



COMMISSION HEARING

TORONTO, ONTARIO – SEPTEMBER 14, 2010

**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 LICENSEES BARRIE MURRAY & BRADLEY BARR**

Standardbred Licensee Barrie Murray (“Murray”), is licensed by the Ontario Racing Commission (“ORC”) as a driver/trainer/owner, licence number 510289.

Standardbred Licensee Bradley Barr (“Barr”), is licensed by the ORC as a groom/owner, licence number P97514.

On May 24, 2009, Flanagan Speed, a horse for which Barr was the registered owner and Murray the registered trainer, was entered in the 9<sup>th</sup> race at Rideau Carleton Racetrack. During the race the horse was pulled up by its driver and did not finish. On the way home from the racetrack Flanagan Speed was found dead in the trailer by Barr.

An investigation into Flanagan Speed’s death indicated high levels of Reserpine, a Class II prohibited drug, in the horse’s blood. On this basis, the Director issued Notices of Proposed Orders to suspend the licenses of both Murray and Barr for three years.

Murray and Barr appealed the Notices of Proposed Orders.

On September 14, 2010, a Panel of the ORC consisting of Vice-Chair James Donnelly, Commissioner John Macdonald and Commissioner David Gorman was convened to hear the appeals.

Angela Holland appeared as counsel for the Administration, Gerry White appeared as counsel for both Murray and Barr, and Murray and Barr attended in person.

Upon consent of Murray and Barr and the Administration, the appeals were heard together.

Upon hearing the testimony of Investigator Charles Beirnes, Dr. Lynne Blackburn, Dr. Mike Weber, Dr. Bruce Duncan, Murray and Barr, upon reviewing the exhibits filed and upon hearing the submissions of counsel for the Administration and counsel for Murray and Barr, the Panel dismissed Murray’s appeal but varied the penalty and allowed Barr’s appeal.

Murray’s penalty was varied as follows:

- i. Murray is suspended for one year, October 26, 2010 – October 25, 2011; and
- ii. Murray is fined \$5,000.

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

DATED at Toronto this 25<sup>th</sup> day of October 2010.

BY ORDER OF THE COMMISSION

  
John L. Blakney  
Executive Director



## REASONS FOR DECISION

### The Appeal

1. Licensees Barrie Murray (Murray) and Bradley Barr (Barr) appeal Notices of Proposed Order to suspend their licenses each for three years. These Notices pertain to the death of the horse FLANAGAN SPEED on Sunday, May 24, 2009, following racing in the 9<sup>th</sup> Race at Rideau Carleton Racetrack on that date. Murray was the trainer of record. Barr was the registered owner.
2. Upon consent of Barr, Murray and the Administration, the appeals were heard together. In response to a question, Gerald White, counsel for both appellants advised the Panel that there was no potential for conflict of interests between the appellants on the identity of the de facto trainer.

### Background

3. The core facts are undisputed and amply supported by evidence.
4. Barr claimed FLANAGAN SPEED at Rideau Carleton for \$15,000 on May 7, 2009. The horse paced that mile in 1.57<sup>4</sup>. On May 17, Barr raced the horse at Rideau Carleton in a \$22,000 claimer. The horse finished 4<sup>th</sup>, beaten 11 lengths. The race went in 1.53<sup>3</sup>. FLANAGAN SPEED paced in 1.55<sup>4</sup>.

