BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

JEFF MULLINS
Respondent

OAH No. L2007010483

AMENDED DECISION

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

The Decision shall become effective and the actual suspension shall commence on February 15, 2008.

IT IS SO ORDERED ON January 16, 2008.

CALIFORNIA HORSE RACING BOARD
Richard B. Shapiro, Chairman

Richard Bon Smith
Acting Executive Director

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the Accusation Against: JEFF MULLINS, Respondent.	CHRB Case No. 06DM011 OAH No. L2007010483

PROPOSED DECISION

This matter was heard on June 4, 5, 6, 7, 8 and August 20, 21, 22 and 23, 2007, at Los Angeles, California, by David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California.

Jeff Mullins (Respondent or Mullins) was present and was represented by Neil Papiano, Attorney at Law. Ingrid Fermin (Complainant) was represented by Jerald L. Mosley, Deputy Attorney General. During a portion of the hearing when Mr. Mosley testified as a witness, Complainant was represented by Martin Miles, Deputy Attorney General.

Oral and documentary evidence was presented. The record remained open for receipt of additional materials, which were received and marked for identification as follows: Complainant's Closing Brief, September 28, 2007, Exhibit 95; Respondent's Brief on Submission – Final Argument, November 16, 2007, Exhibit 148; Complainant's Reply Brief in Opposition to Respondent's Closing Brief, December 5, 2007, Exhibit 96; Complainant's Notice of Motion and Motion to Strike Testimony of Dr. Cothran, November 15, 2007, Exhibit 97; and Respondent's Opposition to Complainant's Motion to Strike Testimony of Dr. Cothran, December 7, 2007, Exhibit 149.

The record closed and the matter was submitted for decision on December 7, 2007.

Subsequently, the ALJ discovered that the Accusation had not been placed into evidence. Therefore, the Accusation is marked as Exhibit 203. Official notice of the Accusation is taken under Government Code section 11515.

Introduction

The Board brought this Accusation against Respondent based on the test results of a urine sample taken from a horse that he trained. The test results showed the presence of mepivacaine, a prohibited substance. Respondent contends, among other things, that the urine sample contained urine of another horse.

The first section of this Proposed Decision addresses numerous motions that were submitted by both parties, some of which relate to testimony and documents referred to during the hearing. The sections that follow relate to the race and the test results, and the applicable law and legal conclusions based thereon.

FACTUAL FINDINGS

Motions

1. Numerous motions were made before, during and after the hearing. Many rulings already appear in the record. Some of the motions were taken under submission. In his closing argument (Exhibit 148), Respondent seeks reconsideration of certain evidentiary rulings. This section contains factual findings, discussions and rulings on the motions under submission and Respondent's request for reconsideration.

2. Respondent brought a motion to dismiss the proceedings based on claims that his constitutional rights were violated. (Exhibit 124.) Complainant orally opposed the motion, on the record. At the outset of the hearing, the ALJ determined that the motion relied upon facts that were not yet on the record, and granted Respondent's request to call Mr. Mosley to testify as a witness. The request was granted with certain conditions imposed, as more specifically set forth in the record.

3. For reasons not fully explained by Respondent, he filed another motion to dismiss, citing the same bases, during a hiatus in the hearing and before Mr. Mosley testified. (Exhibit 133.) Complainant filed a brief and declaration in opposition. (Exhibits 80 and 81.) Respondent filed a reply brief and a correction. (Exhibit 126 and 127.) The new motion was argued on the record, and it was determined that Mr. Mosley's testimony should be taken for purposes of eliciting evidence to make factual findings. Respondent also argued for dismissal of the case in his brief on closing argument (Exhibit 148), raising many of the same points.

4. The gist of Respondent's motions to dismiss is the contention that Mr. Mosley interfered with Respondent's rights to a fair hearing. The two major contentions are that Mr. Mosley withheld documents and test results received from the University of Kentucky Equine Parentage Testing and Research Laboratory (UK lab) that should have been turned over to Respondent, and that Mr. Mosley

improperly interfered in Respondent's efforts to obtain related information from the UK lab by advising agents of the UK lab not to supply that information.

