Ontario
Racing
Commission

RULING NUMBER COM SB 031/2012

COMMISSION HEARING

TORONTO, ONTARIO – AUGUST 16, 2012

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

AND IN THE MATTER OF THE APPEAL AND REQUEST FOR HEARING BY STANDARDBRED LICENSEE BRAD SHAKES

Brad C. Shakes ("SHAKES") is licensed with the Ontario Racing Commission ("ORC") as a Driver/Trainer/Owner (license #W13299).

On December 6, 2011, the horse, High Def Z Tam (tattoo #3E663), trained by SHAKES, participated in the 10th race at Georgian Downs and finished 1st.

On December 13, 2011, the Judges at Georgian Downs received a Certificate of Positive Analysis for High Def Z Tam for the Class II drugs, Caffeine, Theophylline, and Theobromine.

On March 23, 2012, the Judges issued Standardbred Official Ruling SB 43989 wherein SHAKES was fined $5,000 and subject to a 365-day full suspension (with 90 days stayed) for a violation of Rules 9.09(b), 26.02.01, 26.02.02, and 26.02.03(c) of the Rules of Standardbred Racing as a consequence of the positive test.

On March 23, 2012, the Judges also issued Standardbred Official Ruling SB 43976 wherein terms were imposed upon the licence of SHAKES for a two-year period, in accordance with Policy Directive No. 3 - 2008.

On March 27, 2012, SHAKES submitted a Notice of Appeal.

On March 29, 2012, counsel on behalf of SHAKES requested a stay.

On April 2, 2012, the Deputy Director issued Standardbred Ruling Number S.B. 34/2012 wherein SHAKES was granted a conditional stay of his penalties.

On July 6, 2012, a Notice of Hearing was issued to inform the parties that a hearing would be held on August 16, 2012.

On August 16 and October 15, 2012, a Panel of the Ontario Racing Commission consisting of Vice Chair Hon. James M. Donnelly, and Commissioners John Macdonald and Dan Nixon was convened to hear this matter.

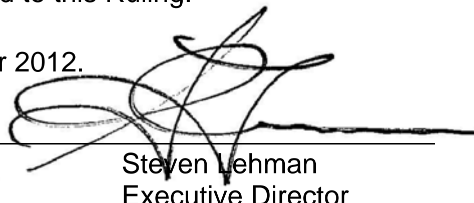
Randy Bennett (with Art Linton) appeared as counsel on behalf of SHAKES. Jennifer Friedman appeared as counsel for the Administration of the ORC.

Upon hearing the testimony of Steve Rushton, Pamela Bray, Jacklyn Goldman, Dr. Elizabeth Shiland, Michel Georgakakis, and SHAKES, considering the exhibits filed, and reviewing the written submissions of counsel, the Panel dismissed the appeal as to liability and penalty.

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

DATED at Toronto this 27th day of November 2012.

BY ORDER OF THE COMMISSION ______________________________



Steven Lehman
Executive Director

REASONS FOR DECISION

The Appeal

1. Licensee Brad Shakes (Shakes) appeals disposition and penalties in Rulings SB 43989 and SB 43976, both dated March 23, 2012.

The Occurrence

2. Shakes was the trainer of High Def Z Tam, winner of race 10 at Georgian Downs on December 6, 2011, which post-race tested positive for the Class II drug Caffeine, the Class III drug Theophylline and Class IV drug Theobromine (Uniform Classification Guidelines for Foreign Substances).

The Judges' Disposition

3. Following a Hearing at Flamboro on March 23, 2012:

- The horse was disqualified, the purse and trainer fees to be returned and redistributed;
- Horses owned by Shakes in whole or part, ineligible to race;
- Horses trained by Shakes and not owned in whole or part by him may be transferred to other trainers subject to approval of the Judges;
- $5,000 fine;
- Full suspension for 365 days with 90 days stayed (to be added to any subsequent positive test violations);
- Conditions added to Shakes' licence for two years following his suspension as per policy Directive No. 3/2008.
- Pursuant to the Rules of Racing, High Def Z Tam rendered ineligible to race for 90 days.

Conditional Stay

4. On April 2, 2012, a Stay was granted conditional upon the Appeal Hearing proceeding prior to July 12, 2012. The Stay was extended to August 16, 2012, upon which date the Appeal proceeded. (although in mid-Hearing further adjourned to October 15, 2012)

5. At the opening of the Appeal, counsel agreed:

- Dr. McKee's evidence may be received in written form in consequence of the doctor's absence and telephone unavailability.
- The positive post-race test for Caffeine was an agreed fact. There was no issue about the identity, continuity or integrity of the sample, the laboratory testing or the positive result for Caffeine.

