

BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of the Complaint Against:

RONALD ELLIS, Trainer
CHRB License #088925
Respondent

CHRB Case Nos. 16SA0260

DECISION

The attached Proposed Decision is adopted by the California Horse Racing Board as its Decision in the above-entitled matter.

The Decision is hereby remanded to the Board of Stewards to issue a ruling and order for the setting of the sixty (60) calendar days of license(s) suspension and payment of the ten thousand dollars (\$10,000.00) fine.

IT IS SO ORDERED ON December 14, 2017.

CALIFORNIA HORSE RACING BOARD
Chuck Winner, Chairman



Rick Baedeker
Executive Director

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

_____)
)
In the Matter of the Accusation Against,)
)
RONALD ELLIS, trainer,)
RESPONDENT.)
_____)

Case No. 16SA0260

PROPOSED DECISION

This matter was heard on six hearing days -- May 22, 23, June 9, 15, 22 (informal), and July 20, 2017 by the Board of Stewards -- Grant Baker, C. Scott Chaney, and Kim Sawyer at Santa Anita Park in Arcadia, CA (except the last day which was held at Del Mar Race Track in Del Mar, CA).

Respondent trainer Ron Ellis (hereinafter "Respondent" or "Ellis") was represented by attorney Steve Schwartz. The California Horse Racing Board (hereinafter "CHRB" or "Complainant") was represented by Deputy Attorney General Venessa Martinez.

After the fifth day of formal hearings, both parties submitted closing briefs pursuant to the predetermined schedule. All of the proceedings were recorded by court reporter Michelle Derieg.

PROCEDURAL BACKGROUND

The Breeders' Cup World Championships was held at Santa Anita Park on November 4 & 5, 2016. In an effort to bolster the integrity of the Championship events and to presumably avoid post race drug positives (both from purposeful administrations of medications as well as accidental ones) the CHRB and the Breeders' Cup embarked on a pre-race, "out of competition" testing program during which many of the Breeders' Cup equine participants were drug tested at various times before the event itself. Pursuant to that testing program, the horse "Masochistic," who was trained by Respondent tested positive for the prohibited medication stanozolol (and its metabolite 16-hydroxy stanozolol), which is an anabolic steroid. During the week preceding the Breeders' Cup races, Mr. Ellis was informed that his horse was still positive for stanozolol (and metabolite) from a test taken on October 28. The test results from the blood showed a

presence of 16-hydroxy stanozolol at a concentration of 252 pg/ml and stanozolol in a concentration of 179 pg/ml. Respondent, in consultation with veterinarians and others, decided to participate in the race. Following the running the race, "Masochistic," who finished second, was drug tested. He again tested positive for stanozolol (30 pg/ml) and 16-hydroxy stanozolol (161 pg/ml). Subsequent to the CHRB laboratory reporting of the alleged positives, the CHRB filed several complaints in this matter. Case number 16SA264 was concerned with disqualification and purse redistribution (involving owner, trainer, and jockey). That action was not contested, therefore "Masochistic" was disqualified and the purse money was redistributed pursuant to LATS Ruling #009 dated December 31, 2016. The instant matter, case number 16SA0260, is concerned with the trainer's responsibility in the positive. After ruling on several motions and stipulations, the case was heard over five formal hearing days from May 22, 2017 to July 20, 2017. At hearing, documentary evidence was submitted and oral testimony was heard. The following witnesses testified at the hearing: Respondent Ron Ellis, Maddy Lab Director Dr. Scott Stanley, Equine Medical Director Dr. Rick Arthur, and CHRB Investigator Phil Myazaki. After the closing of the hearing, closing briefs were submitted and the record was closed.

LIST OF EXHIBITS

- CHRB Exhibit A: Stipulated Agreement.
- CHRB Exhibit B: Investigative Report and Attachments A-Z.
- CHRB Exhibit C: Ellis Subpoena and Response.
- CHRB Exhibit D: Transcript of Warren Interview.
- CHRB Exhibit E: Transcript of Safety Meeting.
- CHRB Exhibit F: Research of Stanozolol in Thoroughbred Racehorses.
- CHRB Exhibit G: Kentucky Horse Racing Commission Documents regarding Masochistic.
- CHRB Exhibit H: Warren Subpoena and Response.
- CHRB Exhibit K: JMS Bill.
- CHRB Exhibit L: Information Regarding Stanozolol Amounts held by Dr. Warren.
- Respondent Exhibit 1: Blood-Horse Article: Final Turn; August 25, 2007.
- Respondent Exhibit 2: "Talkin Horses" with Dr. Rick Arthur, December 19, 2006.

