BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of the Accusation Against: JEFF MULLINS CHRB License #211845 Respondent	Case No. SAC 09-0039

DECISION ADOPTING PROPOSED DECISION WITH MINOR CHANGES (Gov. Code, § 11517(c)(2)(C).)

Attached is a copy of the proposed decision in the above-titled matter submitted to the California Horse Racing Board ("Board") under provisions of Government Code section 11517. You are advised that the Board considered the proposed decision at its April 15, 2010, meeting and elected not to adopt language found on page 22 of the proposed decision: "It is recommended that the suspension run concurrently with any suspension imposed on Respondent in case no. 06DM011 (L2007010483). (In the Matter of the Accusation Against Jeff Mullins). In all other respects the proposed decision was adopted by the Board.

This Decision shall become effective on May 9, 2010.

IT IS SO ORDERED ON April 15, 2010.

CALIFORNIA HORSE RACING BOARD
Keith Brackpool, Chairman

Kirk E. Breed
Executive Director

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CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	
JEFF MULLINS Trainer, CHRB License No. 211845	**Case No. SAC 09-0039**
Respondent.	

PROPOSED DECISION

This Accusation was heard by Steffan Imhoff, a Hearing Officer appointed under California Code of Regulations, title 4, section 19517.5(a) by the California Horse Racing Board (CHRB). Hearings on the Accusation were held at Del Mar, California, on July 20, July 21, and September 8, 2009.

Deputy Attorney General Gary Balekjian represented the CHRB.

Dr. Rick Arthur D.V.M. also appeared for the CHRB.

Senior Investigators Rick Amieva and Sharyn Jolly were present for the CHRB.

Attorney Karen Murphy represented Respondent Jeff Mullins.

The proceedings were transcribed by Barbara Weinstein, Hearing Reporter.

Alexandra DeKoster acted as Court Clerk.

The Accusation was submitted for decision on February 4, 2010.

INTRODUCTION

Milkshaking: In the late 1990's it became apparent that some trainers were manipulating the TCO2 level of their race horses in an attempt to enhance racing performance. This was usually done by tubing the animal with a sodium bicarbonate in a process that earned the *nom de guerre* of milkshaking. This procedure could possibly reduce exercise-induced acidaemia that occurred during a race. Racing Jurisdictions in the United States and internationally considered how to curb this practice. The problem they encountered is that CO2 occurs naturally in the bloodstream of most mammals, including horses. Therefore the governing bodies needed to determine what level of TCO2 demonstrated a clear sign of manipulation. In California there was a period of voluntary testing by the race tracks followed by warnings given to the trainers whose horses were running with high numbers. Eventually, after regulatory hearings, the CHRB in 2005 adopted a Rule prohibiting TCO2 levels in excess of 37.0 millimoles.(Rule 1843.6) Any amount above that level is considered to be a Class 3 violation.

The Race: On August 3, 2008, Pathbreaking, a horse trained by Respondent Jeff Mullins, ran in the 3rd race at Del Mar racetrack. Martin Garcia was his jockey. The conditions of the race were a $35,000 to $40,000 claiming race for 4 year olds and up run at a mile and an eighth on the turf. There were 6 entrants and Pathbreaking finished 3rd, nosing out Hoist the Sail for that placing. The gelding's blood sample was taken prior to the race and was subsequently analyzed for TCO2 content at the Maddy Lab in Davis and found to contain 37.9 millimoles. This finding in excess of the allowable amount of TCO2 has precipitated theses hearings. Respondent Mulllins has denied the allegations in the Complaint and Accusation. Hearings were held, testimony was taken, exhibits and declarations were received. The parties were given a chance to argue the case.

This Proposed Decision is now submitted

FINDING OF FACTS AND CONCLUSIONS OF LAW

PROCEDURAL BACKGROUND

The Complaint in this case was filed on August 8, 2008. It was originally numbered 08DM0010. It is now numbered SAC 09-0039. The Complaint alleges that Pathbreaking,a gelding trained by Jeff Mullins (Lic. No.211845) ran in the 3rd race at Del Mar racetrack on August 3, 2008 with an excess of TCO2 in his blood in violation of CHRB rules 1843.6 (d) (1) (2), 1843(a) and 1887 (a)

The Complaint states, in pertinent part that:

> THE OFFICIAL BLOOD SAMPLE TC148172 TAKEN ON AUGUST 3, 2008 AT DEL MAR THOROUGHBRED CLUB WAS REPORTED BY SCOTT STANLEY OF U.C. DAVIS LABRATORIES TO CONTAIN 37.9 MILLIMOLES PER LITER OF TOTAL CARBON DIOXIDE (TCO2). THIS SAMPLE WAS OBTAINED FROM THE HORSE "PATHBREAKING" WHICH RAN IN THE 3RD RACE AT DEL MAR FINISHING 3RD. THE TRAINER OF RECORD IS JEFF MULLINS.