6. Although not formally admitted, the evidence clearly supported a finding of fact that Shakes was the licensed and actual trainer of the horse at the relevant time and had been the trainer since July 2011.

7. Shakes has been licensed as a trainer since 2004 and has managed his own stable (usually about ten horses) since 2010. He has no record for positive tests. High Def Z Tam had trouble breathing followed by laser pallet surgery with slow healing which was treated with Sucralfate through the McMaster Veterinary Clinic.

8. According to Shakes, Dr. Shiland prescribed a litre of Sucralfate to be administered in 20 cc lots 3 to 4 times daily. The notation by Dr. Shiland on the medication label is "20 cc 2 x daily". Shakes described the horse resisting the multiple administrations so he reported to Dr. Shiland and was, according to Shakes, told to administer once daily. No evidence was given that the amount per day was to be reduced although that seems to have been inferred by Shakes.

9. Shakes testified that since the medication had a pre-race withdrawal time he kept it in a cabinet in the office in his barn to be administered only by him. No evidence was given as to what help he hired to assist in training and grooming. No evidence was given as to who had access to his office or medication chest when he was on vacation or whether either was locked at certain times, or of being capable of being locked.

10. Shakes was at the Harrisburg horse sales for a week in early November and in Jamaica for a week returning on Saturday December 3. Shakes testified that although he was absent, the horse was off the medication during both weeks. During the evening of December 3, Shakes did administer Sucralfate to the horse. The race in issue was Tuesday, December 6 which was beyond the twenty-four hour withdrawal time.

11. Reduced to essentials, Shakes contends:

- He relied upon and complied with veterinary advice specific to that horse and its diagnosed condition.
- The proper standard of review is that the offence is strict liability, not absolute liability notwithstanding express provision to the contrary in the rules of racing. With strict liability, due diligence is a defence. Not so with absolute liability.
- By claimed compliance with veterinary advice, he met the due diligence standard. Accordingly, he asserts that his appeal on liability and penalty must succeed.

Shakes' evidence

12. Shakes informed investigators that he administered Sucralfate to the horse on Monday, December 5, in the morning, (more than 24 hours out from race time) and that he administered Step-Up and Diclazuril with the noon feed on December 6, the race date.

13. Shakes produced for investigators a container from which he claimed to have obtained the Step-Up. Laboratory testing of that substance for Caffeine was negative.

14. On December 20, 2011, Shakes also produced a labelled container, the contents of which he identified as the Sucralfate provided by veterinarian prescription and administered to the horse. That substance by laboratory analysis tested positive for Caffeine and upon a re-test, again was positive for Caffeine.

15. The original dispensing order from Dr. Shiland of the McMaster Clinic dated October 21, 2011 and provided to the pharmacy was linked to the label on the Sucralfate container produced by Shakes by corresponding identification numbers.

16. Each of the ingredients required by the dispensing pharmacy for preparation of that prescription for Sucralfate was accompanied by a certificate of compliance verifying that ingredient.

17. On March 2, 2012, Investigators obtained a different sample of Sucralfate from the dispensing pharmacy, laboratory testing of which was negative for Caffeine.

18. Sucralfate as dispensed by the pharmacy presents as a thin pale yellow or off-white liquid. The substance produced by Shakes to investigators as the Sucralfate administered to the horse was a yellowish creamy paste. Nick Luciano, pharmacist and owner of Trutina Pharmacy, the dispensing pharmacy, was of the opinion that Sucralfate would not degrade in appearance or consistency subject only to a possible darkening in colour. Dr. Shiland was unfamiliar with the creamy paste presentation. This gave rise to her speculation that the substance may not be Sucralfate. However, subsequent laboratory testing confirmed the identity as Sucralfate.

19. The original substance presented to investigators by Shakes as the Sucralfate which he administered pre-race, after storage in a secure room-temperature evidence locker at OPP Headquarters in Orillia, had changed to a yellowish creamy paste. Whether that change was natural or the result of a contaminant was not pursued in evidence.

20. The total volume of the container was 1,000 cc (one litre) which at 70 cc per day would last about 14 days. The Sucralfate label was dated October 21, 2011. According to Shakes, the substance was administered December 5 – 45 days later. Since the Sucralfate was to be administered daily until finished, Dr. Shiland commented in evidence that the administration could not have been as prescribed.

