



COMMISSION HEARING

TORONTO, ONTARIO – OCTOBER 9, 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 TIMOTHY BATES**

On March 5, 2012, the horse, SIGNIFIER (tattoo #5504685), trained by Timothy A. Bates ("BATES"), licence # P33964, finished 8th in the 4th race at Woodbine.

Following the race, the Judges at Woodbine (the "Judges") selected SIGNIFIER to provide blood samples for testing. The samples were sent to Racing Forensics for analysis.

On March 8, 2012, the Judges received a Certificate of TCO₂ Analysis from Racing Forensics in relation to the sample taken from SIGNIFIER with a confirmed TCO₂ test result of 38.3 mmol/L.

On March 9, 2012, the Judges issued Standardbred Official Ruling No. SB 43998 to SIGNIFIER wherein the horse was rendered ineligible to race for a period of 90 days (March 8 to June 5, 2012 inclusive) in accordance with Rules 11.10.01 and 20.01.01(i) of the Rules of Standardbred Racing ("SB Rules").

On May 19, 2012, the Judges issued Standardbred Official Ruling SB 44912 wherein a 60-day full suspension (less time served of 30 days: May 19, 2012 – June 17, 2012) and a fine of \$1,500 were imposed upon BATES for violating Rules 22.38.06, 23.38(a), 26.02.01, and 26.02.03(d) of SB Rules as a consequence of the TCO₂ confirmation. Rules 6.13.01 and 26.08 of SB Rules were also listed in the Ruling.

On May 19, 2012, the Judges also issued Standardbred Official Ruling SB 44911 to BATES wherein, pursuant to Policy Directive No. 3-2008, conditions are to be placed on BATES' licence upon reinstatement for a two-year period (June 18, 2012 to June 18, 2014).

On May 22, 2012, BATES filed a Notice of Appeal.

On May 29, 2012, the Deputy Director issued Ruling Number SB 65/2012 wherein BATES received a conditional stay of his penalties.

On June 21, 2012, a Notice of Hearing was issued to inform the parties that a Panel of the ORC would be convening on July 31, 2012, for the purpose of hearing BATES' appeal.

On August 27, 2012, further to an adjournment request by BATES, a second Notice of Hearing was issued to inform the parties that a Panel of the ORC would be convening on October 9, 2012, for the purpose of hearing BATES' appeal.

On October 9, 2012, a Panel of the ORC comprised of Chair Rod Seiling, Commissioner Brenda Walker, and Commissioner Dan Nixon was convened to hear the appeal.

BATES was in attendance and was accompanied by Bill O'Donnell. Jennifer Friedman appeared as counsel for the Administration of the ORC.



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Upon considering the preliminary motion by the Administration of the ORC to correct the “time served” reference on Standardbred Official Ruling SB 44912, hearing the testimony of Oleh Kupraty, Chuck Fraleigh, Brent Stone, Richard Tso, Dr. Robert McKenzie (who was qualified as an expert witness), Costas Demetrious, and BATES, reviewing the exhibits filed, and considering the oral submissions, the Panel reserved its decision.

Thereafter, the Panel denied the appeal, and ordered the following penalty:

- i) Sixty-day (60) full suspension,
- ii) \$1,500 fine,
- iii) Two-year (2) probation to commence at the conclusion of the suspension with the following conditions:
 - a) The Licensee shall keep the peace and be of good behaviour;
 - b) The Licensee shall allow Commission investigators access to the stabling area at any time to conduct random searches;
 - c) The Licensee shall allow the seizures of illegal or non-therapeutic drugs or medications;
 - d) The Licensee shall be subject to the Commission’s Out of Competition Testing;
 - e) The Licensee may be subject to a Notice of Proposed Order in addition to any penalty imposed by the ORC Judges for any breach of the terms of his licence.

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

DATED at Toronto this 17th day of October 2012.

