Ontario
Racing
Commission

RULING NUMBER COM SB 063/2010

COMMISSION HEARING TORONTO, ONTARIO – DECEMBER 15, 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 LICENSEE JEFFREY SNYDER

Standardbred licensee, Jeffrey Snyder, properly appealed Ruling SB 99/2008, wherein the Director ordered that any purse monies earned by the horse MICHELLES POWER, from August 29, 2007 until November 24, 2007, be remitted to the association within fifteen days for redistribution, and imposing a period of ineligibility retroactively for the same period. On July 9, 2008, Ruling SB 99/2008 was stayed by order of the Deputy Director pursuant to Ruling GEN 001/2008.

On December 15, 2010, a Commission Panel composed of Chair Rod Seiling, sitting alone, convened a hearing. Brendan van Niejenhuis appeared as counsel to the Administration and Arlen Sternberg appeared as counsel to Jeffrey Snyder.

On being advised that the parties consented to an order allowing the appeal, and that the Administration would call no evidence, and on hearing the submissions of counsel for the parties, the Commission allowed the appeal and set aside Ruling SB99/2008. Written reasons for decision were prepared by the Panel, a copy of which is attached to this Ruling.

DATED this 23rd day of December 2010.

BY ORDER OF THE COMMISSION

John L. Blakney
Executive Director

REASONS FOR DECISION

Overview

1. Standardbred licensee, Jeffrey Snyder, appealed SB Ruling No. 99/2008. That ruling was issued as a result of a confirmed positive test result for Darbepoetin-alpha in his horse, Michelles Power, on about April 14, 2008. In accordance with SB Rule No. 18.08.01 any purse monies earned during the period of August 29, 2007 and November 24, 2007 inclusive had to be returned to the association within fifteen days for redistribution. Mr. Snyder was granted a stay as per Ruling No. GEN 001/2008 on July 9, 2008.

2. An oral decision setting aside SB Ruling No. 99/2008 and thereby granting the joint request of Brendan Van Niejenhuis, legal counsel for the Ontario Racing Commission (ORC) and Arlen Sternberg, legal counsel for the appellant, was rendered with written reasons to follow.

Background

3. Blood was obtained from Michelles Power in August of 2007 under the ORC's Out of Competition Testing Program. The initial test on the blood sample did not result in a confirmed test for EPO or DPO. As a result of new testing innovation, the sample was retested and confirmed positive in May of 2008.

4. The Director, upon being informed of the confirmed positive test result, retroactively suspended the horse for ninety days (August 29, 2007 to November 24, 2007) under the ORC's Rule SB.11.10.01 (owner responsibility). Under SB Rule No. 18.08.01, the purse winnings of the horse during that time period were ordered to be redistributed.

5. The parties, at that time, agreed not to proceed further after the granting of the stay (GEN 001/2008) and to await the outcome of the hearing for the horse's trainer, William Elliott. In September of 2009, a hearing was held, wherein Mr. Elliott was suspended for a period of ten years and fined $40,000 as the trainer of a horse with a confirmed positive test for DPO, (SB Ruling No. 030 (a)/2009).

6. Two precedent rulings, McFadden (SB Ruling 003/2009) and Vanderkemp (SB Ruling No. 016/2009) were referenced. Both appeals were related to the issue of when the ninety-day horse suspension takes effect. The issue in question is when should the suspension date commence, the date the sample is obtained or the date of official notice of the positive test result? The Executive Director's Order predated those decisions.

7. Both decisions are unequivocal, the suspension date can only and should only commence after there has been a confirmed positive test result. In McFadden, Vice Chair Donnelly writes at para 11, "The starting date for the suspension is governed by Rule 11.10.01. A cause and effect relationship is created: the cause - confirmation of a positive test, the effect or result - suspension. At para 12 he wrote, "Absent of the positive test there is no authority for suspension, ... The Rule makes no provision for retroactive suspension".

8. In Vanderkemp, Vice Chair Donnelly wrote at para 27, "... Clearly on the face of the Rule, the triggering mechanism for the ineligibility is the establishment of the linkage between the

laboratory test result and the horse which was the donor of the tested sample". He added at para 29, "...The Rule is framed so that the ineligibility automatically flows from and commences with "the date of the identification of the horse" as the positive donor of the positive sample".

9 Added weight to this point of view is found in Prushnok, ORC D No. 17 Ruling COM SB 026/2008. Chairman Seiling wrote at para 26, "This Commission rightly only acts once a confirmatory result is communicated by the official testing body."

10. Two important issues supported the ORC's position on the use of EPO for racing horses. The first was the threat to the horse's health and welfare. The other was a belief that it provided that horse with an unfair competitive advantage.

11. Mr. Van Niejenhuis submitted that both he and staff of the ORC, in discussions with experts in this area, told them that healthy, fit horses do not receive an advantage from the administration of EPO. Scientific research results were tabled that are inconclusive.

12. Tabs 9 and 10 of Ex. 1 are copies of confirming scientific studies. Tab 9, Kinetics and haematological effects of erythropoietin in horses state in the summary, "After drug administration, no significant variations in red blood cell count, haemoglobin concentration, haematocrit or mean red blood cell volume were observed..." Tab 10, Low dose exogenous erythropoietin elicitsan ergogenic effect in Standardbred horses was not as definitive but concluded more study was required to see if the drug (EPO) actually enhances race performance in fit animals".

13. Tab 11, a study conducted by Dr. Bienzle and others, Reticulocyte changes after experimental anaemia and erythropoietin treatment of horses concluded that the administration of EPO helps unfit horses, that it is inconclusive the drug has any effect on fit horses. The study does conclude that EPO/DPO administration to horses does put at risk their health and welfare.