### Death of FLANAGAN SPEED

5. FLANAGAN SPEED was not seen by a veterinarian between the claim and May 24. On May 24, FLANAGAN SPEED was entered to race at Rideau Carleton in a \$22,000 claimer. Barr paddocked the horse, gave it what he described as an untainted commercial pre-race jug and warmed it up. Murray was not at Rideau Carleton that evening. The horse warmed up after Race 6 with no apparent abnormality. Following the 8<sup>th</sup> Race, Barr noticed the horse was shaking in its stall and so reported to ORC track veterinarian, Dr. Lynn Blackburn.
6. Dr. Blackburn assessed the horse during the post parade and detecting no abnormality, permitted it to race. At the start, the horse had to be manually turned or led to the gate. It got away poorly and was pulled up at the half and returned to the paddock.
7. Upon examination, Dr. Blackburn noted quivering in large muscles in fore and hind limbs and a glazed look in its eye. The horse walked and drank normally and had normal heart beat and rhythm considering that it had just raced. Dr. Blackburn suggested the horse be walked to cool it out. She reported to the Judges that she believed the horse had been tranquilized (as indicated by the eye symptoms).
8. Upon re-examination thirty minutes later, heart rate, respiratory rates and temperature were normal. However, the horse refused to move and had hyper-motile gastrointestinal sounds. No painful signs were exhibited other than refusal to move. Dr. Blackburn asked Barr if the horse had been tranquilized and was told “no” and that the horse had been fine all week. Dr. Blackburn accepted that answer as truthful and reliable and acted upon that reliance in her



diagnosis and treatment. The quivering musculature was inconsistent with prior administration of a tranquilizer. Dr. Blackburn now considered the horse suffered from severe myositis (a contraction of the large muscles without release).

9. Dr. Blackburn administered 10 cc Banamine (painkiller), 1 cc Acepromazine (tranquilizer), 5 cc Butorphanol (painkiller) and 8 cc Flumethasone (anti inflammatory). She instructed Barr to take the horse home to be rested. It died in the trailer about one half hour later. Barr reported the death to Dr. Blackburn. Under Dr. Blackburn's direction, Barr complied with ORC protocols for horse death.

10. A Post mortem or necropsy included toxicology testing of the heart blood at the Pennsylvania Equine Research Laboratory which confirmed blood content of Reserpine (3.325 ng/mL), Flunixin (1246.274 ng/mL) and 2-(1-Hydroxethyl) Promazine @ 1.097 ng/mL.

11. Dr. Patricia Dowling, Prof. of Veterinary Clinical Pharmacology at the Western College of Veterinary Medicine concluded on the basis of necropsy and toxicology testing that the cause of FLANAGAN SPEED'S death was fatal hypotension due to the simultaneous actions of two tranquilizers, Reserpine and Acepromazine. Dr. Dowling was unable to determine the original dose or its timing and commented in her report, "but that measured concentration was higher than the mean peak concentration of the horses in the Australian study seen 30 minutes after receiving 2.5 MG or Reserpine intramuscularly." She adds, "it is very likely that its hypotensive effect lasts longer than our ability to detect the drug."

12. Dr. Dowling reported that Reserpine is a long acting tranquilizer developed for use in humans. The behavioural effects of Reserpine have been documented to last for at least 10 days with anecdotal reports of behaviour modification for up to six weeks.

13. The source of the Acepromazine was known. The issue relates to the source of the Reserpine. Both Barr and Murray testified denying administration of the drug or knowledge or complicity therein.

### **The De Facto Trainer**

14. Investigator Beirnes offered the opinion that although Barr was the owner of record and Murray the trainer of record, Barr was the de facto trainer. This opinion was beyond the scope of Beirnes' expertise and is a matter for the Panel based on all the evidence. Nevertheless, Beirnes' opinion was admitted in evidence with its weight subject to determination. (Section 15 SPPA)

15. Murray insisted that he was the actual trainer dealing with all trainer's duties and responsibilities. Their combined evidence was that Barr attended to the horse performing grooming duties and drove the horse in its daily training routine.

16. Barr's evidence was that after several years' absence, at age 44 he had just returned to racing with acquisition of this horse and another now racing at Mohawk. Barr and Murray shared ownership in certain horses. Barr testified that given Murray's forty-nine years' experience in the business he relied on Murray's advice and accepted his decisions. Murray made the claim for FLANAGAN SPEED at the Judges stand with Barr's money.



