



COMMISSION HEARING

TORONTO, ONTARIO – NOVEMBER 17, 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 WALTER WHELAN**

Standardbred licensee Walter Whelan, (“WHELAN”), appealed Judges’ Ruling (SB 42428/10), dated August 13, 2010, wherein he was suspended for a period of 7 days, and fined \$500, as a result of a positive test for Furosemide, taken from the standardbred horse, “Perfect Host”, trained by WHELAN, which finished 1st in the 8th race at Flamboro Downs on July 11, 2010.

WHELAN also appealed Judges’ Ruling (SB 42442/10), dated September 16, 2010, wherein he was suspended for a period of 15 days, and fined the sum of \$1000 and Judges’ Ruling (SB 42441/10) which suspended “Perfect Host” for 15 days, as a result of a positive test for Furosemide, taken from “Perfect Host”, which finished 1st in the 1st race at Flamboro Downs on August 28, 2010.

On November 17, 2010, a Panel of the Ontario Racing Commission (“ORC”) consisting of Chair Rod Seiling, Commissioner Dan Nixon and Commissioner Pam Frostad, was convened to hear the appeals.

Angela Holland appeared as counsel for the Administration, Jean Marc Mackenzie appeared as counsel for WHELAN and WHELAN attended the hearing in person.

Upon hearing the testimony of Senior Judge William Maertens, Dr. Michael Weber, and WHELAN, upon reviewing the exhibits filed and upon hearing the submissions of counsel for the Administration and counsel for WHELAN, the Panel granted the appeals.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Standardbred licensee, Walter Whelan, appealed two rulings of the Ontario Racing Commission (ORC) Judges wherein the horse, Perfect Host, owned and trained by him received two positive tests for the Class V drug, furosemide (lasix).

Background

2. At a de novo hearing held on November 17, 2010, the parties agreed to combine the two appeals into one as is allowed under the ORC Rules of Procedure, 10.1. Representing the ORC Administration as legal counsel at the hearing was Angela Holland with the appellant represented by Jean Marc Mackenzie.

3. Mr. Whelan acquired Perfect Host from trainer Fred Hoffman. Mr Whelan was aware at that time that the horse had a previous positive test for furosemide. Dr. Michael Weber, Manager of Veterinary Services for the Canadian Pari Mutuel Agency (CPMA), confirmed that the appellant contacted him sometime in the spring about furosemide positive tests.

4. Perfect Host raced a number of times for Mr. Whelan wherein he received 3.5 cc of furosemide as per the guidelines of the CPMA EIPH program. Under this controlled program, the administration of the drug must be done by a CPMA authorized person at the track where that horse is to race that day, 4 hours plus or minus 15 minutes before the race. Once approved for the EIPH program, a horse must stay on the program for a minimum of 100 days.

5. The appellant did not dispute that Perfect Host received a positive test result for furosemide for the race at Flamboro Downs on July 11, 2010, and at the same track on August 28, 2010.

6. For the July 11, 2010 race, the horse received 4 cc of furosemide, still under the allowable limit of 5 cc. For the August 28, 2010 race, the dosage of furosemide was reduced back to 3.5 cc, the same amount administered for prior races that did not result in a positive test result.

7. ORC Judge, William Maertens, testified and was confirmed by Dr. Weber that all the judges contacted him seeking information about the positive test result for the horse. One of their concerns was that the horse may have had furosemide administered to it prior to its arrival at the track based on what they perceived to be a high test reading. Dr. Weber confirmed that the actual number was not relatively high. Mr. Maertens confirmed that the Judges did not then have a similar concern for the second positive test result for the August 28, 2010 race.

8. Mr. Whelan contacted Dr. Weber twice more, each time on being informed of the positive test for furosemide for Perfect Host. In the last instance Dr. Weber advised Mr. Whelan to scratch the horse from its next race. By then he testified that he had changed his opinion and now believed that the horse was one of the rare outliers, that is, the horse's system could not metabolize the drug in the normal time as all other horses do. Positive tests for furosemide under the EIPH program are rare. In 19 years only 16 positive tests have occurred in over 200,000 tested horses.



9. Walter Whelan has been licensed for about 42 years. In all that time he has never had one of the horses he trained test positive for any medication. Judge Maertens could not recall any other trainer with such a record although he believed there to be others. Mr. Whelan provided undisputed testimony as to the amount of furosemide the horse was administered and that he had to race the horse in the EIPH program in order to comply with the 100-day rule. He did not feel he was to blame for the positive test and that was the basis for his appeals. Dr. Weber testified that with his change of opinion related to the horse, he now was of the opinion that Mr. Whelan had done all he could to comply with the rules.

10. Under the Rules of Standardbred Racing, a positive test result for furosemide carries an absolute liability offence as to the positive test for the trainer and the horse. Those same rules allow for a strict liability defence as it relates to penalty.

11. The Judges took into account the mitigating and aggravating factors relative to both positive tests results for the horse. In both instances they cut in half the penalty as outlined in the ORC's suggested penalty guidelines. With respect to the first positive test, the penalty was a fine of \$500 and a suspension of 7 days. The guidelines for a first offence ranged for a suspension of between 15 to 75 days and a fine of \$1,000. For the second positive test the penalty assessed by the judges was a suspension of 15 days and a fine of \$1,000. The guidelines call for a suspension of 30 to 100 days and a fine of \$2,000.

Issue

12. Were the penalties imposed by the Judges fair and reasonable given the circumstances for both the July 11, 2010 and August 28, 2010 positive test results for the Class V drug, furosemide?

Decision

13. After carefully listening to the testimony and reviewing the evidence and submissions, the Panel grants the appellant's appeal. His fines and suspensions are reduced to zero under the strict liability defence. The 15-day suspension is irrelevant for the horse given Mr. Whelan has not raced the horse and is taking steps to remove it from the EIPH program.

Reasons for Decision

14. The Judges correctly interpreted and applied the Rules of Standardbred Racing. Their identification of the mitigating and aggravating factors and their application are "textbook". Their utilization of the strict liability defence occurred as intended when the absolute liability offence rule was implemented.

15. Unfortunately for the Judges, they did not have the benefit of Dr. Weber's testimony wherein he stated that he now believed Perfect Host to be an outlier as it relates to the metabolizing of the drugs and that Mr. Whelan had done all he could to comply with the rules. The Panel accepts Dr. Weber's expert testimony and on that basis is left with the only decision it could make, no blame to the appellant.



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16. It is reasonable to expect that if and when Perfect Host changes trainers and or owners in the future, information about the horse being an outlier with respect to the EIPH program is communicated to the new connections. Future positive tests for furosemide for the horse, should they occur, could not reasonably expect to receive the same benefits under the strict liability defence.

DATED this 18th day of November 2010.


Rod Seiling
Chair