In November of 2008 the parties filed a Stipulation which included, *inter alia,* an agreement that the DNA of Pathbreaking's blood sample (TC148172) would be compared at the Forensic unit of Veterinary Genetics Laboratory (FVGL) at UC Davis with Pathbreaking's known DNA sample on file with the Jockey Club. On January 9, 2009 FVGL through it's director Elizabeth Wicum reported to CHRB that the sample DNA matched Pathbreaking's DNA. She further reported that the sample matched no other DNA sample of the 1.7 million horses in their database. This finding essentially eliminated any chain of custody questions concerning blood sample TC148172.

On April 21, 2009 Kirk Breed in his capacity as Executive Director of CHRB filed an Accusation against Respondent. Complainant cites Business and Professions code sections 19461, 19581 and 19582 for the Board's authority to discipline license

holders, such as Respondent for violation of CHRB rules. Horse Racing rules relied on in the Accusation include, in pertinent part the following:

Rule 1887(a). **Trainer to Insure Condition of the Horse.**

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 ---blood test samples---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 license suspended or revoked, or be ruled off.

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
(d) A finding by an official chemist that a test sample taken from a horse contains a drug substance ---in excess of the limit established by the Board for its use shall be *prima facie* evidence that the trainer---has been negligent in the care of the horse and is *prima facie* evidence that the drug substance has been administered to the horse.

Rule1843.1 **Prohibited Drug Substances.**

For purposes of this division, prohibited drug substance means:
(b) Any drug, substance, medication or chemical authorized by this article in excess of the authorized level

Rule1843.6 **Total Carbon Dioxide Testing**

(d) TCO2 levels in the blood serum or plasma shall not exceed:

(1) 37.0 millimoles per liter of serum or plasma.
(2) TCO2 levels in excess of 37.0 millimoles shall be considered a Class three-medication violation for administrative purposes..

The Accusation also cites Rule 1859.5, Disqualification Upon Positive Test. In separate proceedings Pathbreaking has been disqualified from the race in question. His purse of $5,520 for finishing 3rd has been ordered forfeited and redistributed.

Trial Date: The trial on this matter began on July 20, 2009. Prior to the start of the trial the court considered the following pretrial motions:

1) Respondent's Motion to Dismiss on Speedy Trial Grounds.

Respondent argued that there was a lack of compliance with Business and Professions Code sec. 19517.5 (b) which mandates that absent good cause the hearing shall commence within 90 days of the filling of the Accusation. The motion was denied on several grounds including the fact that the hearing did begin on the 90th day (April 21-July 20) and that any delays in the proceedings were agreed to by Mullins' counsel. Under California law when a party agrees to a date beyond the statutory limit they waive any speedy trial argument. *Drescher v. Superior Court* (1990) 218 Cal. App. 3rd 1140. We see no reason to reconsider this ruling.

2) Motions Regarding Prior Violation.

The Attorney General requested official notice be taken of case number L2007010483, In the Matter of the Accusation Against Jeff Mullins. Complainant argued that this mepivacaine prior involving the horse Rob Coin was"relevant to issues in this case including penalty." The court ruled that a prior cannot be used to help prove a present allegation. However it is appropriate, and the rules require that priors be considered if the case goes to a penalty phase.(Rule 1843.2(b) (1))

Respondent later filed a motion and Declaration from Dr. Cothran of Texas A & M University to disregard this prior because Rob Coin's DNA was allegedly mixed in with another horse's DNA. When considering a prior for sentencing you are normally not allowed to challenge the validity of the prior. *Jackson v. Virginia* (1979) 443 U.S. 307,324. To rule otherwise would open up the court to an endless spiral of litigation were no decision would ever be final. Dr. Cothran's Declaration is ruled inadmissible. Respondent's motion to disregard his mepivacaine prior is denied.

Trial Dates, Briefs and Rulings:

The trial on the Accusation was held in Del Mar, California on July 20, July 21 and September 8, 2009. During the trial we rejected Respondent's claim that Dr. Rick Arthur was biased and prejudiced against him. We also reject the Declaration of Frank

Moore whose diatribe against a former CHRB Executive Director is not germane to the issues in this case.