BY ORDER OF THE COMMISSION



Steve Lehman
Acting Executive Director



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REASONS FOR DECISION

Overview

1. Licensee Timothy Bates appealed SB Ruling No. 44912 wherein he was issued a full sixty-day suspension and fined \$1,500 for violating SB Rules 22.38.06, 23.38 (a) and 26.02.03 (d) for a TCO₂ violation. The Judges also listed SB Rules 6.13.01 and 26.08 in their ruling. Conditions, as per Policy Directive No. 3-2008, for a two-year period were also assessed via SB Ruling No. 44911. Bates received a conditional stay on May 29, 2012 (SB 65/2012). Prior to the commencement of the de novo hearing on October 9, 2012, the Ontario Racing Commission (ORC) Administration brought forward a preliminary motion related to a miscalculation of time served by the appellant. The original hearing date for July of 2012 had been adjourned at the request of the appellant.

Background

2. The hearing was delayed on three separate occasions by the Panel to accommodate the appellant. The first delay was for close to an hour to allow for the arrival of Bill O'Donnell who was acting as a "friend" to assist Mr. Bates. The second delay lasted for about a half an hour to allow for photocopying and review by Ms. Friedman, legal counsel for the ORC, of five documents he wanted entered as exhibits and, notwithstanding such action violated the ORC's Rules of Procedure, the Panel allowed them to become exhibits. The third delay was to allow time for Mr. Bates to prepare a will say for Costas Demetrious whom he wished to call as a witness by phone without any prior notification. He originally requested to have him testify as an expert witness. This request was denied. It would constitute a gross contravention of the Rules of Procedure but he was allowed to give testimony via the phone. Notwithstanding, he acted as his own representative, based on Mr. Bates actions, he was versed in the ORC's Rules of Procedure.

3. Ms. Friedman, at the commencement of the hearing, brought forward a preliminary motion as per her notice of intent contained in her Factum (Ex. 3) para 15. She submitted that there had been an error in the calculation of the time served for the appellant and asked that the Panel correct that error. Mr. Bates had, in essence, self suspended himself on being notified of the positive test result and the Judges had erroneously credited him with thirty days. The proper way for them to proceed would have been to stay the penalty thirty days. The Panel reserved decision on the motion.

4. On March 5, 2012, the appellant raced the horse, Signifier, in the 4th race at Woodbine Racetrack finishing eighth. By way of random selection, Signifier was selected for a TCO₂ test. The sample was sent to Racing Forensics for testing along with the other TCO₂ samples collected for that day of racing at Woodbine. Test results for other horses from that day were normal except for Signifier (Ex. 1 tab 10, p 25). Bates was the owner/trainer of the horse and under the Rules (SB 26.02.01) of trainer responsibility, the liability was his related to any positive test.

5. Two agreed statements of facts evolved during the course of the hearing. The first was that the horse, Signifier, did have a high TCO₂ reading (38.3 mmol/L vs. the legal limit of 37 mmol/L) and that there were no issues related to the chain of command for the collection and delivery of the test TCO₂ sample to Racing Forensics, the official TCO₂ testing laboratory. The issues for Mr. Bates were that the testing by Racing Forensics was not properly licensed under the Food and Drug Act as required by law, the obsolete equipment contributed to the false positive and he received an incomplete disclosure package (Ex. 1, tab 18).



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6. Mr. Bates submitted that the Beckman EL-ISE equipment that is mandated in the ORC's Rules for TCO₂ testing is obsolete. The basis for his claim was a July 10, 2012, email communication from a Ted Bautista from Beckman stating that the instrument was obsolete and that support service had been terminated by Beckman on August 1, 2011.

7. Mr. Bates' own witness, Mr. Demetrious, confirmed that rather than obsolete, the term not supported would be more accurate. According to Richard Tso, President and Operations Manager for Racing Forensics and Dr. Robert McKenzie, Laboratory Manger for Racing Forensics, the company knew in advance of Beckman's business decision regarding support for the EL-ISE. Included in their plans to support it was a contract with a Beckman service person, acquisition of spare parts and a new reagent source thereby negating the fact that Beckman no longer was supplying reagents. That new reagent source was Australian Scientific Enterprise whose products are ISO accredited. As part of its quality control, Racing Forensics acquired a six-month supply on the Beckman reagent and ran it along with its Australian supply and found it to be as good as or better than the Beckman reagents according to Dr. McKenzie. Mr. Bates submitted that use of the Australian reagents invalidated the test because they were not approved by Beckman. Dr. McKenzie countered that claim stating that there was no business reason why Beckman would spend money to approve another company's reagents.