5. Before the hearing began, Respondent informed the Board of a desire to have the urine sample subjected to DNA testing to determine if it was from Robs Coin, the horse that is the subject of this matter. At Respondent's request, an agreement was reached to have a portion of the urine sample delivered to the UK lab for DNA testing. On its own volition, the Board later had DNA testing done by the UC-Davis Veterinary Genetics Laboratory (VGL).

6. The agreement for testing by the UK lab was necessary due to the Board's responsibility to maintain control over urine samples it collects. The agreement was the result of many communications between counsel (see, for example, Exhibits 44 through 50), and required, among other things, for Respondent to pay $150 to the Board to cover its costs, which was paid. The agreement by the parties for the UK lab to test samples from Robs Coin contained the following language in a section titled "Laboratory Requirements":

"1. The Lab agrees to maintain a strict chain of custody of the submitted samples and to document analytical procedures. The Lab must notify the CHRB in writing that they can satisfy these requirements prior to the samples being shipped."

"2. The CHRB must be named as the primary recipient of any laboratory finding. The Licensee may receive simultaneous copies of any reports." (Exhibit 49.)

Of note, this agreement was signed by Mr. Mosley on behalf of Complainant and Mr. Papiano on behalf of Respondent. No version of the agreement has a provision for anyone to sign on behalf of the UK lab. Therefore, although the agreement includes obligations that the parties placed upon the UK lab, the agreement did not include any acknowledgment by the UK lab that it was aware of these obligations and agreed to them.

7. Mr. Papiano forwarded the agreement to the UK lab (Exhibit 47B) and asked for the confirmations required by the agreement. Mr. Papiano also forwarded payment of $250 to the UK lab for the testing, pursuant to an earlier invoice from the UK lab (also Exhibit 47B). This invoice is the evidence of what the UK lab agreed to do: the UK lab agreed to do "DNA Typing," described more particularly as "DNA Genotyping on drug case sample-three way comparison with urine, blood and hair Case 'Robs Coin'."

8. In a letter dated January 22, 2007 (Exhibit 143), Dr. Kathryn Graves, director of the UK lab, acknowledged receipt of the testing fee and wrote: "We are capable of maintaining the chain of custody for a particular sample through

documentation of receipt of sample and its location and use in the laboratory. We can provide the results of the DNA testing as well as documentation of methods used in the analysis to the California Horse Racing Board."

9. In a letter dated March 2, 2007, Dr. Graves of the UK lab reported her test results to the Board. (Exhibits 101A and 101B.) This letter and the enclosures were sent to the Board and to Mr. Papiano.

10. Later, at a time not specifically established by the evidence, Mr. Mosley spoke with an expert, Dr. Gus Cothran, about the UK lab report. Dr. Cothran asked for backup data, which Mr. Mosley requested from Dr. Graves. In response, Dr. Graves sent printouts of electropheragrams. (Exhibits 102, 102B and 102C.[1]) Electropheragrams are graphic depictions of the DNA tests by use of a computer program titled STRand.

11. By letter dated May 9, 2007 (Exhibit 83), Dr. Graves forwarded to Mr. Mosley "STRands files" and a zip drive "with the original gel files." Other evidence established that the reference to "STRands files" was actually a reference to 14 pages of printouts of additional electropheragrams.

12. By letter dated May 24, 2007 (Exhibit 85), Mr. Mosley sent those 14 pages to Mr. Papiano.

13. On May 11, 2007, Respondent filed a motion to continue the hearing, set to commence on Monday, June 4, 2007, because the Complainant had not as yet designated a DNA expert or exchanged documents related to the DNA expert. Complainant opposed the request for continuance. This request was denied by order dated May 18, 2007.

14. On May 11, 2007, Mr. Papiano sent a letter to Dr. Graves at the UK lab requesting documents that would support the DNA analysis performed by the UK lab. This letter is attached as exhibit G to the Motion to Dismiss (Exhibit 124). The letter includes 23 categories of documents requested.

15. Mr. Mosley spoke to Dr. Graves concerning Mr. Papiano's request for documents (the letter dated May 11, 2007). He told Dr. Graves that she was not obligated to communicate with anyone and that she was free to talk to anyone she chose.

