

BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of:

**Appeal of the Board of Stewards Official
Ruling # 18, Hollywood Park Racing
Association, dated May 10, 2007**

Case No. SAC 07-0035

**JOSE DELIMA
CHRB License # 230691
Appellant**

DECISION AFTER NON-ADOPTION OF PROPOSED DECISION

This matter was originally heard by the Board of Stewards on April 11, 2007. On May 10, 2007, the Board of Stewards issued Official Ruling #18, which suspended appellant Jose Delima for thirty (30) days for violation of California Horse Racing Board Rule #1902.5 (Animal Welfare)

Appellant, through counsel, filed a timely appeal of Official Ruling #18. The suspension has been stayed pending resolution of this appeal.

Steffan Imhoff, Referee designated under Rule 1414 by the California Horse Racing Board heard this appeal in Arcadia, California on October 22, 2008.

Attorney Steve Schwartz and his associate attorney Lisa Brown represented Jose Delima, appellant.

Deputy Attorney General Margaret Phe represented the California Horse Racing Board (CHRB).

The parties agreed that no further evidence would be offered by either side and that the case would be submitted on the Appellate Record. The Hearing Officer also agreed to consider the motions filed by counsel as well as argument by both sides. Finally, the parties were invited to file additional authority on the question of Legislative intent in the adoption of CHRB Rule 1902.5, and the record was left open to receive that briefing. A Proposed Decision was issued on December 12, 2008.

By Order dated February 27, 2009, the CHRB rejected the Proposed Decision and elected itself to decide the matter upon the record, including the transcript, under the provisions of Government Code section 11517, subdivision (c)(2)(E). The Appellant was notified of the Decision Not to Adopt Proposed Decision on March 3, 2009, and on April 17, 2009 the administrative record, including a transcript of the proceedings was received by the Appellant.

Appellant presented a written argument as authorized in the CHRB's February 27, 2009, Notice of Decision Not to Adopt Proposed Decision.

The CHRB has reviewed the matter on the record and issues its Decision in the matter as follows:

The attached Proposed Decision of the Referee is hereby modified to reflect that the appellant Trainer Jose Delima is suspended thirty days for violation of California Horse Racing Board Rule #1902.5 (Animal Welfare). During the term of his suspension all license and license privileges of Jose Delima are suspended and pursuant to California Horse Racing Board Rule #1527 (Jurisdiction of Stewards to Fine or Suspend), he is denied access to all premises in this jurisdiction, as its Decision in the above-entitled matter. In all other respects, the attached Proposed Decision is adopted.

The Decision shall become effective on June 9, 2009.

IT IS SO ORDERED ON June 5, 2009.

CALIFORNIA HORSE RACING BOARD
John C. Harris, Chairman

A handwritten signature in black ink, appearing to read "Kirk E. Breed", written in a cursive style.

By: Kirk E. Breed
Executive Director

**BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA**

**In the Matter of the Appeal of Stewards)
Official Ruling No. 18, Hollywood Park)
Racing Association, dated May 10, 2007)**

Case No. SAC 07-0035

JOSE DELIMA)

Appellant)

PROPOSED DECISION

This appeal was heard by attorney Steffan Imhoff, an Appellate Judge designated under Rule 1414 by the California Horse Racing Board, at Arcadia, California, on October 22, 2008.

Deputy Attorney General Margaret J. Phe represented the California Horse Racing Board.

Attorney Steve R. Schwartz represented Appellant Jose Delima.

The appeal was submitted for decision on November 6, 2008.

PROCEDURAL BACKGROUND

On March 17, 2007 Senior Investigator Jim Hamilton filed a Complaint against Appellant Delima with this Board. The Complaint, (Case No. 07SA066), alleged violations of CHRB Rule 1902.5(Animal Welfare) and Rule 1530(Cases Not Covered by Rules and Regulations). The Complaint further alleged a factual basis for these rule violations:

The horse "Eligant Wager" trained by Jose Delima was entered in the 1st race at Santa Anita on Feb. 9th, 2007. Dr. Beck conducted a soundness check on "Eligant Wager" the morning of Feb. 9th, 2007. Dr. Beck scratched the horse "Eligant Wager" because the horse was off in the right front. The horse "Eligant Wager" was placed on the vet's list for being unsound. On the morning of Feb. 10th, 2007 (the day after "Eligant Wager" was placed on vet's list) trainer Jose Delima had exercise rider Rodrigo Duran take "Eligant Wager" out onto the track and exercise "Eligant Wager". The horse, "Eligant Wager" broke down on the track. "Eligant Wager" was subsequently euthanized. Exercise rider Duran was transported to Arcadia Methodist Hosp and treated for a FX/RT leg and a FX collar bone.