8. According to Mr. Demetrious, a false positive could be declared if the instrument's drain was not clean. Mr. Tso was certain that his company's quality control measures would ensure that could not happen. Including visual inspections of the drain to ensure there was no clogging, the control measures would indicate if a small amount of anything was caught in the drain and that information would be logged. No such occurrences had been reported at the laboratory.

9. Under SB Rule 22.38, the authority for the ORC to approve a TCO₂ testing laboratory is clearly established (Ex. 4). In SB Rule 22.38.05, the responsibilities of the laboratory are laid out. In clause e, it states analyzing samples for TCO₂ must be done on a Beckman Synchron EI-ISE. Mr. Bates submitted that because the initial screening test was done on a Beckman CX3 notwithstanding the confirming test was done with the Beckman EL-ISE, the test was therefore invalid.

10. Mr. Bates submitted that the equipment used by Racing Forensics and the reagents were not licensed by Health Canada. To support his case, he referenced a Department of Justice document (Ex. 1. tab 15, p 45 # 29) related to medical devices. It reads: "If a test kit is licensed, all of its reagents or articles that are manufactured by the manufacturer of the test kit are deemed, for the purpose of its importation, sale or advertisement, to have been licensed." He claimed that the Beckman EL-ISE had been licensed but offered no proof. Mr. Tso said his company is very proactive and actively searches to ensure it follows all rules and licensing requirements and is unaware of any requirement to license its equipment and or reagents.

11. ORC Investigator, Oleh Kupraty, upon being notified of the positive TCO₂ test interviewed Mr. Bates. The appellant could not explain the positive test and reviewed with the investigator his feed, training and medication programs for the horse. Mr. Bates had no explanation regarding the positive TCO₂ test for Des Takoor who races out of the same facility as the appellant.

12. Inadequate disclosure was also cited as a reason in Mr. Bates' appeal. He was provided a litigation package (Ex. 1, tab 10) which contained more information than what is normally provided. He also received, in error, the TCO₂ readings for his horse (Ex. 6) and the operating procedures for Racing Forensics at the track. The TCO₂ data for Signifier confirmed that the horse was not an outlier (natural TCO₂ reading above the allowed limit). Regarding his request for TCO₂ test results for other horses,



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individual TCO₂ test results are not provided to licensees for their horses or others per ORC policy. That information could assist a person to gain an unfair advantage and potentially assist a person to circumvent the Rules. Mr. Bates was told this and it was explained that he could take the matter further via appeal but he did not proceed.

13. TCO₂ is considered a Class III drug under the Rules of Racing (Policy Directive No. 1-2008, Guideline 6). On March 8, 2012, The Judges received a certificate of TCO₂ confirming a level of 38.3 mmol/L which is over the allowed limit of 37 mmol/L for horses not competing on furosimide. A higher level of TCO₂ (carbon dioxide) is viewed not to be in the best interests of the health of the horse or in the best interests of horse racing as it can affect performance.

14. The Judges, on March 9, 2012, issued SB Ruling No. 43998 whereby Signifier was ruled ineligible to race for 90 days (March 8 to June 5, 2012 inclusive) as per SB Rules Nos. 11.10.01 and 20.01.01 (I).

15. Following a hearing with Mr. Bates wherein he had William O'Donnell with him as his representative, the Judges issued SB Ruling No. 44912. He was suspended 60 days less time served of 30 days and fined \$1,500. As per Policy Directive No. 1-2008, the penalty imposed by the Judges for a first time Class III positive test was at the minimum level of the range.

16. Mr. Bates was at a loss to explain the high reading. He has tubed a horse in the past with mineral oil to treat it for colic, albeit he claimed he was acting as an aide to a veterinarian who has passed. It is well known that some horse people pre-race their horses by "milkshaking" them. This is done by administering bicarbonate soda by means of a tube prior to the race.