17. Other circumstances raise issue with acceptance of the appellants' position relating to the de facto trainer. Barr had been a construction foreman for the last 12 years. He contemplated a return to full-time racing. To do this, he re-mortgaged his house. In three weeks his horse was dead, representing \$15,000 plus tax lying in the trailer. Barr is married with a seven year old daughter. Murray is 69 years old and has fractional ownership in four horses. Barr's father has recently purchased a training track from Murray. There was suggestion in the evidence that the purchase was for Barr's benefit.

18. The issue is not made any easier by Barr's answer to Investigator Beirnes.

Q. According to Barry Murray you are doing all the duties of a trainer on all 5 horses that he is down as trainer of and he stated he only offers advice on harness issues, is that correct?

A. Yeah that's it.

19. Absent proof of involvement in administration of the drug either directly or indirectly or by complicity in directing or aiding and abetting, Barr as owner would not be subject to suspension, all of which gives pause.

### **The Hidden Hand**

20. This is another of those troublesome cases where administration of the drug and knowledge of or complicity in that administration is denied by all parties including Pierre Touchette, the trainer before the May 7 claim.

21. That the drug was probably an intramuscular injectable weighs against accident. Accident is also rendered more remote by Barr's evidence that the only administration to the horse was a pre-race jug, properly labeled, un-tampered with, and acquired at a track tack shop.

22. **Reserpine** – Reserpine is not licensed for use in horses. The Ontario Racing Commission (ORC) by Policy Directive No. 1-2008 promulgated the penalty guidelines for equine drug offences effective January 31, 2008. As identified in the Directive, Reserpine is a Class II drug prohibited at race time. The guideline range for a first offence is a suspension of one to five years plus a \$5,000 fine. Reserpine is a long acting tranquilizer. It might be used to settle or take the edge off a nervous horse thereby assisting him in going to and getting away from the starting gate.

23. Dr. Michael Weber, Manager of CPMA Vet Service (drug & medication control) described a testing protocol conducted by CPMA to establish an elimination or withdrawal rate for Reserpine in horses. As a result of those tests with dosages of 5 MG/IV and 2.5 MG/IM, the CPMA guideline for complete withdrawal was established at 7 days. Dr. Weber explained that there is a consideration of dose dependence as well.

24. Dr. Weber's evidence was:

“In our studies we determined the concentration of Reserpine in serum (blood) and urine following the administration of 5.0 MG IV and 2.5 MG IM (intravenous and intramuscular).



Following the 5.0 MG IV dose, Reserpine blood concentrations were below 3.325 within 3 hours post administration. Following the 2.5 MG IM dose, none of the blood samples had Reserpine concentration at or above 3.325 ng/mL.” Testing of the heart blood from FLANAGAN SPEED resulted in a Reserpine concentration of 3.325 ng/mL.

25. Dr. Weber considered that test result to be high to the extent the administration of the drug certainly could not have been two weeks prior to the death, that is before the horse was claimed. That level suggested to Dr. Weber, administration within hours prior to the race. Dr. Weber mentioned a variety of hypotheses, including unwitting administration as a component of a pre race jug normally containing such as vitamins and electrolytes. This could result from use of unmarked or unlabelled products.

26. Dr. Weber was unaware of any studies on elimination times for horses regularly given Reserpine over a long interval. There was no evidence indicating such administrations.

27. Dr. Weber was 30 years from clinical practice and stated that in his studies only the clinical signs visible to the eye would be noted. In his opinion, an administration of the Reserpine two weeks prior must have been “enormous” to produce that toxicology result. He described one side effect as diarrhea, adding that the drug had “quite a tranquilizing effect.” There was no evidence of such side effects during the two and a half weeks since the claim. With the horse continuing to race through that interval following the claim and apparently being symptom free, that “enormous” dose scenario seemed unlikely. The sudden onset of acute symptoms although not the subject of comment in evidence, absent explanation does not seem to point to administration on or before May 7.

28. That the drug was administered prior to the claim is contrary to reliable impartial testimony from Dr. Weber. That suggestion falls into the category of speculation and conjecture unsupported by evidence and unsupportable on the basis of the entire evidence.