21. Michael Georgakakis, quality control team leader at Medisca, which provided the Sucralfate ingredients to the dispensing pharmacy, testified by telephone reviewing quality control procedures at Medisca in general and in particular as relating to this delivery of Sucralfate. He explained Medisca's internal procedure relating to verification of the product, cleansing of the facility and repackaging procedures. He further pointed out that during the time of repacking for this specific Sucralfate, Caffeine was not being packaged.

22. That quality control regimen at Medisca was comprehensive, sufficiently so to render contamination at that stage a remote prospect.

23. The Hearing was adjourned from August 15, 2012 to October 15, 2012. In the interval, ORC Investigator Rushton obtained and had lab-tested further samples of Sucralfate from Shakes and from the dispensing pharmacy. The former tested positive for Caffeine, the latter negative.

24. In relation to the due diligence issue which would be relevant to liability on a strict liability format and which is relevant to penalty in an absolute liability format; the interval for the week preceding December 3rd is a problem. There is no evidence as to what care and training arrangements were in place. There is no evidence from whomsoever Shakes left in charge of the stable in that interval. There is no evidence that those responsibilities were properly discharged in relation to High Def Z Tam.

25. There is a significant gap relating to discharge of the trainer responsibility obligation in the critical week before the positive test. The evidence is silent on the issue of access to Shakes' office and its contents in that interval.

26. There is no indication in the evidence of tampering, enemies, strangers, unauthorized access, discontented or incompetent helpers, labour problems or conflicts of any kind which might suggest third party intervention. There was no evidence from Shakes or his staff as to security arrangements or day to day care and management. There was no evidence about security for the Sucralfate while Shakes was in Jamaica.

27. In light of the failure of evidence relating to the training and care protocol and in light of the failure to comply with veterinarian instruction, no due diligence defence has been demonstrated on a balance of probability. There must be a finding of breach of the trainer responsibility rule regardless of whether the proper standard is absolute or strict liability.

Absolute Liability

28. Something must be said about the necessity and justification for the absolute liability standard applying to trainer responsibility. This is a policy decision made by the Commission and is not subject to being overruled by a Hearing Panel.

29. A licence to race is a privilege. In return for that privilege, licensees agree to abide by the Rules of Racing, SB Rule 1.07. The trainer responsibility rule in absolute liability format is one of those rules.

30. Litigants before a Commission Panel are entitled to justice as a matter of right. In the Court system, that justice is defined as "justice according to the law." In the racing world that justice is further refined as "justice according to the Rules of Racing." Within these parameters the Commission must deliver a high standard of justice because a disciplinary suspension can have grave and permanent consequences upon a professional career (Kane v. U.B.C. 1980 1 S.C.R. 1105, Dickson J.).

31. The burden of proof is on the Administration – the due diligence burden is upon Shakes on a balance of probability. The civil standard of proof applies as discussed in O.R.C. v. Wallis & Piroski O36/2011 at paragraphs 146 to 152. The evidentiary burden is "cogent, clear and concise evidence". The Commission must consider all relevant factors. In matters of law it must be correct. In matters of discretion it must be reasonable.

32. The "tool" of absolute liability is onerous. But no more so than the statutory power of Immediate Suspension without a preceding Hearing or prior notice (s. 23 RCA 2000). That Immediate Suspension power demonstrates legislative recognition of the need for prompt and effective means of protecting the integrity of racing. That power of Immediate Suspension flows from a legislative decision that the public interest in racing supersedes in some measure, individual rights to procedural fairness by notice and a Hearing.

33. The trainer responsibility rule is the foundation upon which racing integrity rests. Erosion of the integrity of the racing product undermines public confidence which is reflected by reduced attendance and mutuel handle. With the changing landscape of racing, purse funds from slot revenues will end March 31, 2013. Thereafter a portion of the wagering dollar will be the sole source of purse funds. Integrity must be assiduously protected not only for its own virtue but for the practical reason that absent purse funds there would be very little racing.

34. The foremost obstacle to the integrity of racing is the use of drug stimulants. It is within the competence of the industry to rid itself of this peril. If horsemen stop using illegal drugs and substances the issue disappears.

35. A less effective response to the drug peril would be for horse people to inform on rule violators. An anonymous whistleblower's potential difficulties include classification as a "rat" with risk of reprisal. The industry being unwilling to police itself to that extent, protection of the public interest remains for the Racing Commission.

36. The "chemists" of the industry learn from each other how to "boost" the horse and how to evade responsibility. For some, if they cheat under the Rules, an untruth under oath is no inhibitor.