- Respondent Exhibit 3: Racing Medication and Testing Consortium Scientific Advisory Committee Members Lost, Horsemen's Journal, Spring 2007.
- Respondent Exhibit 4: "RMTC Makes Withdrawal Time Recommendations," RMTC Press Release, October 20, 2010.
- Respondent Exhibit 5: "RCI Looks at added Out-of-Competition Testing," March 23, 2016.
- Respondent Exhibit 6: "Too Many Holes in Racing's Rule Net," Blood-Horse, March 9, 2017.
- Respondent Exhibit 7: Transcript of Interview, Ronald Ellis, December 20, 2016.
- Respondent Exhibit 8: Page #2 of Exhibit "Y" of Complainant's Complaint Package.
- Respondent Exhibit 9: Rick Arthur E-Mail to Rick M. Baedeker, November 5, 2016.
- Respondent Exhibit 10: "CHRB Trainers Argue," Blood-Horse, March 16, 2016.
- Respondent Exhibit 11: Telephone Records of Dr. Herb Warren.
- Respondent Exhibit 12: Declaration of Samantha Siegel.
- Respondent Exhibit 13: Declaration of James Cassidy.
- Respondent Exhibit 14: Photo of Masochistic, May 13, 2017.
- Respondent Exhibit 15: Breeders' Cup Horsemen's Information Guide.
- Respondent Exhibit 16: Dr. Warren's Bill to Jay Em Ess Stable.
- Respondent Exhibit 17: Stewards' Minutes -- March, 2010.
- Respondent Exhibit 18: Dr. Warren's Bill to Paloma Court, October 31, 2016.
- Respondent Exhibit 19: Name Claim form.

FACTUAL FINDINGS

I

At all times herein mentioned, Ron Ellis was licensed by the CHRB in the license category of trainer.

II

- On August 29, 2016, the thoroughbred racehorse "Masochistic" was administered the anabolic steroid stanozolol by Dr. Herb Warren and placed on the CHRB Official Veterinarian's List for 60 days.

III

Out of Competition blood testing was conducted on "Masochistic" on September 1, October 13 and October 28, 2016, showing positive test results for stanozolol in concentrations of 724, 522 and 179 pg/ml, respectively, 16-hydroxy stanozolol in concentrations 1280, 1087, and 252 pg/ml, respectively.

IV

Respondent, based upon the test results and consultation with experts, decided to start "Masochistic" on November 5, 2016.

V

On November 5, 2016, the thoroughbred racehorse "Masochistic" ran in the sixth race (Breeder's Cup Sprint) at Santa Anita Park and finished second.

VI

Following the running of the race, blood and urine samples were obtained from "Masochistic" and transported to the University of California, Davis, Maddy Analytical Laboratory (hereinafter "Maddy Lab"), the official testing laboratory for the CHRB.

VII

After testing the samples, U.C. Davis laboratory reported that the post race blood sample #SA23993, which came from "Masochistic" was positive for stanozolol in a concentration of 30 pg/ml and 16-hydroxy stanozolol in a concentration of 161 pg/ml.

VIII

Stanozolol and its metabolite are classified under the California Horse Racing Board rules and regulations as a class 3 substance in the penalty category B.

IX

Pursuant to the rules, Respondent made a timely request that the split sample be tested by The Industrial Laboratories, which confirmed the presence of stanozolol (188 pg/ml) and 16-hydroxystanozolol (29 pg/ml).

X

On December 31, 2016, LATC Ruling #009 was published disqualifying "Masochistic" and distributing the purse accordingly.

APPLICABLE RULES AND REGULATIONS

California Horse Racing Board rule 1843. Medication, Drugs and Other Substances.

It shall be the intent of these rules to protect the integrity of horse racing, to guard the health of the horse, and to safeguard the interests of the public and the racing participants through the prohibition or control of all drugs, medications and drug substances foreign to the horse. In this context:

- (a) No horse participating in a race shall carry in its body any drug substance or its metabolites or analogues, foreign to the horse except as hereinafter expressly provided.
- (b) No drug substance shall be administered to a horse which is entered to compete in a race to be run in this State except for approved and authorized drug substances as provided in these rules.
- (c) No person other than a licensed veterinarians or animal health technician shall have in his/her possession any drug substance which can be administered to a horse, except such drug substance prescribed by a licensed veterinarian for a specific existing condition of a horse and which is properly labeled.
- (d) A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance or a finding of a drug substance in excess of the limits established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse.
- (e) Nothing in this Article shall prevent a racing association or fair from setting eligibility conditions, as agreed to with the acknowledged horsemen's organization, for individual races, or for its entire race meet, that prohibit the use and/or presence of drug substances or medications in biological test samples collected from participating horses at detection levels lower than what is authorized by the Board. Such conditions if established in accordance with Rule 1581, shall not be deemed in conflict with the rules and regulations of the Board.

NOTE: Authority cited: Sections 19440, 19580, 19581 and 19582. Business and Professions Code. Reference: Sections 19401, 19440, 19580, 19581 and 19582; Sections 337f, g and h. Penal Code.

HISTORY:

1. Repealed and new rule filed 10-29-81; effective 11-28-81.
2. Amendment of subsections (a), (c) and (d) filed 8-19-92; effective 9-18-92.
3. Amendment filed 7-25-16, as an emergency; effective through 1-24-17.

California Horse Racing Board rule 1843.1. Prohibited Drug Substances.

For purposes of this division, prohibited drug substance means:

- (a) any drug, substance, medication or chemical foreign to the horse, whether natural or synthetic, or a metabolite or analog thereof, whose use is not expressly authorized in this article.
- (b) Any drug, substance, medication or chemical authorized by this article in excess of the authorized level or other restrictions as set forth in this article.

NOTE: Authority cited: Sections 19440, 19562, 19580 and 19581, Business and Professions Code. Reference: Sections 19440, 19562, 19580, and 19581, Business and Professions Code.

HISTORY:

1. New rule filed 10-7-94; effective 11-6-94.

California Horse Racing Board rule 1887. Trainer to Insure Condition of Horse.

- (a) The trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. If the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. In addition, the owner of the horse, foreman in charge of the horse, groom, and any other person shown to have had the care or attendance of the horse, may be fined, his/her license suspended, revoked, or be ruled off.
- (b) A ship-in horse is defined as any horse entered to race that has not been in the care of a Board-licensed trainer for seven consecutive calendar days prior to the day of the race for which it is entered.
- (c) Notwithstanding the above, if the Board or its agent fail to notify a trainer or the owner of a ship-in horse of a potential positive test within 21 calendar days from the date the sample was taken, the trainer or the owner of a ship-in horse shall not be deemed responsible under the rules unless it is shown by the preponderance of the evidence that the trainer or the owner of a ship-in horse administered the drug or other prohibited substance defined in ship-in horse administered the drug or other prohibited substance defined in Rule 1843.1 of this division, caused the administration or had knowledge of the administration.

NOTE: Authority cited: Sections 19440, 19580 and 19581, Business and Professions Code. Reference: Sections 19440, 19577, 19580 and 19581 Business and Professions Code.

HISTORY:

1. Amendment filed 7-9-92; effective 8-8-92.
2. Amendment filed 10-25-94; effective 11-24-94.
3. Amendment filed 12-6-99; effective 12-6-99.
4. Amendment filed 8-8-05; effective 9-7-05.
5. Amendment filed 12-29-15; effective 4-1-16.

DISCUSSION OF ISSUES

The genesis of this complaint against Respondent was a positive post race drug test. There was a hearing with respect to the positive test and disqualification which went uncontested. As a result, "Masochistic" was disqualified and the purse was distributed according to the revised order. In fact, both parties stipulated to the existence of the positive, leaving the sole purpose of this hearing to determine if Mr. Ellis has any responsibility with respect to the positive itself. The CHRB Rules and Regulations provide a very specific framework regarding adjudicating these issues. CHRB rule 1843(d) (Medication, Drugs and Other Substances) provides in part that "A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board.shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse." In this case, we find prima facie evidence of a positive. For many years, that rule, coupled with CHRB rule 1887 (Trainer to Insure Condition of Horse) created a strict liability framework and the inquiry would end here. Recently, however the rigidity of strict liability has been somewhat eroded by two rules that allow for defenses to the trainer insurer rule and that contemplate aggravating and mitigating circumstances that affect the application of a penalty. We find that none of the defenses in CHRB rule 1888 (Defense to Trainer Insurer Rule) apply, so we must move onto the penalty guidelines. Before so doing, however, there are a few issues with which we must deal that arose at hearing. Frankly, there was a fair amount of testimony and evidence that we found irrelevant and extraneous. Both parties often veered far from the narrow issue of aggravating and mitigating circumstances.

I. Preliminary Issues

First, in his closing, Respondent asserted that the appropriate standard of proof in this proceeding is clear and convincing evidence because a trainer's license is a professional license (like a nurse or lawyer) as opposed to an occupational license. It is not necessary for this Board to take a position on this assertion. We do recognize that "preponderance of the evidence" has been the standard in every other trainer responsibility case in California, but do not feel it is necessary to make a determination in this case. That is because all of the factors that we will consider in this case satisfy both evidentiary standards.

Next, Respondent took some time at hearing and in his closing brief to question why the CHRB did not disclose the out-of-competition positives to the Breeders' Cup and public; to imply that Equine Medical Director Rick Arthur had a duty to help Mr. Ellis make a determination as to whether he should run or not; and to claim that Dr. Arthur impeded Respondent's attempt to conduct one more test before the running of the Breeders' Cup race (the final existing test was taken 8 days before the race). This Board does not see the relevance with respect to aggravating and mitigating circumstances other than to besmirch the good reputation of the Equine Medical Director. The important fact in this case is the positive itself and not whether the out-of-competition result was made

public or whether the CHRB should help Mr. Ellis decide whether to run. While the CHRB could have somehow attempted to preclude “Masochistic” from running, the ultimate decision to run resided solely in Respondent’s realm of responsibility.

Next, the CHRB spent a fair amount of time at hearing and in their closing brief attempting to prove that “Masochistic” received an unreported administration of stanozolol. They used circumstantial evidence in trying to prove this: the lingering levels of stanozolol past the typical clearance period, the fact that another administration was unreported in 2015, and a possible discrepancy in the amount of stanozolol remaining in the medication bottle of Dr. Warren (Respondent’s private veterinarian). Ultimately, we believe that the CHRB did not prove this theory (even to a preponderance of the evidence standard).

Lastly, we did not hear the testimony of Dr. Hebert Warren, Respondent’s private veterinarian. Dr. Warren had health issues during the three months of live testimony and there were no guarantees that he would have been able to testify anytime in the foreseeable future. We therefore closed the hearing without his testimony over the objections of Respondent because we believed that it would unduly delay the process and was far from certain to even occur. In addition, after 5 days of testimony, this Board believed that Mr. Warren’s testimony was not necessary for Respondent’s (or Complainant’s) case, as will be clear from the aggravating and mitigating circumstances analysis below.

II. Aggravating and Mitigating Circumstances

CHRB Rule 1843.3 (Penalties for Medication Violations) establishes penalty categories based on drug classifications, minimum and maximum fines and suspensions for violations, and aggravating and mitigating factors that would necessitate a deviation from those guidelines. Specifically, the rule states that “there may be mitigating circumstances for which a lesser or no penalty is appropriate, and aggravating factors may increase the penalties beyond the minimum.” We will examine each of these eleven factors here.

1. “The past record of the licensee regarding violations of Business and Professions Code section 19581.” Mr. Ellis has a good record in this regard and therefore this is a mitigating factor.
2. “The potential of the drug(s) to influence a horse’s racing performance.” Respondent argues that the evidence showed that stanozolol is not performance enhancing. We believe the evidence demonstrated that the research tends to indicate that stanozolol can influence, and based on its classification, at the very least, has the *potential* to influence performance. While it is clear that the anabolic steroid does not directly affect performance, it almost certainly indirectly affects performance for the very reasons it was administered: appetite, recovery, attitude, etc. Therefore this is an aggravating factor.
3. “The legal availability of the drug.” Stanozolol is legal and prescribed by a veterinarian. Therefore, this is a mitigating factor.

4. "Whether there is reason to believe the responsible party knew of the administration of the drug or intentionally administered the drug." This factor is aggravating because evidence showed that Respondent both knew about the administration of stanozolol and intentionally administered it.
5. "The steps taken by the trainer to safeguard the horse." While evidence demonstrated that Mr. Ellis runs a safe barn with regard to medication, this factor is neutral because we find that he intentionally administered stanozolol and therefore any safeguards to prevent administration are inconsequential.
6. "The steps taken by the owner to safeguard against subsequent medication violations..." This factor is neutral.
7. "The probability of environmental contamination or inadvertent exposure due to human drug use or other factors." This factor is neutral.
8. "The purse of the race." The purse in the Breeders' Cup Sprint (1.5 million dollars) is extremely large and therefore this factor is aggravating.
9. "Whether the drug found to be present in the official test sample was one for which the horse was receiving treatment as determined through the process described in Rule 1842 of this division." The stanozolol administration in August was listed on Dr. Warren's Confidential Report and the CHRB did not prove an unreported administration so this factor is mitigating.
10. "Whether there was any suspicious wagering pattern on the race." There was no evidence of wagering irregularities and therefore this is a neutral.
11. "Whether the licensed trainer was acting under the advice of a licensed veterinarian." Mr. Ellis was acting under the advice of a licensed veterinarian regarding stanozolol and its withdrawal time, therefore this factor is mitigating.

Rule 1843.3 explains that the preceding factors can be mitigating or aggravating but that the list is not exhaustive. We find one other factor important, if not controlling, to the analysis. This post race positive is unique in the sense that the trainer had an out-of-competition test result from a sample taken from "Masochistic" 8 days before the race. Respondent had actual knowledge that his horse was positive before the race and knew that there was, at the very least, a consequential chance that he could be positive on race day. While the evidence varied slightly with respect to the chances that "Masochistic" would be positive on race day, all evidence indicated that there was real, significant risk of a positive. Respondent knew the risk and decided to run his horse despite that risk. To feign surprise after the positive occurred is not convincing. We find this factor to be extremely aggravating. Consequently we find that the aggravating circumstances greatly outweigh the mitigating ones and therefore require a departure from the minimum penalties described under the guidelines, and believe that instead the maximum penalty under the guidelines is appropriate. The maximum penalty under the guidelines for a Class 3, Category B medication (first offense) is a sixty (60) day suspension and a ten

thousand dollar fine (\$10,000.00). The CHRB argued that the rules and the facts of this case not only allow us, but require this Board to go beyond the maximum allowed and impose a one hundred and twenty day (120) suspension, and a twenty five thousand dollar (\$25,000.00) fine. We do not believe that the rules allow this action, nor do we believe that the facts demand it, even if the rules permitted. As a result, pursuant to those guidelines and factors, we believe that a sixty (60) day suspension and ten thousand dollar (\$10,000.00) fine are appropriate. Steward Baker dissents as to the length of the suspension. He believes that a ninety (90) day suspension is appropriate.

CONCLUSION/PROPOSED DECISION

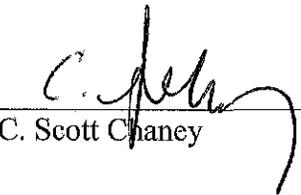
Given the foregoing, the majority recommends that the CHRB suspend Mr. Ellis' license(s) for a period of sixty (60) calendar days, and levy a fine of ten thousand dollars (\$10,000.00).

DATED: December 3, 2017.

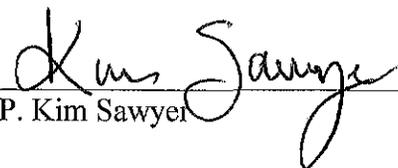
BOARD OF STEWARDS



Grant Baker



C. Scott Chaney



P. Kim Sawyer

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