Ontario
Racing
Commission

RULING NUMBER COM SB050/2011

COMMISSION HEARING TORONTO, ONTARIO – OCTOBER 19, 2011

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 BLAKE CURRAN

Blake Curran ("Curran") appealed against Standardbred Official Rulings SB 43443 and dated July 21, 2011, wherein Curran was fined $5,000 and subject to a two-year suspension (with 180 days stayed) for a violation of SB Rules 9.09(b), 26.02.01 and 26.02.02, as a consequence of a positive test for the Class II drugs, Lidocaine and Desethyl Lidocaine.

On July 25, 2011, Curran advised the Judges of his Intent to Appeal.

On August 3, 2011, counsel on behalf of Curran submitted a Notice of Appeal as to "penalty only".

On August 18, 2011, a Notice of Hearing was issued advising that a Hearing will be held on October 19, 2011.

On October 19, 2011, a Panel of the Ontario Racing Commission consisting of Chair Rod Seiling, and Commissioners David Gorman and Dan Nixon was convened to hear this matter.

Larry Todd appeared as counsel on behalf of Curran. Jennifer Friedman appeared as counsel for the Administration.

Upon hearing the testimony of ORC Senior Judge John Campbell, ORC Supervising Veterinarian Dr. Bruce Duncan, Dr. Garth Henry, Dr. Berthiaume-Atack and Curran and upon hearing the submissions of counsel, the Panel varied the penalty as follows:

1) The suspension of two years (with 180 days stayed) is varied to two years (with one year stayed) less time served from July 21, 2011 to October 19, 2011;
2) The fine of $5,000 is upheld;
3) The two-year probation is upheld. Should any medication rule be violated during the course of the probation, the stay will automatically expire.

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

DATED at Toronto this 24th day of October 2011.

BY ORDER OF THE COMMISSION

John L. Blakney
Executive Director

REASONS FOR DECISION

Overview

1. Standardbred licensee, Blake Curran, appealed a decision of the Judges, SB 43443 wherein he was suspended two years with 180 days stayed and fined $5,000 for violating SB Rules Nos. 9.09 b, 26.02.01 and 26.02.02.

Background

2. Mr. Curran was trainer of the horse, Glittering Muscles, when it raced on July 1, 2011 at Rideau Carleton Raceway (RC) in the 1st race. Subsequent to the race on July 8, 2011, the Judges at RC received a Notification of Positive Test for the horse for the Class II drugs, Lidocaine and Desethyl Lidocaine.

3. Legal counsel for the Ontario Racing Commission (ORC), Jennifer Friedman, and the appellant's legal counsel, Larry Todd, confirmed that the appeal was on the penalty related to the ruling and that the appellant was not going to dispute the positive test.

4. Judge John Campbell confirmed that the Judges utilised RCI's Penalty Guidelines (Ex. 5) in assisting them to determine the appropriate penalty. They identified mitigating and aggravating factors as follows:

> Mitigating: Curran admitted to the culpability. He sought advice from two veterinarians as to whether to scratch the horse, and the acceptance of Dr. Henry's "bad" advice - the unlikelihood a positive test would result from a topical application that was quickly washed off.
>
> Aggravating: Factors were the licensee's licensing history, his apparently careless stable practices and the possibility of an unidentified secondary contact of the drug with the horse that caused the Positive Test Result.

5. The Judges determined that it should be classified as a first time violation notwithstanding the appellant had just had a probation period expire three weeks earlier. In moving up the penalty from the minimum one-year suspension, Mr. Campbell submitted that there was a possible unexplained secondary contact of Lidocaine with the horse given the topical application was not the likely source for the Positive Test Result.

6. Dr. Bruce Duncan, Supervisor of Commission Veterinarians along with Dr. Garth Henry and Dr. Linda Dr. Berthiaume-Atack all confirmed the unlikelihood that the Positive Test Result could have been the result of the topical spray given there were no open cuts on the horse according to Mr. Curran. They did agree that a potential cause could have been that the horse could have ingested some of the spray by inhaling it or by licking it. There was no disagreement of Lidocaine's ability to dull/lessen pain.

7. Dr. Berthiaume-Atack testified that she never gave Mr. Curran an option as to whether to race the horse and left that decision to him. Mr. Curran contradicted her in his evidence claiming she did say it was okay. Supporting Berthiaume-Atack's version was Investigator Beirnes' report, Exhibit 1, tab 2. She did not advise the Judges as to the Lidocaine issue and Glittering Muscles later that day when she subbed for the track vet at Rideau Carleton as she had no opinion and the horse was not sick or lame, therefore she had no basis to contact the Judges under the Rules.

8. Dr. Henry, one of the veterinarians the appellant uses stated he would have raced the horse, given the facts he was told, had he been the trainer. In hindsight, he admitted he was wrong and was surprised by the positive test.

9. Mr. Curran became alarmed as he was coming off the track at his training centre and witnessed his employee spraying Glittering Muscles which had been turned out in the paddock as per normal procedure for a horse to race that day.

10. He stated he then read the label on the Bactene and when he discovered it contained Lidocaine, he ordered the person to bathe the horse and wash off the spray. He confirmed on examination the horse had no open cuts but it did have welts from fly bites.

11. The Bactene was in the stable area on a shelf. No testimony was led to indicate any precautions were in place other than it was up high enough so that his children could not reach it.

12. His explanation for possible reasons for past scratches (4) for his horses into race under "medication in error" was a mix up of horses' feed tubs wherein one of the horses may not have eaten all of its feed which contained medication. Mr. Curran did not agree it represented carelessness on his behalf. Such practice, if followed by Mr. Curran in his stable, is lax at best, and certainly not what is the accepted "standard" for "good" stable practices.