14. Mr. Sternberg submitted that Mr. Snyder's agreement not to race Michelles Power at WEG tracks until August 2008 and the approximate three weeks the ORC declared the horse ineligible to race equated to a de facto earnings penalty (90-day rule). Following the confirmation of the positive test result for Michelles Power on April 25, 2008, the ORC declared the horse ineligible to race until it received a satisfactory Elisa test result. Eligibility for the horse was restored on May 15, 2008.

15. No evidence was led to suggest that the appellant was aware or condoned the administration of the illegal drug on his horse. Mr. Snyder's record as an owner, one who raced across North America, was unblemished re medication violations.

Issue

16. Was the interpretation of the SB Rule No. 11.10.01 (90-day ineligibility rule) correctly applied to Michelles Power? Is the ORC's policy on EPO valid given the scientific research results?

Decision

17. The Panel agreed with the joint submission of the parties as per the oral decision rendered at the hearing and granted the appeal.

Reasons for Decision

18. For greater certainty, the merits of this appeal relate solely to owner responsibility and the application of Commission Rules and subsequent penalties.

!9. There was no dispute that the blood obtained from Michelles Power had a confirmatory test for EPO reported to the ORC by the official testing laboratory on or about April 14, 2008.

20. Undisputed evidence was led that the appellant was neither aware nor condoned the administration of the illegal drug to his horse. Mr. Snyder, whose horses race all across North America, had an unblemished record as an owner as it related to medication infractions prior to Michelles Power.

21. William Elliott, the trainer of Michelles Power, was held responsible for the positive test result at a hearing before a tribunal of this Commission (SB 030(a)/2009). His penalty was a ten-year suspension and a $40,000 fine in accordance with ORC policies as they relate to the administration of illegal, non-therapeutic drugs.

22. Dr. Larry Soma, an expert from the University of Pennsylvania and other experts the Commission consulted were unable to provide proof that EPO provides any appreciable increase in haemoglobin or haematocrit levels in healthy fit horses. This position was supported by a 1994 French study by Jaussaud (Ex. 1, tab 9). Dr. K. H. McKeever, in another study (Ex.1, tab 10), reported that low doses of EPO evoke a pronounced increase in red blood cell volume and ability to transport oxygen and appear to enhance aerobic capacity and post exercise recovery. This report said more study was needed as was another report done at the University of Guelph involving Dr. Bienzle (Ex. 1, tab 11).

23. Notwithstanding the inconclusive scientific research on EPO's ability to provide an advantage to fit, healthy horses, the danger to the health and welfare of the horse from such administrations is clearly demonstrated in reports found at tabs 7 and 8 of Exhibit 1. From this perspective alone, the health and welfare of the horse, the ORC's policy on EPO is founded on proven scientific research and is therefore valid. Quite simply stated, there is no valid medical rationale for the administration of EPO/DPO et al to a fit, healthy horse. If the horse is sick or anaemic, or such that an administration is required, it should not be racing.

24. Furthermore, licensees who administer perceived performance enhancing drugs are surely guilty of violating the Rules of Racing akin to a person who attempts to murder another human being via an injection of some substance on the belief it will do the "job" but discovers after the fact it did not possess the necessary properties to meet the objective. The attempt has but one objective, to gain an unfair advantage and therefore surely is a violation of the rules of racing whether there is an enhancement to performance or not. Do the deed; expect to do the time, plain and simple.

25. The ORC stance and rulings on the use of such illegal, non-therapeutic medications as laid out in tabs 12 and 13 of Exhibit 1 goes to its core mandate as per the Ontario Racing Commission Act, to protect the health and welfare of the horse and to protect the public. The ORC should, for greater certainty, modify the policy on the use of illegal non-therapeutic drugs to ensure that it covers intent. To abandon those policies would equate to an abdication of the Commission's legislated mandate, not to mention the vast majority of horse people who play by the rules and rely on the ORC for a level playing field. The ORC should and must continue to pursue and punish anyone who administers illegal, non-therapeutic drugs to race horses.

26. Therefore, the deterrence as per the ORC's penalties has been and continues to be appropriate. Those penalties need to remain in the best interests of racing. Without them, the Commission's ability to regulate would be diminished greatly and could allow "cheaters" to prosper without much concern for being caught. Without the current deterrence in place it would surely jeopardise the reputation and future of an entire industry that relies on the support of the public to survive, a public that has clearly indicated that it abhors the use of performance enhancing drugs for any athletic contest and will not support those who it sees as not being vigilant and proactive to eradicate such behaviour.

27. The panel concurs with the application of SB Rule No. 11.10.01 as outlined in the referenced precedent cases, McFadden, Vanderkemp and Prushnok. It is quite specific; authority for a suspension is the result of proof of a positive test. That proof is the notice from the official testing laboratory. The 90-day rule was incorrectly applied to Michelles Power and the estimated $250,000 to $300,000 of earnings during the time period in question does not have to be redistributed.

28. Notwithstanding the aforementioned, the fact remains that Michelles Power did have a confirmed positive test for EPO and SB Rule No. 11.10.01 should have been applied on the date the Commission received notice from the official testing laboratory, that being April 14, 2008.

29. The Panel accepts that Michelles Power received a de facto application of the rule via a combination of the time the horse was either ineligible to race in Ontario combined with the time the appellant agreed not to race his horse at WEG tracks, a combined period in excess of 90 days. While the solution is not ideal, there is no question the owner suffered an economic penalty which is and remains a cornerstone of the rule, a rule that the statistics clearly indicates is meeting its objective.

DATED this 23rd day of December 2010.

Rod Seiling
Chair