37. The enforcement difficulty with a strict liability trainer responsibility rule is a Hearing that proceeds as follows:

- As stated the burden of proof is on the Administration. The standard of proof is on a balance of probability based upon an evidentiary burden of cogent evidence clear and convincing.
- The trainer describes precautions for protection of the horse to industry standards and denies involvement in or knowledge of administration of the drug stimulant. The disclaimer of involvement is entitled to assessment according to the circumstances of each case.

38. When this scenario plays out a dozen times in a dozen instances that constitutes too many coincidences. The circumstantial evidence supports a finding of lying. There is a short list of persons who have the opportunity, the means and the motivation to provide expensive performance-enhancing blood doping, often by injection. The overwhelming probability is that someone is lying under oath. The problem - which ones? In the individual instance it is difficult to conclude that the trainer is lying.

39. With a series of positive test Hearings with that template style of defence evidence, the result is highly improbable. That is a recurrent mysterious unexplained administration of racing stimulant to someone else's horse. That result calls to mind the expression – "Once is happenstance, twice is coincidence, thrice is enemy action." The consequence is that prosecution of positive test cases on a strict liability format is ineffectual. The industry sees drug enforcement as ineffectual. That approaches allurement for those who seek to evade racing rules to gain an "edge". In result, doping cases have been on the increase.

40. Against that background, the Racing Commission in reliance that the legislature intended to provide effective means for protection of the public interest adopted the absolute liability standard for the trainer responsibility rule.

41. In Regina v City of Sault Ste Marie 1978 40 CCC (2nd) 353, at page 374 Dickson J. states:

"Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the Legislature, the importance of the penalty and the precision of the language used will be primary considerations in determining whether the offence falls into the third category," (the third category being "absolute liability.") The Commission concluded that this standard had been met and introduced the absolute liability rule for the express purpose of protecting the public interest in racing.

42. **Section 5** of the Racing Commission act 2000 provides:

"The objects of the Commission are to govern, direct, control and regulate horse racing in Ontario in any or all of its forms. 2000, c. 20, s.5."

43. **Section 6** provides

The Commission shall exercise its powers and perform its duties in the public interest and in accordance with the principle of honesy and itnegrity, an social responsibility. 2000, c. 20.s.6.

44. **Section 11 (1)** provides:

The Commission may make rules for the conduct of horse racing.

45. **Section 11 (7)** provides that the Commission shall hold Hearings for persons who consider themselves aggrieved by a decision of a person acting under a power delegated by the Commission.

46. **Section 7** identifies the powers of the Commission which include:

- To govern, direct and control horse racing in Ontario.
- To license participants in racing.
- To set conditions under which licenses may be issued, continued or renewed.
- To require licensees to keep books of account.
- To require Commission approval for racetrack officials and employees.
- To hold Hearings relating to carrying out its objects and powers.
- To impose penalties for contravention.

47. **Section 6(k)** empowers the Commission to establish the procedure for its Hearings including issuing summons, taking evidence under oath, production of documents and "things that the Commission considers requisite in a Hearing."

48. That overall regulatory pattern for the purpose of protecting the public interest in horse racing pursuant to Section 6 is comprehensive. Thereby the Legislature has made it clear that the dominant

value is the public interest. The Legislature has subverted individual rights by providing for Immediate Suspension which must be viewed as a significant intrusion with multiple and serious consequences for employment income and reputation. Overall, the message from the Legislature must be that the public value is high, that stern measures are justified and finally, implicitly that stern measures are provided.

49. The primary purpose is prevention of drug abuse, not its punishment. By the punishment stage, the damage has been done. The protection of racing integrity is best accomplished by racing defences being out-front or ahead of the blood dopers. That out-front status is achieved by:

- Standardbred Rule 1.09 which stipulates and puts the Industry on notice of a broad general catch-all power to protect the public interest in racing. Racing is instantaneously vulnerable to blood-doping cheaters. One positive test taints the fairness of that race and thereby the overall fairness and integrity of racing – which is so vital for the Industry. Because of that critical vulnerability the response to blood-doping must not be on a catch-up basis. From the public interest perspective, punishment after the fact does not rehabilitate integrity. The notoriety of the blood-doping incident and punishment serves only to promulgate racing's difficulty with cheaters.

- The absolute liability status of the Trainer Responsibility rule applied as detailed herein.

50. The encroachment on procedural fairness by the enforcement of the absolute liability trainer responsibility rule is mitigated by:

- An immediate right of appeal to the Commission.

- No minimum penalty applies.

- The penalty for the "blameless" (who have succeeded in a due diligence defence) being restricted to a fine of non-oppressive amount (with no suspension for the "blameless").

- By factoring due diligence considerations into the penalty assessment.

51. 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.