13. Mr. Curran admitted to two previous positive tests but submitted he was innocent of the high EPO level warning on the basis he had claimed the horse and the level was there on its acquisition..

Issue

14. Was the penalty assessed by the Judges at RC to Mr. Curran for the Class II drug violation for the horse, Glittering Muscles, appropriate given both the mitigating and aggravating factors?

Decision

15. After carefully listening to the testimony and reviewing the submissions and documents rendered, the Panel denies the appeal but varies the penalty as follows: The stay on the two year full suspension is extended to twelve months with time served to count. The fine remains at $5,000 and Mr. Curran is to be put on probation for two years. Upon completion of his penalty, if he is judged to violate any drug related rule of racing during that interval, his stay will be automatically revoked.

Reasons for Decision

16. Under Policy Directive No. 1/2008- Penalty Guidelines for Equine Drug, TCO_2 and Non therapeutic Drug Offences, the Judges correctly identified that the Positive Test Result should be treated as a first time offence and applied the appropriate penalty range (Ex. 2, page 5). The suggested guideline is one to five years plus a $5,000 fine. They also correctly took into consideration mitigating and aggravating factors when finalizing their decision on penalty.

17. The difference for the Panel in weighing both the mitigating and aggravating factors, in making its decision to vary the penalty, was that it was guided by Vice Chair Donnelly's Ruling in Preszcator (SB

012/2007) wherein at Para 12 he wrote " The absence of willful wrongdoing does have a significant impact on penalty". As was the situation in that case, Mr. Curran relied on his veterinarian, Dr. Henry, whose advice was that it was okay to race the horse as he did not think it would result in a positive test. Certainly a licensee should be entitled to rely on advice provided to him by a licensed ORC veterinary doctor. That assertion is given further weight wherein in Preszcator, Mr. Donnelly wrote that the appellant was entitled to rely on an unlicensed veterinarian recognizing the risks that person may not be current.

18. The Panel accepts the testimony of Dr. Berthiaume-Atack supported by Investigator Beirnes report (Ex. 1, tab 2) that she left the decision up to Mr. Curran as to whether to race the horse. Notwithstanding her position, Mr. Curran could reasonably be expected to rely on Dr. Henry with whom he had a longstanding professional relationship as his veterinary doctor for his horses.

19. Mr. Curran had not received a penalty within the past three years, albeit he had just within the past three weeks had a probation order expire. His licensing history (Ex. 4) indicates two positive tests, a warning for an EPO overage, a rule breach for purchasing drugs from unlicensed vendors and four medicated in error scratches. Clearly, he has a demonstrated problem related to his ability to manage according to the rules the proper legal medication of his horses.

20. It is reasonable to conclude that his lack of accepted professional management regimen in his stable may be a cause. The product that caused the positive test was available to his groom and apparently there were no prohibitions about use notwithstanding the horse was turned out prior to race as was the "norm". The onus was on him to read in advance the label on products to be used on his horse. He acknowledged this, and he should have had appropriate safeguards in place and not just place the product out of reach of his kids. His explanation of the possible cause of past "medicated in error" scratches as to the mixing up of feed tubs from other horses who had medication added to their feed and did not eat all of it speaks directly to inadequate and inappropriate stable procedures.

21. The Panel was also guided by Mr. Donnelly's statement in that same ruling as it relates to deterrence wherein he wrote at para 16: "The Panel is fully cognizant of the drug issue, its central importance and the need for specific and general deterrence…" in Para 18 of that same Ruling he added: "The punishment must fit the crime. Into that mix of punishment, general deterrence, specific deterrence and rehabilitation must go into such matters as the number of suspension days and served to date, the effect on the licensee's record…"

22. A Class II violation is a very serious breach of the Rules of Racing. Mr. Curran did not dispute the Positive Test Result for the horse for which he was the trainer and accepted his responsibility as such. As Dr. Duncan testified, RCI classifies drug rule breaches as to their "seriousness". A Class II violation, therefore, is very serious breach. Lidocaine with its ability to dull or numb pain can influence the outcome of a race and therefore is on the list of prohibited substances as per the Canadian Pari Mutuel Agency's Schedule of Drugs. Based on his record and practices, one can reasonably conclude previous penalties and sanctions have not had any meaningful impact and have not served as a deterrent.

23. Mr. Todd submitted that a penalty of three to eight months would be appropriate based on the degree of culpability of Mr. Curran. In support of his position, he referenced three precedent cases, Vrablic, Rose and Belhumeur. The aggravating difference in those cases versus Mr. Curran is their previous "good" licensing history as opposed to the appellant.

24. As to culpability, the Panel accepts the testimony of all three veterinarians, Dr. Duncan, Dr. Henry and Dr. Berthiaume-Atack that the positive test could possibly have come from mucateous ingestion either through inhaling it when it was sprayed on the welts or licking it before it was washed off. This evidence was not available to the Judges. The Judges' rationale for penalty was the evidence before them re the topical application of the drug was unlikely to cause the positive result and hence the possibility of another application of some kind. Under those circumstances, adding to the minimum penalty was reasonable.

25. Dr. Berthiaume-Atack, as the Commission veterinarian on July 1, 2011, had no basis to scratch the horse as per SB Rule No. 8.02. She had no opinion as to a possible positive test nor was the horse lame or sick.

DATED this 24th day of October 2011.

Rod Seiling
Chair