A formal hearing on the Complaint was held by the Board of Stewards on April 11, 2007 at Santa Anita Racetrack. The panel consisted of Steward C. Scott Chaney, Steward Albert Christiansen and Steward Tom Ward. The CHRB was represented by Senior Investigator Jim Hamilton. Appellant Delima was represented by attorney Steve Schwartz. Mr. Schwartz brought a motion *in limine* to dismiss the part of the Complaint alleging a violation of CHRB Rule 1530. The Board of Stewards granted the motion thus the hearing proceeded solely on the allegation that Appellant violated CHRB Rule 1902.5.

The Board of Stewards issued a written ruling on May 10, 2007 upholding the complaint and finding that Appellant Delima had violated CHRB Rule 1902.5. On that same date the Stewards simultaneously issued their Official Ruling which stated:

Trainer JOSE DELIMA is suspended thirty days (May 24, 2007 to June 22, 2007) for violation of California Horse Racing Board Rule #1902.5 (Animal Welfare). During the term of his suspension all license and license privileges of Jose Delima are suspended and pursuant to California Horse Racing Board Rule #1527 (Jurisdiction of Stewards to Fine or Suspend), he is denied access to all premises in this jurisdiction.

On May 11, 2007 Appellant's counsel filed a timely Notice of Appeal of the Board of Stewards Ruling in Case No. 07SA066. His contemporaneous request for a stay of the proceedings was denied by the Board. On May 21, 2007 the Los Angeles County Superior Court issued a temporary stay of the proceedings until September 21, 2007. On August 24, 2007 the Board voluntarily extended the stay until all of Appellant's administrative remedies have been exhausted. The appeal was designated No. SAC- 07-0035.

On October 22, 2008 a Hearing on the appeal was held at Santa Anita Race Track. Hearing Officer Steffan Imhoff presided over the proceedings. Appellant was present and was represented by attorney Steve Schwartz and his associate, attorney Lisa Brown. Deputy Attorney General Margaret Phe represented the CHRB. Also present for the CHRB was Senior Investigator Jim Hamilton. The proceedings were reported by Barbara Weinstein. The parties agreed that no further evidence would be offered by either side and that the case would be submitted on the Appellate Record. The Hearing Officer also agreed to consider the motions filed by counsel as well as argument by both sides. Finally, the parties were invited to file additional authority on the question of Legislative Intent in the adoption of Rule 1902.5, and the record was left open to receive that briefing

This Appeal to the CHRB is authorized by Rule 1761. Appellant has the burden of proof on appeal under Rule 1764.

The focus of the hearing was whether or not Appellant violated Rule 1902.5 (Animal Welfare) when he elected to work the filly "Eligant Wager", without consulting a vet, when the previous day the Official State Veterinarian had placed the filly on the vet's list for lameness and his own private vet had also found her to be lame.

Under the provisions of Business and Professions Code Section 19517, the CHRB may overrule a Stewards' Decision if a preponderance of the evidence shows either that the Stewards mistakenly interpreted the law, new evidence of a convincing nature is produced or the best interest of racing may be better served.

A Stewards Decision will be sustained if supported by "substantial evidence". *Overturf v. CHRB(1978)* 86 CA3d 979,986.

DISCUSSION

A) *Summary of Evidence*

Appellant Jose Delima is a thoroughbred horse trainer licensed by the CHRB. On February 9, 2007 "Eligant Wager" a four year old roan filly, owned and trained by Appellant was entered in the 1st race at Santa Anita, a 6 Furlong \$10,000 claiming race. The morning of the race Dr. Gary Beck, Official State Veterinarian, came by the Delima barn at Santa Anita to conduct the usual race day soundness check on "Eligant Wager". After watching her jog the vet concluded the filly was obviously unsound in the right front. He rated her as a grade 2 to grade 3 on a 1 to 4 A.A.E.P grading scale. Having found her to be unsound Dr. Beck ordered her scratched from the first race and placed on the vet's list. A scratch slip was placed on Appellant's desk and his groom was instructed to inform him that the horse was out.