17. It was the position of the appellant that the cause of the positive test reading had to be with Racing Forensics. The recent increase in positive tests for TCO₂, to him, was proof. Six positives in 2012 at Woodbine with none in 2011.

18. The Panel takes very seriously the appellant's claim in questioning the integrity of Brent Stone, Manager of Racing Operations for the ORC and Judge Dave Stewart. From a materiality aspect related to the appeal, this had no bearing.

19. The issue relates primarily to if a retest (split sample) was available to Mr. Bates and supposed information he was provided by both individuals on separate occasions. Mr. Bates could have called Mr. Stuart as a witness to substantiate his allegation. For whatever reason, he opted not to bring forward corroborating testimony. Split sample retesting is no longer available because there is no other laboratory in Ontario to conduct it and, with the problems related to transporting it in time for testing, it has been discontinued. The fact of the matter is that to have a split sample taken that would have any relativity to the positive on Signifier it would have had to have been taken at the same time. Testing the horse after the fact would prove nothing. On another matter, the manner in which Mr. Bates acquired the Racing Forensics Operating Procedures is irrelevant to the appeal.

Issue

20. Is the ORC's TCO₂ testing program legal and does any part of the program, instruments or reagents require a license by the Federal Food and Drug Act? Was the positive test reading on the horse, Signifier, from the March 5, 2012 4th race at Woodbine the result of problems with the testing process by Racing Forensics thereby causing a false positive? Was Mr. Bates provided adequate disclosure? Should the Panel agree with the ORC request to correct the miscalculation of the days related to the



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appellant's suspension?

Decision

21. After carefully listening to the testimony and reviewing the evidence and documentation filed, the Panel denies the appeal. The penalty is varied. It is set at sixty days and \$1,500, and the conditions for two years as attached to his licence by the Judges remain in effect as per Policy Directive No. 3-2008.

Reasons for Decision

22. By agreement, Signifier had a TCO₂ reading of 38.3 mmol/L which was above the permitted level of 37 mmol/L. Therefore, SB Rules Nos. 22.38(a), 26.02.01, 26.02.03(d) and 22.38.06 were violated.

23. In terms of penalty, it is at the lowest end of the published penalty scale for a first time offender (Policy Directive No. 1-2008). When reviewing penalties, the ORC has a policy of taking into consideration mitigating and aggravating factors. The only mitigating factor was that this was the appellant's first TCO₂ positive. From an aggravating perspective, the appellant has refused to accept responsibility, instead trying to cast doubts on the program's legality and the competence of the laboratory. Furthermore, he claims no motive suggesting that with the Woodbine starting fee alone he could make money thus totally ignoring the opportunity to race for more than triple the purse than he could elsewhere.

24. The Racing Commission Act confers broad ranging powers to the ORC as the regulator of horse racing in Ontario as per S 6 of the Act. Specifically, it is mandated to "exercise its powers and perform its duties in the public interest and in accordance with the principles of honesty and integrity and social responsibility". In S 7 of the Act, the ORC "has power, (a) to govern, direct, control and regulate horse racing in Ontario in any and all of its forms."

25. Rule 22.38.01 deals with the approval of a TCO₂ laboratory. It reads: "In any part of Rule 22.38 "approved laboratory" means a laboratory approved by the Commission under 22.38.02 to conduct the testing of standardbred horses in accordance with Rule 22.38.05." In Rule 22.38.02, the approval process is addressed. It reads: "The Commission may approve a laboratory under Rule 22.38.01, if (a) the Commission is satisfied that the laboratory employs competent staff, and has the necessary facilities and technical capability to conduct the testing of standardbred horses in accordance with Rule 22.38.05, and (b) the laboratory conducts the testing of standardbred horses in accordance with Rule 22.38.05, and (c) the laboratory undertakes to permit the Commission such access to its facilities and records, at any reasonable time selected by the Commission, that will allow the Commission to audit the laboratory operations for the purpose of determining its compliance with the requirements of Rule 22.38.02 (a) and (b)."

26. Racing Forensics is in compliance with the Rules of Racing as it relates to being the official laboratory for TCO₂ testing.

27. The evidence is both cogent and compelling. The Commission's TCO₂ program is legal; the authority for its establishment is set out in SB No. 22.38. There was no credible evidence related to a requirement to have the laboratory's instruments or reagents licensed by the federal government. This is a provincial program with federal involvement limited to limits and penalty via the Canadian Pari-Mutuel Agency. It is reasonable to expect that Racing Forensics would be aware of any Food and Drug Act licensing requirements and would comply if required.



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28. The laboratory was not in violation of the Rules in conducting the TCO₂ test on Signifier's sample. It is factual that the screening test was conducted with a Beckman CX3, the confirming test was conducted with the Beckman EI-ISE as required by the Rules (SB 22.38.05).

29. The evidence is clear and compelling. There is no reasonable basis on which to submit the positive test for Signifier was caused by the malfunction of equipment or incompetence of the laboratory or its staff. The procedures that are in place ensure that the positive test for Signifier was not a false positive caused by improper equipment maintenance. The control process would reveal if any material had been caught in the drain even if a visual inspection missed it. The laboratory had no record of any such occurrence.

30. The Beckman EL-ISE instrument is not obsolete. The Panel accepts Dr. McKenzie's testimony that it is still the most precise instrument for TCO₂ testing. The Panel agrees with Mr. Demetrious that the terminology regarding the EL-ISE as is not supported by Beckman is accurate. Racing Forensics has taken the proper steps for instrument support (Beckman employee) and reagent supply from an ISO accredited supplier thereby guaranteeing the quality of the testing. The Panel notes that to obtain ISO approval is not a one time act but involves ongoing reviews.

31. Mr. Bates received adequate disclosure. In fact, he received more than what is normally required to be disclosed. The only information denied to him dealt with individual TCO₂ readings for other horses which, for the good of racing and the public interest, correctly should not be made available to him. Furthermore, he was offered another avenue for possibly acquiring this information and opted not to pursue it.

32. The objectives of the TCO₂ program are to protect the health and welfare of the horse and the public interest. These are key mandates of the Commission, and clearly fall within the responsibilities of the Commission as per the Act. Deterrence is an integral part of the penalty regimen. It serves to punish the offender and serve as a notice to others regarding the consequences. The penalty assessed by the Judges was at the lowest end of the Commission's published penalty regimen.

33. With regard to the number of TCO₂ positives in 2012 versus 2011 cited by the appellant, the Panel looks at those as being statistically irrelevant. There are a number of other, more plausible reasons, none of which include a false positive.

34. The appellant denies knowing the cause of the high TCO₂ reading. Based on the evidence that the horse did not have a natural high reading, it is reasonable to conclude he was administered something to cause it. Mr. Bates, as the trainer of record, bears that responsibility. The Panel is aware of the practice of "milkshaking" horses by some individuals to improve performance. It is reasonable to conclude, in the absence of any mitigating factors, Signifier was administered something that caused the positive TCO₂ test result. Mr. Bates is responsible. Some licensees now have the ability to test the TCO₂ level of their horse to ensure the level is not above the legal limit. This is not a foolproof method as previous violators can attest. Mistakes in dosage and changes in weather are well known to affect the reading. It is also worth noting of another TCO₂ positive from the same training area within the same relative time frame.

35. In terms of precedent and good policy, it was prudent to vary the penalty. Licensees cannot self suspend and ORC officials should not recognize such action. If there are valid reasons to recognize self imposed activity it should be via a stay of the time as Judge Fraleigh noted. In this instance, a stay is not warranted.



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36. There was an admitted clerical error contained within the litigation package (Ex.1, tab 10, p 25) on the checklist page at # 9. It is irrelevant but the Panel requests that it be corrected as offered by Dr. McKenzie.

DATED this 17th day of October 2012.

A handwritten signature in cursive script that reads "Rod Seiling".

Rod Seiling
Chair