16. Sometime after his conversation with Dr. Graves, Mr. Mosley received a phone call from counsel for the UK lab about Mr. Papiano's request for documents.

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[1] These exhibits were not received in evidence. Exhibits 102B and 102C are attempts to provide better copies of Exhibit 102.

Mr. Mosley offered his opinion that Dr. Graves was not obligated to communicate with anyone and that Dr. Graves was free to talk to anyone she chose.

17. On May 25, 2007, Respondent filed a letter concerning his contention that Mr. Mosley had improperly interfered in Respondent's efforts to obtain related information from the UK lab by advising agents of the UK lab not to supply that information. The letter requested a continuance of the hearing. Respondent filed an addendum to this letter dated May 29, 2007, and another letter dated May 30, 2007. Complainant filed an opposition to some of these letters. In a telephonic conference on the issues on May 31, 2007, Presiding ALJ Janis Rovner denied the request for continuance and ordered that Mr. Mosley make the zip disk available to Mr. Papiano.

Some of these letters were not previously made a part of the record. For purposes of completing the record, they are added as follows: Mr. Papiano's letter dated May 25, 2007, is marked for identification as Exhibit 204; Mr. Papiano's letter dated May 29, 2007, is marked for identification as Exhibit 205; Mr. Papiano's letter dated May 30, 2007, is marked for identification as Exhibit 206; Mr. Mosley's letter dated May 29, 2007, is already in evidence as Exhibit 88; and Presiding ALJ Janis Rovner's Order dated June 1, 2007, is marked for identification as Exhibit 207.

18. In compliance with the Order, Mr. Mosley made the zip disk available to Mr. Papiano.

19. Dr. Graves was never listed as a witness by either party. There was no evidence that Respondent made other efforts to obtain information from the UK lab or to establish a proper evidentiary basis for use of the work product of the UK lab as evidence at the hearing. For example, there was no evidence that Respondent requested the UK lab to sign a declaration whereby the records from the UK lab might be considered as business records under Evidence Code section 1271 or an official record under Evidence Code section 1280. Nor was there evidence of any attempt to compel Dr. Graves or anyone from the UK lab to give testimony, such as setting a deposition under Government Code section 11511, which specifically addresses compelling testimony from an out-of-state witness. (As noted below in Factual Finding 20 (F), Respondent's counsel was aware of the availability of a deposition under Government Code section 11511 because it is mentioned in the motion papers, Exhibit 124, page 3, lines 11 and 12.) It was evident from the outset of the hearing that Complainant was challenging the admissibility of the UK lab results and that Respondent would have to establish admissibility to make use of the information.

20. (A) The motion to dismiss is denied. Several bases of the motion were not established. For example, it was not established that the UK lab was an agent of Complainant, the Board or its counsel. The agreement between the parties for the UK lab to provide DNA testing did not obligate the UK lab to do anything—the UK lab

was not a signatory to that agreement. Moreover, Respondent paid for the testing, not the Board.

(B) The only agreement the UK lab made regarding the sharing of backup information was to send it to the Board, not to Respondent. (See Factual Finding 8.).

(C) Mr. Mosley's comments to Dr. Graves and to counsel for the UK lab do not amount to misconduct. The inference that Respondent argues—that Mr. Mosley instructed Dr. Graves not to comply with Mr. Papiano's requests—is not supported by the evidence. Rather, the evidence is that Mr. Mosley told Dr. Graves she could choose to communicate or not to communicate with anyone. Further, Respondent did not establish by admissible evidence that the unwillingness of the UK lab and Dr. Graves to further communicate with Respondent was the result of anything said to them by Mr. Mosley, or any other actions taken by him.

(D) The zip disk sent to Mr. Mosley on May 9 was ordered to be forwarded to Mr. Papiano on May 31, 2007. The subsequent hiatus in the hearing, from June 9 to August 19, 2007, allowed ample time for Respondent to make efforts to analyze and meet the data from the UK lab.

