outside and inside the racing industry. The unanswered question is whether the improvement in racing times which have been shown in a number of studies are due to the reduction in bleeding or other actions of furosemide. (Ex. 8, Review of Furosemide in Horse Racing: Its Effects and Regulation, J. vet. Pharmacol. Therap. 21, 228-240 1998, Soma, L.R., Uboh, C.E., page 228)

36. It is significant that these studies analyzed plasma for furosemide. In contrast, the CPMA analyzes serum for furosemide.

37. Chambers stated that there are different drug regulations in Pennsylvania and Ohio v. Canada, and that the levels of furosemide in the plasma may have been affected by interdrug reactions.

38. Chambers advised that studies by the CPMA have produced “different results from plasma v. serum.” “Positive tests under the EIPH program are rare. In 19 years, only 16 positive tests have occurred in over 200,000 tested horses.” (Ex. 2, Administration Factum, Walter Whelan v. ORC, November 18, 2010, Ruling Number COM 055/2010, page 2, para 8)

39. Chambers previously testified that in 2012, he “ran tests on 4 samples to ensure that the CPMA testing program was working properly. He was confident that there were no errors in the laboratory test procedures, and no change in testing procedures has been made since November 2010.” (Ex. 2, Administration Factum, Justin Robson v. ORC, tab 1, page 5, para 21)

40. The evidence of Chambers was preferred on this threshold issue.

41. The appellant did not satisfy the burden of proof upon him upon the first ground of appeal.

Issue (ii) Was the horse an outlier?

42. “Outlier n. 1. One who or that which lies outside.” (the Random House Dictionary of the English Language, The Unabridged Edition, 1966, page 1022)

43. Armstrong advised that “there is no forensic test to distinguish between an outlier and administration of furosemide post four hours,” and that “there is no biological entity that responds to a drug in identical fashion” (each time a drug is administered).

(a) Whelan precedent – horse, Perfect Host

44. In Whelan, the expert opinion of Weber was summarized as follows:

Weber “believed that the horse was one of the rare outliers, that is, the horse’s system could not metabolize the drug in the normal time as all other horses do. Positive tests for furosemide under

the EIPH program are rare. In 19 years only 16 positive tests have occurred in over 200,000 tested horses.

Dr. Weber testified thathe now was of the opinion that Mr. Whelan had done all he could to comply with the rules.” (Ex. 2, Administrative Factum tab 2, Walter Whelan v. ORC, Ruling Number SB COM 055/2010)

45. Weber discussed the Veal Marsala positive with Chambers.

46. Weber wrote:

“.... while there are some similarities between “Veal Marsala” and “Perfect Host”, (Whelan’s horse) there are major differences surrounding the issue. Both of the aforementioned horses are aged geldings with no apparent pathological conditions. This does not distinguish them from a lot of other horses on the EIPH Program and in my opinion the similarity ends there. Veal Marsala tested positive on one occasion subsequent to a 250 mg dose.” (Ex. 1, Book of Documents, tab 15, page 33, e-mail Weber to Chambers, February 5, 2013, 11:47 a.m., subject Furosemide – Veal Marsala)

47. Chambers agreed with Weber.

48. Moore took the position that Veal Marsala was an outlier. She stated in her report:

“On examination, the horse was in excellent condition and both jugulars were patent. No external abnormalities pertaining to veinipuncture were noted. A blood sample was taken for a complete blood count.No significant findings were identified to explain the high furosemide reading.However, the characteristics of the horse, namely his age (8) and number of years on furosemide (5) are similar to the characteristics of a horse that the ORC previously identified as an outlier (‘Perfect Host’, age 11, 7 years on the Lasix program). The latter horse did not have any laboratory evidence that required his classification as an outlier. There was just no other explanation for the high- post race furosemide level. Based on the information provided to me, my examination of the horse and within the context of the CPMA’s current Lasix Program, I consider “Veal Marsala” to be an outlier similar to the previously designated horse.” (Ex. 1, Book of Documents, Moore Equine Services, Medical Report, tab 7, para 11)

49. Whelan had not had a positive test in 42 years. His horse, Perfect Host, had three positives for furosemide with two different trainers and different dosages.

50. Veal Marsala tested positive on one occasion.

51. Allard, in contrast to Whelan, did not contact ORC officials for assistance and did not attempt to replicate the testing process in an out-of-competition experiment.

(b) Moreau precedent – horse, Lennon Blue Chip

and

(c) Robson precedent – horse, Bob Lee

The detectable perivascular damage observable in the physical and/or ultrasonic examinations of both of these horses provided a foundation for longer elimination times and increased blood levels of furosemide.

(d) Brealey precedent – horse, Bob Lee

The experiment involving the controlled administration of furosemide revealed that the horse had an allergic reaction to the drug.

52. Veal Marsala was described as an older horse with several years on the EIPH Program. These two factors, standing alone, without further evidence, including physiological abnormalities (internal or external), allergies, replication of dosage of furosemide, out-of-competition experiments, further history,

et al, are insufficient to satisfy the panel, on a balance of probabilities, by evidence that was “clear, convincing and cogent”, that Veal Marsala was an outlier.

53. The appellant did not satisfy the burden of proof upon him upon the second ground of appeal.

Issue (iii) Did the appellant exercise due diligence in compliance with the trainer responsibility rule?

54. Allard is an experienced trainer. Many of his horses are older and many are on the lasix program. Allard has had more than 250 starts with horses on the program. Allard stated that he does not train his horses on lasix. Following the positive test he “put the entire barn on 3 c.c.’s.” (of furosemide)

55. Armstrong provided three potential explanations for a higher furosemide level:

- (a) a higher dose;
- (b) dose closer to four hours before race;
- (c) IV or IM administration (intravenous or intramuscular)

56. These explanations are precluded by the presence of the horse in the pre-race retention barn. Allard had a duty to protect his horse from a positive test. The panel was left in doubt. There was no acceptable explanation presented by the appellant for the positive test. The panel was not persuaded on a balance of probabilities, that the appellant exercised due diligence in compliance with the trainer responsibility rule, in the protection of Veal Marsala, from the positive, quantitative test for furosemide.

57. The appellant did not satisfy the burden of proof upon him upon the third ground of appeal.

Issue (iv) Was the penalty too severe?

58. Penalty

(i) Fundamental Principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (Criminal Code of Canada, Martin’s Annual Criminal Code 2013, page 1442)

(ii) Penalty Guidelines

A first offence for a Class V drug has a suggested penalty of a \$1,000 fine and a full licence suspension range of between 15 to 75 days. (Penalty Guidelines for Equine Drug Offences, ORC Policy Directive No. 1-2008, effective January 31, 2008)

(iii) Other mandatory consequences of positive test (in addition to fine and suspension)

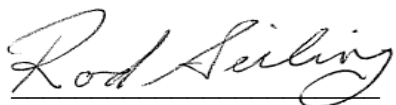
The judges made the following further orders:

- (a) purse to be returned and redistributed (SB Rule 9.13);
- (b) driver/trainer fees to be returned and redistributed (SB Rule 18.09.01);
- (c) horses not owned but trained by Allard may be transferred to another trainer with the judges’ approval (SB Rule 26.08);
- (d) any horse owned in whole or in part by Allard is ineligible to be entered to race (SB Rule 6.13.01).

59. The penalty imposed on December 22, 2012 by the track judges, one-half of the fine and the low end of the suspension range suggested in the Guidelines, would appear to be fair and balanced in view of all the circumstances, including the cooperation of Allard; his attempts to discover the cause(s) of the positive test; his history in the industry; his subsequent steps to protect his horses; and the collateral consequences that have befallen him.

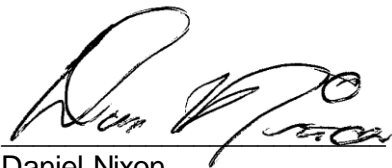
60. The penalty imposed on December 22, 2012, by the track judges was confirmed.

DATED this 25th day of June 2013.



Rod Seiling
Chair

Anthony Williams
Vice Chair



Daniel Nixon
Commissioner