Dr. Dawn Hunkin, Appellant's private vet, was also at his barn the morning of the 9th. She was there to give "Eligant Wager" her pre-race lasix shot. When she went into Appellant's office she saw the scratch slip and realized that Dr. Beck had scratched the filly as unsound. Dr. Hunkin decided to conduct her own examination of "Eligant Wager". After watching her jog and finding her left knee to be warm she concluded that the horse was mildly unsound (grade 1) in the left knee. Later that day she informed Delima of her diagnosis that the horse was mildly off. She didn't think the horse was "terrible" and she had "seen worse" but she "could see why Dr. Beck had scratched the horse".

On the following morning, February 10, 2007, Appellant was at his barn trying to decide if he should work "Eligant Wager". First he had his groom jog the filly back and forth in the barn area. Appellant thought she looked pretty sound. Then he gave a leg up to jockey/exercise rider Rodrigo Duran. He also had Duran jog "Eligant Wager" in the barn area and the rider thought she felt good. When they got to the track Delima told

Duran that the filly had been a vet scratch the previous day. He told Duran to warm her up well and only work her if she felt good. They proceeded on to the track where Duran jogged the filly in preparation for a workout. When he went by Clocker's Corner he told Appellant that she was feeling good and Appellant told him to work her. Appellant Delima made the decision to work "Eligant Wager" without consulting a vet because he felt that he knows his horses, knows how they feel and he often rides them himself. There is no evidence whether or not Appellant palpitated both or either of "Eligant Wager's" front legs prior to sending her out to the track.

During the workout "Eligant Wager" broke down approaching the 1/8 pole. Duran was thrown from his mount and suffered a broken leg and fractured collar bone. "Eligant Wager's" injuries were unfortunately more catastrophic, and were serious enough that she needed to be humanly euthanized on the track. The subsequent necropsy established that the filly had suffered multiple injuries to the right front ankle. The most acute of these injuries were to the right fore fetlock joint and the third metacarpal. These are the type of injuries that are most common in equine fatalities. The examination also revealed a chronic articular ulceration of the left knee.

The two veterinarians strongly disagreed on Appellant Delima's culpability in the filly's demise. Dr. Beck gave a Declaration stating; "The working of a known unsound horse is an act of reckless endangerment for the health of the horse and the rider and any other horse and rider on the race track at the time. Working 'Eligant Wager; on 10 February '07 after being diagnosed as unsound and lame on February 9, '07 was cruel and abusive". Dr. Hunken respectfully rejected Dr. Beck's position. She felt that Appellant is a professional horseman who works his own horses and who knows whether or not a horse is sound. In addition since he owned half of the filly, and she was not insured, it would make no sense for Delima to risk injuring her by working her if he thought she was lame. She did not believe that if Appellant thought "Eligant Wager" was off he would have worked her without having a vet look at her first.

B) *Controlling Law*

The Stewards have general authority and supervision over all licensees, including licensed trainers such a Mr. Delima. (Rule 1527, Business & Professions Code Sec. 19420) That authority includes their ability to impose a fine or suspension for violating CHRB Rules. (Rule 1528, Business & Professions Code Sec. 19440).