(E) Respondent also contends that the zip disk provided by Mr. Mosley was corrupted, making it impossible to access the UK lab data. However, it was established by the evidence that accessing the data on the zip disk required use of the STRand program. When Mr. Mosley sent the zip disk to an expert, Dr. Lyons, she was able to access the data and send print copies of the electropheragrams to Mr. Mosley, who forwarded them to Mr. Papiano by letter dated July 10, 2007. (Exhibit 87.) It was not established by evidence on the record that Respondent used the correct procedure and program in his attempts to access the data.

(F) Respondent also contends that Mr. Mosley improperly withheld exculpatory information received from Dr. Gus Cothran of Texas A & M University. Respondent argues that the disclosure of this information was made too late to undertake a deposition of Dr. Cothran under Government Code section 11511. Again, the long hiatus in the proceedings allowed Respondent to follow up this evidence. Further, the contention is based on the assumption that Mr. Mosley was somehow obligated to turn over the information he received from Dr. Cothran. The assumption is contrary to the statute governing discovery in administrative actions, Government Code section 11507.6. Mr. Mosley's conversation with Dr. Cothran does not fall within any category of discoverable documents or information.

(G) Respondent did not establish an evidentiary record sufficient to support the bases stated in the motions to dismiss. Those motions are denied.

21. Complainant filed a motion to exclude certain testimony of Dr. Cothran, and Respondent filed opposition papers. (Exhibits 97 and 149.) The motion identifies four portions of the testimony[2] and seeks exclusion on grounds of relevance, as the testimony related to documents that were not received into evidence.

22. The motion to exclude testimony is granted in part and denied in part. The motion is denied as to portions one and three: these portions of testimony merely demonstrate Dr. Cothran's familiarity with having seen the documents before, and were relevant, in part, in determining whether he was able to offer testimony about the manner in which the documents were prepared. The motion is granted as to portions two and four: this testimony goes to the substance of the documents, which have not been received in evidence. Therefore, the testimony in portions two and four is excluded.

23. Throughout his brief on final argument (Exhibit 148), Respondent requests the ALJ to reconsider rulings sustaining hearsay objections to certain data from the UK lab, Exhibits 101A, 101B and 128. Respondent raises several contentions, some of which are discussed below.

24. Respondent contends that the documents qualify for the business records exception to the hearsay rule under Evidence Code section 1271. This contention is rejected, as there was insufficient admissible evidence to establish the mode of preparation or that the sources of information and the method of preparation were such as to indicate the trustworthiness of the documents.

25. Respondent also contends that the documents qualify for the public employee records exception to the hearsay rule under Evidence Code section 1280. This contention is rejected, as there was insufficient admissible evidence to establish that the writing was made by and within the scope of duty of a public employee or that the sources of information and the method of preparation were such as to indicate the trustworthiness of the documents.

26. Respondent confuses the issue by referring to the general adage in the Administrative Procedure Act that administrative hearings can use relaxed rules of evidence and that relevant evidence may be admitted "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs," as set forth in Government Code section 11513, subdivision (c). However, this language is qualified by certain limitations, such as subdivision (e), which requires deference to

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[2] All testimony was from August 21, 2007, the transcript of which was attached to the motion. The motion addresses portion one (TR p. 9, ll. 9 – 12); portion two (TR p. 11, l. 5 through p. 12, l. 6); portion three (TR p. 16, ll. 9 – 19); and portion four (TR p. 18, ll. 12 and 13). NOTE: the testimony in portion four is ascribed incorrectly in the transcript to Mr. Papiano when it was actually given by Dr. Cothran.

the rules regarding privilege, and subdivision (d), which places limits upon the use of hearsay evidence. Nothing in Government Code section 11513 would allow a relaxation of the evidentiary rules relating to the exceptions for hearsay for business records or official records. Further, even under the relaxed standards for administrative hearings, proper evidentiary requirements must still be met. For example, in *Ashford v. Culver City unified School Dist.* (2005) 130 Cal.App.4th 344, videotapes were excluded from evidence based on objections that there was no foundation or authentication of the evidence.

27. Respondent's contention that expert witnesses may rely upon hearsay as the basis of their opinions was fully briefed on Complainant's motion in limine and the related briefs (Exhibits 89, 90, 144 and 145) and argued, and ruled upon, on the record. Nothing in the closing brief provides an adequate basis to reconsider those rulings.