At the conclusion of these proceedings a briefing schedule was set. The Complainant's Opening Brief was due 30 days after the Transcripts were filed (October 6, 2009). That Opening Brief was filed on November 6, 2009. Respondent's Brief was filed on December 8, 2009. The Complainant's Reply Brief was filed on December 29, 2009. Thereafter, Respondent submitted a letter brief on January 7, 2010. The Attorney General objected to the letter brief in their own letter dated January 13, 2010. That objection is overruled. In addition both parties responded to the suggestion of the court to file simultaneous briefs on February 4, 2010 on an issue concerning the interpretation of language in section 19581. After considering the briefs on this issue we are now satisfied that the section, when read in context, does not require the Complainant to prove that Pathbreaking was administered a substance subsequent to his entry into the August 3rd race.

I. EVIDENCE OF A *PRIMA FACIE* CASE

(1.) Trainer of Record:

Respondent Jeff Mullins, trainer license no. 211845, was at all relevant times, except when he was serving a 20 day license suspension in February and March, 2008, the trainer of record for the 4 year old gelding Pathbreaking.

(2.) Del MarRace:

Pathbreaking ran in the 3rd race at Del Mar on August 3, 2008. He finished 3rd in a claiming race run at a mile and an eighth on the turf. Jeff Mullins was Pathbreaking's trainer for that race.

(3) Testing His Blood:

A sample of Pathbreaking's blood was drawn at the Del Mar receiving barn between 40 minutes to an hour before the 3rd race. The sample was designated as number 148172 and sent to U.C. Davis for processing and testing for DNA and TCO2. The

testing of Pathbreaking's blood for TCO2 was not unique. All 71 horses that ran that day had their blood tested for TCO2 levels.

(4) Chain of Custody and Identity of Sample:

The chain of custody and the identity of the sample being Pathbreaking's blood were conclusively established through the testimony of Elizabeth Wictum. Ms. Wictum is the director of the Forensic Veterinary Genetics Laboratory (FVGC) at U.C. Davis. Sample 148172 was sent to FVGC by stipulation for a DNA test that compared the sample with the DNA sample for Pathbreaking on file with the Jockey Club. (number T647218). Wictum explained the DNA comparison process in great detail. She then gave her conclusion that the two samples came from the same horse; Pathbreaking. She further concluded that the Jockey Club sample did not match the DNA of any of the other 1.7 million horses in their database.

(5) Results of Testing by Dr. Stanley of Pathbreaking's Blood for TCO2:

For the past 13 years Doctor Scott David Stanley has been in charge of the Maddy Lab and all testing that is done there. He is the chief chemist and is responsible for their drug testing program. Dr. Stanley is well qualified as an expert in equine toxicology and pharmacology. Respondent's attempt to impeach him for allegedly padding his resume is not well taken. Any suggestion that his testimony should be disregarded is rejected.

Dr. Stanley supervised the testing of sample 148172, Pathbreaking's blood sample that was tested at the Maddy Lab. The tests were performed on August 6th and reported by Dr; Stanley in a 46 page report dated August 23, 2008. The initial finding of an excessive TCO2 level for sample for 148172 (Pathbreaking) was reported to the CHRB by letter on August 7, 2008. Notification of a positive TCO2 test for Pathbreaking was served on Respondent's representatives on August 9, 2008 by Senior Investigator Rick Amieva.

Dr. Stanley explained that all 71 samples from the August 3rd racing at Del Mar were initially screened for TCO2 levels. All of the calibration and instrument work was cheeked and were found to be in good working order. All the samples passed the initial screening test except for one. That one failed sample, were the TCO2 level exceeded 37 mm/l was 148172; Pathbreaking. Each sample was calculated twice. The unadjusted

level for Pathbreaking was calculated at 41.0 and 41.1 mm/l. These numbers were then adjusted downward by a variance factor of 2.1. This takes into account any adjustment that might be required to the data. So in this case the adjusted TCO2 numbers could actually vary from 38.9 and 39.0 to 43.1 and 41.1. However, the numbers are only adjusted downward and not upward. The TCO2 levels were recorded on the initial screening as 38.9 and 39.0. It is these numbers that must exceed 37.0 to earn a failed score on this test. The average score for horses that raced at Del Mar on August 3rd was 31.1 mm/l a number that was almost 8 millimoles per liter below Pathbreaking's score.

Because the initial screening showed a failure the Lab went on to do confirmation testing. Four replicates are taken from the original sample and each sample is tested twice for a total of eight tests. They also recalibrate the instruments and rerun the sample verification controls. All 8 tests must show a level above 37 mm/l to fail the confirmation test. That was the case with sample 148172. Pathbreaking's TCO2 numbers came in above 37.0 mm/l in all 8 tests. At that point a mean or average number for the 8 tests is calculated. In this case the mean is 37.93 mm/l. This number is then rounded down to 37.9 mm/l which is the number reported to CHRB.

In summation Pathbreaking's blood serum or plasma contained 37.9 mm/l TCO2 when he ran in the 3rd race at Del Mar on August 3, 2008.

(6) *Prima Facie* Case

The "Trainer Insurer" rule states that (t)he 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.... If the chemical or other analysis of ---blood test samples....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...license suspended or revoked, or be ruled off. (Rule 1887).

In addition the "Medication and Drug" rule warns trainers that (a) finding by an official chemist that a test sample taken from a horse contains ....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...agent 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.(Rule 1843(d)). California courts have historically upheld the trainer insurer rule. *People v. Scott* (1944) 24 Cal.2d 774,782; *Sandstrom v. California Horse Racing Board* (1948) 31 Cal.2d 401,408; *Jones v. Superior Court* (1981) 114 Cal.App. 3rd 725

Rule 1843.6 the "Total Carbon Dioxide Testing " provides that "TCO2 levels in the blood serum or plasma shall not exceed ---37.0 millimoles per liter of serum or plasma" .

Here Complainant has proven all the elements necessary to make out a *prima facie* violation of Rule 1887 as alleged in the Accusation. The gelding, Pathbreaking , trained by Jeff Mullins, ran in the 3rd race at Del Mar racetrack on August 3, 2008 with an excessive amount of TCO2 in his system (37.9 mm/l). Nothing further is necessary to establish a *prima facie* case. Therefore the burden has now shifted to Respondent to prove a defense to the charges by a preponderance of the evidence. (Evidence Code Sec. 602)

I. RESPONDENT DEFENSES:

A. The Lasix Bump:

Respondent argues that Lasix also known as Furosemide is the most important issue in this case. Lasix is a diuretic anti bleeding medication. As long as it is administered at least 4 hours from post time in a dosage of 150mg-500mg it is a legal race day medication. Trainers in consultation with their veterinarian, within the CHRB rules, controls when and how much Lasix to administer to their horse.

It is known that Lasix can have some effect on a race horse's TCO2 levels. Respondent uses the "Lasix Bump" to argue for a dismissal of the Accusation. As we shall see the argument is not persuasive.

(1) There is a No Lasix Safe Harbor Defense:

Respondent argues that as long as Lasix was administered to Pathbreaking in a lawful amount at a lawful time then he cannot be faulted if this results in an excess TCO2 finding. The first problem is that it is unclear whether Rule 1845 (e) which requires that Lasix be administered no later than 4 hours before post time. Melinda Blue, Respondent's veterinarian testified that she gave Pathbreaking his Lasix between 11 and 11:15 on the morning of August 3. We have taken judicial notice of the post time of the 3rd race, which was at 3:04 in the afternoon. So there is a better chance than not that the Lasix was given by Blue less than 4 hours from post time in violation of Rule 1845 (e).

Equally importantly is the fundamental misconception evidenced around a safe harbor defense. If there was a limit on the amount of Lasix in the horse's system then a showing that the veterinarian complied with specific CHRB rules on time and amount might constitute a defense. Likewise if the Complaint was there was no trace of the Furosemide in the post race serum or blood (Rule 1845 (e) there might be a safe harbor defense if it was proven that all relevant CHRB rules were followed. However, here we are concerned not with the amount of Lasix in Pathbreaking's system but the amount of TCO2 in his system.

The safe harbor defense must be rejected.

(2) Respondent Failed to Prove that Lasix Caused Pathbreaking's Excessive TCO2 Level.

Mullins and his veterinarians Melinda Blue and Dana Steed all denied "milkshaking" Pathbreaking prior to the August 3rd race.

However Respondent's argument that Pathbreaker's excessive TCO2 result was caused by the injection of a large but legal dose of Lasix was presented primarily through the declarations of Dr. Thomas Tobin. The submission of Dr. Tobin dated January 12, 2010 is not submitted under penalty of perjury and is not admissible. Without deciding on the admissibility of his Declaration of December 6, 2009 we have reviewed that document and find that we disagree with his central conclusion. First, as stated above it is questionable whether Respondent proved that the gelding was given a legal dose of Lasix by the veterinarians. There is confusion both about the timing of the injection and

the identity of the injectee. The vet report first listed Steed as giving the injection and it was later changed to Blue. In any event it was Tobin's opinion that the horse was not administered bicorbinate prior to the August 3rd race. He believes that Pathbreaking is a statistical "outlier" with an abnormally high TCO2 level which was elevated by receiving the maximum dose of Lasix (500 mg.) less, than three hours from the time the blood sample was taken.