Here the Stewards found that Appellant had violated CHRB Rule 1902.5 (Animal Welfare), that provides : **"No person under the jurisdiction of the Board shall alone, or in concert with another person, permit or cause an animal under his control or care to suffer any form of cruelty, mistreatment, neglect or abuse. Nor shall such person abandon; injure; maim; kill; administer a noxious or harmful substance to; or deprive an animal of necessary care, sustenance, shelter or veterinary care."**

C) *Appellant's Contentions*

1) *Due Process*

Appellant argues that the Stewards engaged in misconduct and created a conflict of interest and therefore violated Appellant's due process rights by becoming secret expert witnesses. This argument is based on the assertion that because Steward Chaney was a former assistant trainer and Steward Christiansen was a retired trainer that they somehow secretly used that prior experience to form opinions concerning training standards to Appellant's detriment. First it should be noted that there is nothing in the record concerning either Steward's training background. We have received no request from Appellant to take notice of these facts. More importantly there is simply no compelling authority for Appellant's claim. Stewards are expected to have a background in racing. In fact they are not eligible to apply for the position unless they do have that background. *Business and Professions Code*, Sec.19512(3) Stewards properly use their familiarity with all aspects of racing to interpret and enforce the rules of racing.

The only authority cited by Appellant for this novel theory is *Government Code* Sec.11515 (Official Notice) which provides in part; "In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State." The section goes on to provide for notice to the parties and a chance to refute. Because the Stewards were not acting as witnesses in this case, secret or otherwise, and they took no Official Notice of any CHRB technical or scientific facts, reliance on California Government Code Sec.11515 is misplaced. Appellant's due process argument must be rejected

2) *CHRB Rules*

Appellant takes the position that because there is no specific CHRB rule that prohibits a trainer from working a horse one day after the horse is placed on the vet's list for unsoundness then that conduct cannot be punished by the Stewards or by the Board. We agree that there is no rule that places a time limit on when a horse can work after being placed on the vet's list. Rule 1866. There is evidence from both Investigator Hamilton and Official State Veterinarian Dr. Gary Beck conceding that point.

Nevertheless there is one rule that should give a trainer pause about bringing a scratched horse back in one day. Rule 1628 provides that "(t)he stewards may declare a horse out of a race when in the opinion of the Official Veterinarian or the Racing Veterinarian such horse cannot give his best effort to win such race due to physical disability or other physical cause. The further entry to any race in this State of such horse shall not be accepted until the expiration of **at least 48 hours** from the time of declaration and until the said horse has been examined and his physical condition approved for racing by the Official Veterinarian"(emphasis added) . While not directly on point this rule suggests a reasonable minimum time for a scratched horse to recuperate.

In any event, we are aware of no authority for the proposition that a rule specifically prohibiting certain conduct is required. No Board or Legislative Body can formulate rules that take into account the infinite permutations of human behavior. Many of our rules are written in broad strokes such as Rule 1902 which prohibits Conduct Detrimental to Horse Racing. Likewise Rule 1902.5 Animal Welfare, the specific rule that Appellant was found to have violated, is written to encompass the many ways a race horse's welfare can be compromised. The argument that a more specific rule is mandatory is not well taken.

3) *Interpreting Rule 1902.5 (Animal Cruelty)*

At the hearing before the Board of Stewards Appellant presented sufficient evidence to convince the Stewards that Mr. Delima had no specific intent to harm "Eligant Wager". "This Board of Stewards finds no evidence that there was any intent by (Delima) that the horse injure herself by working a day after being placed on the veterinarian's list for being unsound." We agree with this assessment. There is simply no evidence that Appellant had the slightest intent or desire that any harm come to his filly.

If specific intent was required under Rule 1902.5 this Complaint would have to be dismissed. However, in their Statement of Decision the Board of Stewards interpreted Rule 1902.5 in the following manner;

"(I)n interpreting the language of the rule, **we do not believe that it requires specific intent to find that the rule has been violated.** The plain meaning of the words 'permit, 'neglect,' and 'deprive' indicate **that simple negligence or carelessness can, in certain situations, be sufficient to violate the rule.** Additionally, from a policy standpoint, this Board believes that this rule should be interpreted expansively in order to serve its intended and stated purpose; that is to protect the welfare of the horse." (emphasis added)

We find this common sense approach more useful than trying to apply the tenants of *eiusdem generis* and *noscitur a sociis* as suggested by Appellant. We have reviewed the cases cited by counsel, *People v Rogers* (1971) 5 Cal. 3rd 129 and *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, and do not find them helpful in harmonizing the terms such as cruelty, mistreatment, neglect, abuse, abandon, injure, maim, kill, administer or deprive that are listed in Rule 1902.5. What is significant is the legislative history of Rule 1902.5's adoption by this Board in 2005 which has been provided by Respondent. It is very clear that it was the intent of this Board to expansively protect the welfare of animals under the Board's authority from coming to harm whether or not the source was intentional or negligent. The Board of Stewards was correct in coming to this conclusion.