The parties and the race

28. The Accusation was brought by Complainant in her official capacity as Executive Director of the California Horse Racing Board (Board).

29. Respondent is licensed by the Board as a trainer, holding license number 211845-3/2007, renewed on or about March 21, 2007, and renumbered 211845-3/2010.

30. On July 8, 2006, Respondent was the trainer of the horse Robs Coin, which was entered in the seventh race of the licensed thoroughbred horse race meeting conducted at the Hollywood Park Race Track. Robs Coins finished in second place in that race.

31. At all times while Respondent was the trainer of Robs Coin, the horse was registered by the Jockey Club, registration number 0104311, with tattoo identification number E04311.

32. A post-race urine sample was taken from Robs Coin and forwarded for testing to the Equine Analytical Chemistry Laboratory at the University of California at Davis (UC-Davis lab), an official Board laboratory.

33. In a letter dated July 25, 2006, the UC-Davis lab notified the Board that Robs Coin had tested positive for the prohibited substances mepivacaine and hydroxymepivacaine in an amount in excess of the permitted level.

34. Mepivacaine is a Class 2 drug as defined by California Code of Regulations, title 4 (Regulations or CCR), section 1843.2. Under CCR section 1844, subdivision (e), the maximum amount of mepivacaine and its metabolites

(hydroxymepivacaine is a metabolite of mepivacaine) permitted in a urine test sample is 10 nanograms per milliliter (ng/ml).

35. Mepivacaine is generally used by veterinarians as a local anesthetic, most often for minor procedures such as suturing a wound or to deaden nerves in an area such as a joint so that the veterinarian can assess suspected lameness or injury to the area. It is almost always used in an injection, and there is no common oral or topical application. Veterinarians and trainers are aware that mepivacaine is one of the drugs for which post-race urine samples are tested.

36. A concern for a horse training or racing with more than the allowed amount of mepivacaine is that the horse will not have the normal response to pain and may therefore run when an injury or lameness might other wise prevent it, increasing the risk of further injury to the horse as well as the other horses and the jockeys in the same race.

37. The UC-Davis lab determined that the urine sample from Robs Coin contained mepivacaine in the amount of 6.9 ng/ml and hydroxymepivacaine in the amount of 23.1 ng/ml. These results are added together to determine the total amount, 30.0 ng/ml of both mepivacaine and its metabolite, to compare to the maximum amount established in the regulation.

38. The Board notified Respondent and Darren Carraway, the owner of Robs Coin at the time of the race, of the test results. As permitted by the Regulations, Respondent requested that the split sample[3] be tested.

39. The split sample was tested at Industrial Laboratories in Colorado, which determined that it contained mepivacaine in the amount of 10.9 ng/ml and hydroxymepivacaine in the amount of 51.3 ng/ml.

40. By letter dated April 8, 2007, the Board notified owner Carraway that, as a result of the positive test results, the purse earned by the horse in the amount of $7,200 was forfeited under CCR section 1859.5.

Evidence in Mitigation and Aggravation

41. Respondent submitted evidence of the veterinary care received by Robs Coin while under his training. There was no evidence that Robs Coin was ever given mepivacaine for any purpose during this time.

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[3] When the urine sample is taken from the horse, a portion is retained as the "split sample" which, as occurred here, can be used for further testing. (See Regulation 1859.25.)

42. The evidence established that there was no need to administer mepivacaine to Robs Coin during this time period. Robs Coin did not suffer the type of injury or require the type of testing or treatment for which mepivacaine would be administered.

43. There was no direct evidence that Respondent or anyone under his control was responsible for administration of mepivacaine to Robs Coin. The only basis upon which Respondent is found responsible for the findings of mepivacaine and its metabolite in the urine sample of Robs Coin is due to the trainer-insurer rule discussed in Conclusions of Law 13 and 16.

44. Respondent did not submit evidence, as he could have under Regulation 1888, that he "made every reasonable effort to protect the horses in his care from tampering by unauthorized persons."