We start with a *prima facie* case which under Rule 1843(d) requires us to assume that the drug was in fact administered. It is Respondent's burden to prove otherwise. We believe that the evidence provided by Dr. Stanley and Dr. Arthur is more compelling then the Declaration of Dr. Tobin. For example Dr. Tobin speculates that Pathbreaking is a statistical freak, yet he has no serious answer for the statistics detailing Pathbreaking's TCO2 tests. Those 17 TCO2 tests were compiled by Dr. Stanley and put into evidence. Each test underwent the same protocol. The blood was initially tested twice and the 2.1 uncertainty factor was subtracted from the results. Both numbers have to exceed 37.0 mm/l to proceed to further testing. The results showed that the only failed TCO2 test for Pathbreaking was on the August 3rd race at issue. It is not logical to blame the Lasix bump for the excess TCO2 result in that one race. Pathbreaking was treated with Lasix in all 17 of those races but again only had an excess TCO2 finding in the August 3rd race.

It is instructive to look at the averages of these results. The average score when Respondent was training the horse was 34.32 mm/l while the average score when others were training Pathbreaking was 32.33. This shows a significant difference of 5.6mm/l between the score for other trainers and the excessive 37.9 TCO2 result in this case. These findings are consistent with the conclusion reached in an article co-authored by Dr. Stanley and Dr. Arthur with Dr. Cohen and Dr. Wang in the Equine Veterinary Journal (Factors influencing pre-race serum concentration of total carbon dioxide in Thoroughbred horses racing in California). Respondent has cited this article because it found a general correlation between some variables shared by Pathbreaking (sex, longer upper level claiming race, finishing in the top three) and modest elevation of pre-race TCO2 levels. However the more interesting and relevant finding was that the strongest correlation of elevated TCO2 levels was the horse's trainer. The trainer was more important than the horse.

Dr. Tobin's speculation that Pathbreaking's pre-race Lasix shot is the cause of his TCO2 overage is undermined by his reliance on faulty data. The primary source of his theory is a paper co-authored by Dr. Kline entitled "Effect of Dose of Furosemide on Plasma TCO2 Changes in Standardbred Horses" published in the Journal of Equine Veterinary Science (July 2006). The article involves an experiment with nine Standardbred race horses in Illinois. Dr. Tobin concedes that nine horses is a "small sample". In fact one need not be a scientist to recognize that an experiment with just nine animals could not possibly produce reliable data. (The article co-authored by Dr. Arthur and Dr. Stanley with Dr. Cohen and Dr. Wang for example involved data on 2349 California race horses.)

Dr. Arthur points out the major flaw in the data. Dr. Kline failed to use a measurement uncertainty adjustment. If Dr. Kline had used the 2.1 adjustment used in California, then every example Tobin cited to show a TCO2 overage caused by Lasix would fall below the 37.0 mm/l standard. The adjusted data invalidates Tobin's theory that lays the blame on pre-race Lasix for causing Pathbreaking's unlawful TCO2 level.

Again Dr. Arthur points out a relevant statistic that further undermines Tobin. Tobin relies on the fact that one out of the nine horses had a TCO2 reading above 38mm/l. In the 18 months since Pathbreaking's positive 30 - 40,000 race horses have been tested for TCO2. If the one in nine figure was accurate there should have been at least 300 to 400 TCO2 positives testing above 37.0 mm/l. In fact there was zero.

Finally Tobin ignores the fact that Respondent was responsible for the timing of the Lasix shot. It was his vet that chose to give the injection probably unlawfully close to post time which caused the pre-race TCO2 test to be given less than 3 hours from the injection.

In sum we conclude that Mullins has not met his burden to show by a preponderance of the evidence that Pathbreaking's TCO2 level of 37.9 mm/l was caused by a lawful Lasix injection

(3) California's TCO2 Regulations take the Lasix Bump into Consideration and meet the Requirements of Due Process.

Respondent spends considerable effort trying to prove that the CHRB's TCO2 legislation is not as enlightened as other jurisdictions, particularly New York and Illinois. We do not consider that a relevant inquiry and have not admitted the evidence for that purpose. However, we will consider the question of whether the CHRB's TCO2 regulations afford Respondent due process and whether CHRB considered the Lasix bump when adopting the TCO2 regulations in 2005.