29. Dr. Bruce Duncan, Supervisor of ORC Veterinarians and Manager of the ORC Death Registry, commented on the death. Given the information provided to Dr. Blackburn that the horse had not been tranquilized, her administration of Acepromazine was appropriate for her final diagnosis of myositis, so severe, that the horse could not or would not move. Neither Dr. Weber nor Dr. Duncan could comment further on the timing or amount of the dosage of Reserpine.

30. The appellants presented well in the witness box, expressing dismay. Assessment of credibility goes beyond appearance and demeanour. More important than their demeanour is assessment of the content of their evidence in light of proven facts. Evidence need not be either accepted or rejected. There is a middle ground where evidence neither accepted nor rejected raises doubt on the burden of proof issue.

31. The Administration need not make proof to the extent of identifying the person who administered the drug. The Administration case does prove on a balance of probability that Reserpine was administered to the horse after May 7, 2009. The Standard of proof is identified in *F.H. v McDougall* 2008 3 SCR41, paragraph 49.



32. The Administration case viewed in light of the appellants' denial falls short of proving who administered the drug. FLANAGAN SPEED raced with Reserpine in its system. Under the Trainer Responsibility Rule (26.02.01), the trainer is responsible.

33. Upon consideration of all the evidence, the Panel finds that the trainer of record, Murray, was the de facto trainer with ultimate responsibility for decisions relating to the care and management of the horse. That ultimate responsibility component is the decisive factor in making that finding. It may be that as between Barr and Murray, whatever their responsibility, they know where it lies.

34. There is no evidence of wrong doing, knowledge or complicity by Barr. It follows that Barr's appeal must succeed. Murray's appeal must fail.

35. On the penalty issue, Murray's close to 50-year history in the business with only one violation about 10 years ago is a mitigating factor. Also in mitigation is Murray's candour in admitting that he was the de facto trainer. Mitigating factors must be included in the penalty equation. The general rule is that similar offences by similar offenders in similar circumstances should have similar penalties.

36. The drug/medication issue poses a lethal threat to the public interest in horse racing. The applicable principles are detailed in ORC Ruling #21/2007 re Brian Scott and are adopted although not repeated here.

37. The integrity of racing is fundamental. Drug violations are antithetical to the well being of racing. There must be full measure given to consideration of general and specific deterrence as the dominant penalty factor. Like-minded persons must be warned. The offender should not repeat. The conduct must be denounced in unmistakable terms.

38. The high end of the penalty range is appropriate in worst case circumstances, worst offence, worst offender. A person proven to have willfully administered the prohibited substance would probably fall into the upper half of the penalty range.

39. If proof falls short of demonstrating identity of the perpetrator and liability is premised upon trainer responsibility, then the penalty is more likely to be in the lower half of the range.

40. The Administration led evidence of a prior drug offence by Murray (a positive July 10, 2000 resulting in a suspension July 21, 2000 to August 19, 2000). This evidence of an earlier offence ought not to be treated as propensity evidence tending to prove that if the person offended once he/she would likely do so again. The true purpose of such evidence is limited to cross examination on credibility. If that evidence is not used on the credibility issue, notwithstanding the broad admissibility in S15 SPPA, it probably should only be tendered at the penalty phase of the Hearing as an aggravating factor.

41. The Director's proposed suspension is at the mid-point of the guideline range. The appropriate range for this offence would be a suspension of one to three years. Given the peril to racing integrity posed by drug offenders, one member of the Panel concluded that the proposed three-year suspension although at the high end cannot be said to be wrong and accordingly no basis exists for variance of the proposed suspension. However, the majority of



COMMISSION HEARING

TORONTO, ONTARIO – SEPTEMBER 14, 2010

---

the Panel concluded that based on Murray's long-term racing record, the penalty should be a one-year suspension with a fine of \$5,000.

42. The Director's Proposed Order for Murray will issue in accordance with the majority decision.

DATED this 25<sup>th</sup> day of October 2010.

James M. Donnelly  
Vice Chair