45. There was no evidence that Respondent had any intent to administer mepivacaine to Robs Coin. To the contrary, Respondent indicated that mepiviacaine should not have been administered to Robs Coin because there was no reason for it to be administered and because of the risk of injury.

46. (A) There was no documentary evidence of any prior disciplinary actions against Respondent. However, Respondent testified that he had a violation in Wyoming in 1988 or 1989 when a friend of his father ran a horse under Respondent's name and the horse tested positive for a prohibited substance. The friend paid the fine and Respondent was "restricted to the front side" for one year. Respondent candidly testified that he continued to allow others to race horses under his name after that incident, as he was "young, not so wise and broke." At the time, he considered it as a matter of survival because he needed the money.

(B) Respondent testified to a violation in Louisiana when, unbeknownst to him, his help administered "netadine/taganol" to a horse. Respondent was fined $1,000 and there was no suspension. There was no evidence of when these events occurred.

(C) Respondent also admitted there may have been some minor violations in California, although there was no further evidence of the time, type or outcome. According to Dr. Rick Arthur, the Equine Medical Director of the Board, Respondent has no prior Class 1, 2 or 3 violations in California. These refer to the classifications of drugs that can be administered to race horses in Regulation 1843.2.

Other Defenses

47. A considerable amount of evidence and argument was devoted to Respondent's contention that the urine sample that tested for an amount in excess of

the permitted amount of mepivacaine was either not from Robs Coin or was from a mixture of urine from Robs Coin and another horse.

48. Under Evidence Code section 500, the burden of proof to establish this defense rests upon Respondent.

49. Complainant established the proper chain of custody of the urine sample, from the point it was collected from Robs Coin to the points of testing by the UC-Davis lab, Industrial Laboratories, the UK lab and the VGL.

50. Respondent did not prove that the urine sample was from any horse other than Robs Coin or was a mixture of Robs Coin and another horse. While Respondent submitted sufficient evidence to establish the possibility of these propositions, he did not submit a preponderance of convincing evidence on these points.

51. More specifically, the DNA evidence was provided by two labs: the VGL at UC-Davis and the UK lab. As noted in great detail on the record and in the section on "Motions," above, Respondent was unable to establish a proper basis for the UK lab results to be received in evidence. Respondent lacked sufficient admissible evidence to dispute the identification of Robs Coin as the source of the urine sample. The DNA results from VGL were convincing, although subject to some criticism from Respondent due to perceived insufficiencies in the forensic nature of the reporting and backup data and the differences between equine parentage testing and forensic genetic testing. Particularly convincing was the conclusion that the genetic test results were compared to 1.8 million other DNA test results for horses in the VGL database, including 4 to 500,000 thoroughbred horses, and that the only match was to Robs Coin, whose genetic test results were in the database from 2001 when the horse was registered with the Jockey Club.

52. Similarly, Respondent raised the possibility that the amount of mepivacaine found in the urine sample might be explained by other events, such as environmental contamination, adulteration of other medications with mepivacaine, or the specific gravity of the urine. However, Respondent's evidence on these contentions was not convincing and did not amount to preponderance.

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CONCLUSIONS OF LAW AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judge makes the following conclusions of law:

Applicable Laws and Regulations

1. The "Horse Racing Law" is found in Business and Professions Code, chapter 4, division 8. (See Bus. & Prof. Code, § 19400, et seq.)[4]

2. (A) Under the Horse Racing Law, the Board has broad authority. For example, under Code section 19440, subdivision (a): "The board shall have all powers necessary and proper to enable it to carry out fully and effectually the purposes of this chapter. Responsibilities of the board shall include, but not be limited to, all of the following:

"(1) Adopting rules and regulations for the protection of the public and the control of horse racing and parimutuel wagering.

"(2) Administration and enforcement of all laws, rules, and regulations affecting horse racing and parimutuel wagering.

"(3) Adjudication of controversies arising from the enforcement of those laws and regulations dealing with horse racing and parimutuel wagering . . . ."

(B) Under Code section 19562, "The Board may prescribe rules, regulations, and conditions, consistent with the provisions of this chapter, under which all horse races with wagering on their results shall be conducted in this State."