Respondent put the New York TCO2 regulations at issue through the telephonic testimony of Richard Violette a trainer and President of the New York Thoroughbred Horseman's Association. New York has had a TCO2 regulation since 2005. When a horse is treated with Lasix the regulatory threshold is 39.0 mm/l. The regulations also include a quarantine provision which allow a trainer with a TCO2 positive to place the horse in quarantine for 3 or 4 days. If the horse is still TCO2 positive at the end of the quarantine then the trainer is exonerated.

Violette recalled his own experience with a TCO2 positive of 39.1 or 39.2mm/l on a horse he claimed to have not given any alkalizing agents. The horse was still positive at the end of quarantine and Violette was exonerated.

The Illinois TCO2 statute, which is essentially the same as New York was put in evidence. That statute (Title 11, Subtitle B., Chapter I, # 603.180 Carbon Dioxide Tests) provides that if a horse is not running on Furosemide the regulatory level is 37.0 mm/l and if the horse is running on Furrosemide the regulatory level for TCO2 is 39.0 mm/l. The Illinois statute also has a 72 hour quarantine period which may be requested by the trainer and can result in exoneration if the TCO2 level remains positive at the end of quarantine.

Respondent asserts that many other racing jurisdictions have the same TCO2 regulations as New York and Illinois but no evidence of that fact has been placed in the record.

Dr. Rick Arthur is the Equine Medical Director for CHRB. He provided evidence concerning the adoption of the TCO2 regulations by the Board in 2005. The Board was aware that race day Lasix could affect the TCO2 levels in race horses and was aware that

some jurisdictions were setting a higher level for horses running on Lasix. The Board rejected that option. The International level for TCO2 set by the International Federation of Horse Racing Authorities (IFHA) set 36.0mm/l as the standard for horses not running on Furosemide. The Board set the violation level above that figure at 37.0mm/l to take the Lasix bump into account.

The Board also was counseled by Dr. Rick Sams the Chief Chemist for the Ohio Racing Commission. Ohio had a very successful TCO2 program using the 37.0mm/l standard.

In addition the Board was aware of the voluntary TCO2 program that had been going on for some time. Initially 20% of the horses were testing above 37.0mm/l but eventually it got down to close to zero. This showed the TCO2 levels were controllable by trainers even for horses running on Furosemide. The TCO2 regulation of 37.0 mm/l enjoyed wide support in the Industry including the support of the Thoroughbred Owners of California (TOC), the California Thoroughbred Trainers Association (CTTA) and the racetracks

Finally we must consider the effect of the Measurement Uncertainty Adjustment of 2.1 mm/l that is deducted from every TCO2 test run in California. There was no evidence presented that either New York or Illinois made this deduction in their TCO2 calculations. This Adjustment makes a 37.0 mm/l score coming out of the Maddy Lab equivalent to a 39.1 from New York or Illinois.

Under these facts we find that the Board was aware of the Lasix bump and made a rational and science based and experience based decision to adopt the 37.0 mm/l standard for the TCO2 testing program and to not have a separate standard for horses running on Furosemide.

The only other issue is whether the lack of a quarantine program affects the fundamental fairness of the Board's TCO2 testing program. We don't believe it does. Whether to include a post -race quarantine is a decision that falls within the Board's sound discretion. We find that the CHRB TCO2 testing program, as presently constituted, satisfies the due process requirements of the state and federal constitutions. (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32).

B. The Rule 1888 c. Defense

> Rule 1888 c. provides: A trainer …charged with a violation of Rule 1887…may defend, mitigate or appeal the charge if: He shows, by a preponderance of the evidence, that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons;

(1) Respondent Argument:

Respondent is asserting that because he made every reasonable effort to protect Pathbreaking from tampering by unauthorized persons he is entitled to a dismissal under Rule 1888 c. The burden is on Mullins to prove this defense. *Vienna v. California Horse Racing Board* (1982) 133 Cal.App. 3rd 387.

(2) Evidence Regarding Security:

Respondent Mullins, his veterinarian Dr. Blue and her assistant Dr. Stead all testified briefly concerning barn security. Stead believed that Mullins had the best run and most organized training operation on the backstretch. Respondent's foreman and assistant trainer know every horse including their medication schedule. Stead is not allowed contact unless one of those gentlemen is present. Dr. Blue agreed with her assistant calling Respondent's training operation as the best she had ever seen. She verified that no horse is medicated or treated by anyone unless the foreman or assistant trainer is present. Respondent calls his assistant trainer really conscientious. He also testified that no one gets in the barn or touches the horses unless the foreman or assistant trainer is present.

(3) Discussion:

Although Respondent established that he has a well run barn with conscientious employees there was little evidence offered on barn security. The foreman and assistant trainer cannot be in the barn and awake 24 hours a day. We do not know how intruders are kept out of the barn or whether there are security guards on duty at any time. Likewise we have no evidence of fixed video cameras in Respondent's barn. This relatively inexpensive and widely available security equipment would ordinarily be mandatory for any trainer asserting a rule 1888 (c) defense.

On this record we must find that Appellant failed to prove by a preponderance of the evidence that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons

CONCLUSION

The evidence shows that Respondent was (1) the trainer of Pathbreaking a gelding that ran in the 3rd race on August 3, 2008 at the Del Mar race track and (2) that Pathbreaking ran in the race with an excessive amount of TCO2 in his system.(37.9 mm/l) These facts established a *prima facie* violation of Rule 1887, the Trainer Insurer Rule and shifted the burden to Respondent. Respondent presented three defenses related to his "Lasix bump" theory and an 1888 c defense. We have rejected all of these defenses as being legally and/or factually insufficient. The Respondent has failed to establish a defense by a preponderance of the evidence. Therefore we hold that the Accusation (Sac 09-0039) has been proven true and we consider the question of penalty.

PENALTY

I. Authority of CHRB to Impose a Suspension or Fine on Respondent

It is axiomatic that having found the Accusation to be true the CHRB has the authority to impose a fine or suspension on Mullins. The granting of these powers, including the power of the CHRB to adopt Rules and Regulation concerning punishment can be found in Business and Professions Code Sections 19420, 19440, and 19461.

In addition Rule 1405 specifically empowers the CHRB to suspend or fine any licensee for any violation of the Rules;

> Violation of any provision of this Division, whether or not a penalty is fixed therein, is punishable in the discretion of the Board by revocation or suspension of any license, by fine or by exclusion from all racing inclosures under the jurisdiction of the Board, or by any combination of these penalties. The Board may independently punish any misconduct of any person connected with racing. (Rule 1405)

Rule 1887 specifically authorizes the CHRB to suspend or fine a trainer when a prohibited level of a substance turns up in his horse's blood:

> ...If the chemical...analysis of ...blood test samples...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. (Rule 1887)

Rule 1843.1(b) defines prohibited drug substances to include "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. (Emphasis added) Under Rule 1843.6 (d) TCO2 levels in the blood or serum are limited to 37.0 mm/l. We have previously found that Pathbreakig's pre-race blood sample contained 37.9mm/l. Respondent, as trainer, is subject to the appropriate penalty for an excess TCO2 finding.

II. Determining Range of Penalties.

A. Under Rules 1843.2 and 1843.3

In determining what penalties Respondent is subject to in this case we first turn to Rule 1843.2. Classification of Drug Substances. Under this Rule the CHRB is directed to consider the classification chart which divides each Class 1,2,3,and 4 drug into A,B,C, and D penalty categories. A TCO2 overage is officially listed as a Class 3 violation with a Class B penalty rating. (Rules 1843.3 and 1843.6 (d) (2).)

We than turn to the charts attached to Rule 1843.3 where the range of penalties are divided by letter(A-D), owner or trainer and prior record. They are also divided between an excess TCO2 finding between 37.0 mm/l and 38.9 mm/l and findings of 39.0 mm/l and above. Respondent has no prior violations of Rule 1843.6 (excess TCO2). The relevant penalties are listed on page 100 of the Horse Racing Rules under Trainer 1st Offence, TCO2 (>37mm/l<39mm/l).

Under this section Respondent is subject to "Up to a 30 day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 60 day suspension." As to a potential fine a "(m)inimum fine of $1500

absent mitigating circumstances is called for. The presence of aggravating factors could be used to impose a maximum fine of $5,000.

B. Assessing Aggravating and Mitigating Circumstances:

Rule 1843.3 is the Penalty for Medication Violations rule. This rule became effective May 28, 2008 and is applicable to this case. Its provisions allow for imposition of a monetary penalty for cases based on the trainer-insurer rule.

Rule 1843.3 also provides instruction in determining the proper penalty in TCO2 violation cases. We start with the basic penalty chart that is part of the rule. As previously determined that chart before adjustments for aggravation and mitigation has a suspension range between zero and 60 days and a fine of between $1500 and $5,000. Then we assess aggravation and mitigation as to the eleven specific factors listed in the rule. These factors are mandatory and must be considered when applicable.

We also are instructed to assess aggravation and mitigation for any other relevant factors for this particular case. Other cases are not instructive because there are no other fully litigated TCO2 matters since the new penalty provisions under Rule 1843.3 went into effect.

It is important to recognize that in looking at aggravation and mitigation it is not just a question of adding up the factors on each side of the ledger. Rather it is the overall strength of the factors that leads to a conclusion of whether a deviation from the norm is required. Just one compelling aggravating or mitigating finding can outweigh everything on the other side. *People v. Grant* (1988) 45 Cal.3d 829, 857, fn.5. Finally, the findings on aggravation and mitigation are applied to the potential penalties in Rule 1843.3.

C. The Mandatory Factors and Circumstances:

1) The past record of the licensee regarding violations of Business and Professions Code section 19581.

This is directed to a trainer's record in California for drug or medication violations. Mullins has a relatively recent Class 2 mepivicaine violation. (In the Matter of the Accusation Against Jeff Mullins, case no. 06DM011). In that case the horse Rob Coin, trained by Mullins ran in a race at Del Mar with an excess of mepivicaine in his

system. On January 16, 2008 the Board issued a decision suspending Mullins for 90 days. Seventy days was suspended and Mullins was put on one year probation with the condition that he serves a 20 day suspension and that he obeys all rules and regulations of the Board.

We consider a recent class 2 medication violation a serious aggravating factor.

2) The potential of the drug(s) to influence a horse's racing performance:

There is some dispute as to whether milkshaking or other techniques to raise a horse's TCO2 level actually does what it is reputed to do –improve a horse's racing performance. However there was certainly enough evidence from Dr. Arthur and others that raising the TCO2 level has the potential to influence a horse's performance.

This is an aggravating factor.

3) The legal availability of the drug:

This factor is aimed at unlawful drugs and drugs that have not been approved for equine veterinary use. Bicorbinates come under this category. They are available in drug stores without a prescription and are therefore easy to obtain and use.

This is an aggravating factor.

4) Whether there is a reason to believe the responsible party knew of the administration of the drug or intentionally administered the drug:

This section is designed to assign additional culpability to a trainer who is directly involved in the administration of an illegal drug as opposed to negligence in allowing it to happen. We have proceeded under the trainer insurer rule. There is no direct evidence that Mullins milkshaked Pathbreaking or that it was done with his knowledge or permission.

This is not an aggravating factor.

5) The steps taken by the trainer to safeguard the horse:

We have considered this issue in Respondent's 1888 (c) argument. Respondent has offered insufficient evidence concerning his barn security to mitigate this offense.

This factor is neutral.

6) The steps taken by an owner to safeguard against subsequent medication violations including, but not limited to, the transfer of the horse(s) to an unaffiliated trainer:

This factor Not Applicable.

7) The probability of environmental contamination or inadvertent exposure due to human drug use or other factors:

No evidence was presented on this issue. This is a neutral factor

8) The purse of the race:

The purse of the race was $46,000. This is not significant enough to be considered an aggravating factor.

This factor is neutral.

9) Whether the drug found to be present in the official test samples was one for which the horse was receiving treatment as determined through the process described in Rule 1842 of this division:

Rule 1842 describes the Official Veterinarian Report. It is not applicable in a TCO2 case.

This factor is neutral.

10) Whether there was any suspicious wagering on the race:

There was no evidence of any suspicious wagering.

This is not a factor in aggravation.

11) Whether the licensed trainer was acting under the advice of a licensed veterinarian:

Mullins was making medication decisions in consultation with his veterinarian Dr. Melinda Blue

This is a circumstance in mitigation.

CONCLUSION

The fact that Respondent has a recent class 2 violation in California and that Pathbreaking's unlawfully elevated TCO2 level may have affected the outcome of the race are serious factors in aggravation that outweighs the circumstances in mitigation. We hold that the appropriate penalty in this case is a 30 day suspension and a $2500 fine.

ORDER

Accusation No. SAC 09-0039 (08DM0010) filed April 21, 2009 charging trainer Jeff Mullins , Lic. No. 211845 with violating CHRB Rule 1843.6 (d) (1) (2), 1843(a), and 1887 (a) in that Pathbreaking, a horse trained by Mullins ran in the 3rd race at Del Mar on August 3, 2008 with an excess level of TCO2 in his system (37.9mm/l) is found TRUE. Therefore the CHRB enters the following ORDER.

1) Trainer Jeff Mullins' license is suspended for a period of 30 days.

2) Trainer Jeff Mullins shall pay a fine of $2500.

3) The timing of the payment of the fine and the serving of the suspension shall be decided by Kirk Breed, Executive Director California Horse Racing Board. It is recommended that the suspension run concurrently with any suspension imposed on Respondent in case no. 06DM011 (L2007010483. (In the Matter of the Accusation Against Jell Mullins).

IT IS SO ORDERED

DATED: 3-5-10

STEFFAN IMHOFF,
Hearing Officer