52. The Racing Commission concluded that it had implicit authority to proceed with enforcement of the trainer responsibility rule as an absolute liability offence. This was based on:

- The first premise that against the background difficulty in protecting the public interest this exercise of a discretionary power would be seen as reasonable.

- The second premise was that with the absolute liability standard, certain results clearly in the best interests of racing, could be maintained as follows:

- Placement of the horse because the performance enhancing drug made the race unfair.

- Redistribution of purse funds for the same reason.

- Disqualification of the horse for 90 days as a measure to have owners take an active part in protecting racing from drug dispensing trainers; by protecting their own horses they protect the industry.

- The third premise related to the "blameless" trainer concept. There would be no licence suspension provided a due diligence defence was made out. The penalty would be confined to a moderate or reasonable fine. On this basis, the absolute liability approach would be correct in law under the standard in the Sault Ste Marie case.

53. Those considerations of reasonableness and correctness in law were seen as compliance with Judicial Review standards.

Result

54. In reply argument, counsel for the Administration contends the Panel should give "little or no consideration" to four cases cited by the appellant because they were not referenced in the Appellant's factum.

55. In matters of law, the Administrative Tribunal is held to a standard of "correctness". Folly indeed it would be to disregard authorities and precedents simply because there has been a breach of ORC Rules of Procedure (ORC Procedural Rule 4.7).

56. Further in reply, counsel for the Administration asks leave to file further submissions if those four cases are considered by the Panel –*"respectfully requests that the Panel grant it the opportunity to advance further submissions, rely upon additional precedents and invite submissions from those who seek standing including the Attorney General."* That submission is devoid of merit. Counsel had fully opportunity to make reply submissions and to reference authorities.

57. In response to the Attorney General reference, the challenge in this Hearing is to the validity of a Rule of Racing framed and passed by the Racing Commission. The enabling legislation is subject to interpretation not constitutional challenge.

58. Regarding penalty, the guideline suggestion for a first offence Class II violation is "one to five years, $5,000 fine." Although not binding on the Panel, the guidelines do promote consistency and predictability of penalties thereby contributing to fairness.

59. The dominant penalty factor is general deterrence. Specific deterrence is a secondary feature. Shakes' racing record stands to his credit. His explanation of his "late" medication offences is accepted. In mitigation are his candour with investigators and his willingness to deal with his difficulty.

60. The Appeal must be and is hereby dismissed both as to liability and penalty.

61. Pursuant to request from Medisca and with consent of both counsel, in the interests of protecting trade confidentiality, **Exhibit (A) and the corresponding 42-page brief in the book of documents will be sealed to be opened only upon instruction from the ORC Board.**

62. For convenient reference, rules and a directive are appended hereto as follows: Rules 1.07, 1.09, 26.02.01, 26.02.03, Directive 3 - 2008.

DATED this 27th day of November 2012.

James M. Donnelly
Panel Chairman

Rule 1.07 Every person participating in and every patron of a meeting shall abide by these rules and accept the decisions of the Judges, subject to the right of appeal to the Commission.

Rule 1.09 If any case occurs which is not or which is alleged not to be provided for by the rules, it shall be determined by the Judges or the Commission as the case may be, in such manner as they think is in the best interests of racing. Provided however, the Commission in its absolute discretion may waive the breach of any of the rules, which waiver or breach the Commission does not consider prejudicial to the best interests of racing.

Rule 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.

Rule 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;
(b) any trainer whose horse(s) tests positive resulting from the out-of-competition program;
(c) any trainer whose horse(s) tests positive resulting from testing in accordance with or under the *Pari-Mutuel Betting Supervision Regulations*;
(d) any trainer whose horse(s) level of $TC0_2$ equals or exceeds the levels set out in Rule 22.38.

Directive 3 - 2008

Ontario Racing Commission

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March 3, 2008

STANDARDBRED DIRECTIVE NUMBER 3 – 2008
RULES OF STANDARDBRED RACING 2005

The Ontario Racing Commission at its meeting of Tuesday, January 22, 2008, resolved that the Rules of Standardbred Racing 2005 be amended by the promulgation of the following Rule. Previously issued under Standardbred Directive 1 – 2008, the Rule is being re-issued to reflect the correct effective date.

Chapter 26

TRAINERS AND GROOMS

New Rule 26.18 At the time of declaring a horse for entry, the trainer of the horse is responsible for ensuring that the person making the entry declares the name of the ORC licensed veterinarian who has primary care of that horse. Failure or refusal by a trainer to comply may result in the horse being made ineligible.
(Effective June 1, 2008)

BY ORDER OF THE COMMISSION

John L. Blakney
Executive Director