3. The Board has the authority to suspend or revoke any license it has issued if any law or regulation has been violated, under Code section 19461. Under Code sections 19581 and 19582, the CHRB may suspend a license or impose a monetary penalty, or both, for administering unauthorized substances to a horse.

4. Use of medications for horses is restricted by statute. Code section 19581 states, in pertinent part: "No substance of any kind shall be administered by any means to a horse after it has been entered to race in a horse race, unless the board has, by regulation, specifically authorized the use of the substance and the quantity and composition thereof."

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[4] References to the Business and Professions Code are indicated as "Code" and the section number.

5. Medications and drugs are discussed in Regulation 1843, which states:

"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 veterinarian 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 in excess of the limit 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."

6. Regulation 1843.1, subdivision (b), defines "prohibited drug substance" as "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."

7. Under Regulation 1844, medications authorized by the Board may be administered. Under subdivision (e)(2), the official urine test sample may contain mepivacaine in an amount that does not exceed 10 ng/ml.

8. Regulation 1858 states, in pertinent part, that urine samples shall be taken from all race winners and from other finishers as designated by the Stewards.

9. Regulation 1859 states the methods by which urine samples shall be collected and sent for testing. Under subdivision (b): "If the official laboratory fails to detect in the official test samples, a prohibited drug substance, as defined in this article, the official sample shall be discarded immediately."

10. Regulation 1859.25 states, in pertinent part that, in addition to the official urine test sample, a "split sample" shall be preserved for further testing at the request

of a trainer if the official test sample was found to contain a prohibited substance. Under subdivision (d), the Board sends the split sample to the designated laboratory for testing, with the following possible results:

"(1) If the findings by the independent Board-approved laboratory fail to confirm the findings of the prohibited drug substance as reported by the official laboratory, it shall be presumed that the prohibited drug substance was not present in the official sample.

"(2) If the findings by the independent Board-approved laboratory confirm the findings of the prohibited drug substance as reported by the official laboratory, the Executive Director shall report these findings to the Board within 24 hours after receiving confirmation of the prohibited drug substance in the split sample."

11. A positive test can lead to disqualification under Regulation 1859.5, which states:

"A finding by the stewards that an official test sample from a horse participating in any race contained a prohibited drug substance as defined in this article, which is determined to be in class levels 1-3 under Rule 1843.2 of this division, unless a split sample tested by the owner or trainer under Rule 1859.25 of this division fails to confirm the presence of the prohibited drug substance determined to be in class levels 1-3 shall require disqualification of the horse from the race in which it participated and forfeiture of any purse, award, prize or record for the race, and the horse shall be deemed unplaced in that race. Disqualification shall occur regardless of culpability for the condition of the horse."

12. Regulation 1887, subdivision (a) states the trainer insurer rule.

"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."

13. Regulation 1888 states possible defenses to violations of the trainer insurer rule in Regulation 1887:

"A trainer or other person charged with a violation of Rule 1887 of this division may defend, mitigate or appeal the charge if:

"(a) He was not, before the commencement of any proceeding against him, informed of the charges being brought against him;

"(b) He was not permitted counsel, representation or an advisor of his choosing in any hearing before the stewards concerning the charges;

"(c) He shows, by a preponderance of evidence, that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons; and

"(d) He was not permitted to introduce evidence in his own behalf before any finding or ruling was made against him. Nothing herein shall require that the stewards permit cross-examination of any witness appearing before them, or issue subpoenas for the attendance of witnesses."

14. As relevant to this case, the penalties for use of unauthorized substances are discussed in Code section 19582, subdivision (a), which states, in pertinent part:

"(1) Violations of Section 19581, as determined by the board, are punishable as set forth in regulations adopted by the board.

"(2) The board may classify violations of Section 19581 based upon each class of prohibited drug substances, prior violations within the previous three years, and prior violations within the violator's lifetime.

"(3) (A) The board may provide for the suspension of a license for not more than three years, except as provided in subdivision (b), or a monetary penalty of not more than fifty thousand dollars ($50,000), or both, and disqualification from purses, for a violation of Section 19581.