The legislative history of the Board's adoption of Rule 1902.5 is found in the Office of Administrative Law's Notice of Approval of Regulatory Action, File No. 05-1128-04S. We take judicial notice of this document. Of particular note is the section describing the necessity for the rule which states in part:

The humane treatment of animals, which includes the methods used to **train**, race and care for equine athletes, is a central tenant of the horse racing industry. It is important that everyone involved in horse racing acts responsibly towards horses engaged in the sport.---The Board has determined that a regulation that provides specific authority to act for the good of an animal's welfare is needed. (emphasis added)

It is apparent from the text of the rule and the Board's stated reasons for adopting the rule that the primary purpose was to insure the humane treatment of animals at the racetrack. That purpose cannot be achieved if the enforcement of Rule 1902.5 is restricted to acts of specific intent. We find that Delima can be held responsible under that rule even if he acted simply negligently rather than intentionally.

4) *Standard of Care*

The Board of Stewards found that Delima's action in working his filly one day after she was scratched from her race and placed on the vet's list was a negligent violation of Rule 1902.5 that failed to meet a minimum standard of care for a trainer. Appellant argues that the minimum standard of care must be established by expert testimony which he asserts was absent in the proceedings below. Appellant's authority for this argument is *Osborne v. Irwin Memorial Bloodbank* (1992) 5 Cal. App. 4th 234 which holds at page 277:

Ordinarily, where a professional person is accused of negligence in failing to adhere to accepted standards within his profession the accepted standard must be established only by qualified expert testimony {citations} **unless the standard is a matter of common knowledge** {citation}.

We do not believe that *Osborne* supports Appellant's position that expert testimony to establish standard of care was necessary in these proceedings. Rather we believe this comes under the rule that expert testimony is unnecessary if the standard is a matter of common knowledge. We hold that the standard of care in this case is a matter of common knowledge. It is certainly a matter of common knowledge for licensed stewards who were the fact finders in the case and were charged with determining if Delima acted reasonably or negligently. Expert testimony on standard of care was not required in this case. The Stewards properly found that Appellant failed to adhere to a minimum standard of care.

5) *Penalty*

We find that Appellant presented substantial evidence, that while it does not excuse his actions, it does mitigate his culpability. To begin with we have the Stewards' finding, which we have endorsed, that Delima did not have any intent to harm his filly. Next we have the fact that Delima owned ½ of the filly who was not insured. This means he lost \$10,000 of her purchase price as well as any possibility of additional purse money. He also has been faced with the cost and uncertainty of litigation and a stain on his reputation for having been found to have violated the Animal Welfare Rule.

While we continue to adhere to our opinion that Delima was negligent in not having a veterinarian check out "Eligant Wager" before sending her to work on the track we recognize that he did take some lesser steps to determine her soundness. Delima had both his groom and his exercise rider jog the horse and warm her up several times, with no feedback that she was off, before giving the go ahead for her fatal workout.

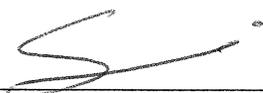
In addition, Delima's private veterinarian, Dr. Dawn Hunkin, gave a very positive assessment of both his horsemanship and good character.

In sum, while we hold that there was substantial evidence to uphold the Stewards imposition of a 30 day suspension we also believe there is sufficient mitigating evidence to order that the imposition of the 30 day suspension be stayed and that Delima be placed on one year probation.

ORDER

Official Ruling # 18, Hollywood Park Racing Association, dated May 19, 2007, imposing a THIRTY (30) day suspension on Appellant JOSE DELIMA, (Lic. # 230691 9/2011) for violating the Animal Welfare Section under Rule 1902.5 on February 10th, 2007 is hereby AFFIRMED. The Judgment is MODIFIED to reflect that imposition of the THIRTY (30) day suspension is stayed and the Appellant is placed on one year probation to begin when this order becomes final.

DATED: 12-12-08



STEFFAN IMHOFF
Designated Appellate Judge