"(B) The actual amount of the monetary penalty imposed pursuant to this paragraph shall be determined only after due consideration has been given to all the facts, circumstances, acts, and intent of the licensee, and shall not be solely based on the trainer-insurer rule, as established in Sections 1843 and 1887 of Title 4 of the California Code of Regulations.

"(4) The punishment for second and subsequent violations of Section 19581 shall be greater than the punishment for a first violation of Section 19581 with respect to each class of prohibited drug substances, unless the administrative law judge, in findings of fact and conclusions of law filed with the board, concludes that a deviation from this general rule is justified."

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Cause for Discipline

15. Cause exists to suspend or revoke Respondent's license for violation of Business and Professions Code section 19461 and California Code of Regulations, title 4, section 1887, due to the presence of the prohibited substance mepivacaine which was in excess of the permitted levels in Robs Coin, a horse trained by Respondent, during the seventh race at the Hollywood Park Race Track on July 8, 2006. See Factual Findings 28 through 39.

Discussion and Outcome

16. Under California Code of Regulations, title 4, section 1887, subdivision (d), the finding of the drug in excess of permitted limits is prima facie evidence that the drug was administered to the horse.

17. Regulations 1843, 1843.1, 1843.2 and 1844, subdivision (e)(2), operating together, create the presumption that test results of more than 10 ng/ml of mepivacaine establish that the drug has been administered to the horse.[5] The effect of this presumption, under Evidence Code section 604, is that the ALJ and the Board must assume the existence of the presumed fact (that is, that Respondent is responsible for administration of the drug to the horse) "unless and until evidence is introduced which would support a finding of its nonexistence."

18. As noted in Factual Findings 47 through 52 , Respondent's contentions that the presence of mepivacaine might be explained by other sources, such as another horse or environmental contamination, were not supported by sufficient, credible evidence to overcome the presumptions set forth in Conclusions of Law 5, 6, 7, 12, 16 and 17.

19. Complainant argues for an outcome including forfeiture of the purse, a fine of $25,000 and suspension of Respondent's trainer's license for 90 days.

20. The purse is awarded to the owner (see Factual Finding 38) and not retained by Respondent. There was no evidence that Respondent was awarded the purse. Therefore, there is no basis to order Respondent to return the purse. Further, the owner was not named as a party to these proceedings. Therefore, due to the possible lack of due process as to the owner, no order will be issued herein regarding forfeiture of the purse.

21. There was no evidence of administration of mepivacaine to Robs Coin other than by operation of the trainer insurer rule in Regulation 1887. Under the specific provisions of Code section 19582, subdivision (a)(3)(B) (set forth in

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[5] Regulation 1843, subdivision (d), uses the concept of "prima facie evidence" which, under Evidence Code section 602, establishes a rebuttable presumption.

Conclusion of Law 14), the Board cannot issue a fine solely based upon the trainer insurer rule. This more specific statute takes precedence over the more general statutes and regulations authorizing imposition of a fine. Therefore, no fine is imposed.

22. Although the Board is authorized to enact regulations concerning penalties for violation of the statutes and regulations concerning medications, Complainant did not cite to any such regulations. There was no evidence of any prior offenses by Respondent that would qualify this matter for treatment as anything other than a first offense of this type. Under all of the circumstances of this matter, and with due regard for the protection of the health, safety and welfare of licensees, horse racing in general, and the people of the state of California, the appropriate outcome is to suspend Respondent's license as a trainer for ninety (90) days and stay that suspension, on condition that Respondent's license is actually suspended for twenty (20) days and that Respondent suffer no other violations of the Horse Racing Law for a period of one year.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The trainer's license of Respondent Jeff Mullins is suspended for ninety (90) days; provided, however, that the suspension is stayed and Respondent is placed on probation for one year on the following terms and conditions:

1. The license is actually suspended for a period of twenty (20) days, beginning on a date to be established by the Board.

2. Respondent shall obey the Horse Racing Law and all regulations of the Board.

3. Failure to comply with any term of probation is a violation of probation. If Respondent violates probation in any respect, the Board, after giving Respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed.

4. Upon successfully completing all terms of probation, the stay of the remaining period of probation shall become permanent and Respondent's license shall be fully restored.

DATED: December 28, 2007.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings