

BEFORE THE HORSE RACING BOARD

STATE OF CALIFORNIA

In the Matter of the Complaints Against:

MIKE MUDARIS
CHRB License #255448
Respondent

CHRB Case Nos. 16DM088
16DM089

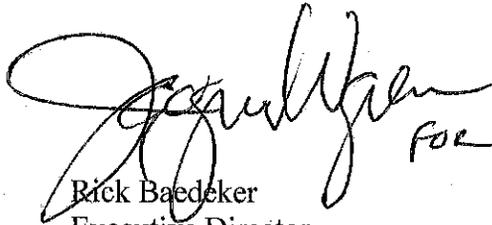
DECISION

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 payment of the seventeen thousand-five hundred (\$17,500.00) fine and setting the eighteen (18) months of suspension.

IT IS SO ORDERED ON October 2, 2017.

CALIFORNIA HORSE RACING BOARD
Chuck Winner, Chairman


for
Rick Baedeker
Executive Director

functions. Both motions were denied. We then heard oral evidence from several witnesses: Test Barn employees Gilbert Ruano and Sergio Chavez, Dr. Joseph Bertone (out of order), Dr. Scott Stanley, Dr. Rick Arthur, CHRB Investigator Jim Hamilton, exercise rider Tomas Urbina Jr., Stable Forman Tomas Urbina, Sr., and Respondent Mike Mudaris. Documentary evidence was also marked for identification and entered into evidence. The hearing was then brought to a close. As agreed upon, Complainant submitted its closing brief on or before June 13, 2017 and Respondent submitted its closing brief on June 27, 2017.

LIST OF EXHIBITS

CHRB Exhibit A: Complaint #16DM088 (Iancol)

CHRB Exhibit A-1: Complaint #16DM089 (ShakeItUpBetty)

CHRB Exhibit B: Report of Investigation (Iancol)

CHRB Exhibit B-1: Report of Investigation (ShakeItUpBetty)

CHRB Exhibit C: CHRB Memorandum dated August 25, 2016 (Iancol)

CHRB Exhibit C-1: CHRB Memorandum dated August 25, 2016 (ShakeItUpBetty)

CHRB Exhibit D: University of California, Davis – Certificate of Analysis (Iancol)

CHRB Exhibit D-1: University of California, Davis – Certificate of Analysis (ShakeItUpBetty)

CHRB Exhibit E: University of California, Davis – Final Report

CHRB Exhibit F: Official Veterinarian's Report

CHRB Exhibit G: Test Sample Shipping Invoice

CHRB Exhibit H: Acknowledgement of Test Sample (Iancol)

CHRB Exhibit H-1: Acknowledgement of Test Sample (ShakeItUpBetty)

CHRB Exhibit I: Official Race Program (Iancol)

CHRB Exhibit I-1: Official Race Program (ShakeItUpBetty)

CHRB Exhibit J: Chart of the Race (Iancol)

CHRB Exhibit J-1: Chart of the Race (ShakeItUpBetty)

CHRB Exhibit K: Photographs of Respondent's Barn on August 27, 2016

CHRB Exhibit L: Trainer's Work List

CHRB Exhibit M: Positive Test Notification Form (Iancol)

CHRB Exhibit M-1: Positive Test Notification Form (ShakeItUpBetty)

CHRB Exhibit N: CHRB Memorandum dated September 1, 2016

CHRB Exhibit O: Owner's Notification of Positive Test (Iancol)

CHRB Exhibit O-1: Owner's Notification of Positive Test (ShakeItUpBetty)

CHRB Exhibit P: Veterinarian Confidential Report (Iancol)

CHRB Exhibit P-1: Veterinarian Confidential Report (ShakeItUpBetty)

CHRB Exhibit Q: Inquiries on Iancol and Respondent

CHRB Exhibit Q-1: Inquiries on "ShakeItUpBetty" and Respondent

CHRB Exhibit R: Disqualification Complaint #16SA197 (Iancol)

CHRB Exhibit R-1: Disqualification Complaint #16SA198 (ShakeItUpBetty)

CHRB Exhibit S: Ruling on Disqualification Complaint #16SA197 (Iancol)

CHRB Exhibit S-1: Ruling on Disqualification Complaint #16SA198 (ShakeItUpBetty)

CHRB Exhibit T-1: Prior Offense for "ShakeItUpBetty" in May 2016

CHRB Exhibit U: Equine Veterinary Journal article

CHRB Exhibit V: Scott Stanley resume

CHRB Exhibit W: Rick Arthur resume

FACTUAL FINDINGS

I

At all times herein mentioned, Mike Mudaris was licensed by the CHRB in the license categories of owner and trainer.

II

On August 12, 2016, the thoroughbred racehorse "Iancol" finished fifth in the third race at Del Mar Race Track.

III

On August 12, 2016, the thoroughbred racehorse "ShakeItUpBetty" finished fifth in the fourth race at Del Mar Race Track.

IV

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

V

After testing the samples, U.C. Davis laboratory reported that the post race blood sample #DM13179, which came from "Iancol" contained sildenafil at a level of 12 nanograms per milliliter and Dexamethasone (2,536 pg/ml) which exceeds the authorized limit of 5.0 pg/ml.

VI

After testing the samples, U.C. Davis laboratory reported that the post race blood and urine sample #DM13181, which came from "ShakeItUpBetty" contained sildenafil at a level of 5.2 nanograms per milliliter and 14 nanograms per milliliter, respectively.

VII

Sildenafil is classified under the California Horse Racing Board rules and regulations as a class 3 substance in the penalty category A.

VIII

Dexamethasone is classified under the California Horse Racing Board rules and regulations as a class 4 substance in the penalty category C.

IX

The two sildenafil positives were caused by intentional administration in an attempt to influence the outcome of the race by barn personnel.

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. Repealer 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 1844(f)(4) Authorized Medication.

Consistent with the intent of these rules, drug substances and medications authorized by the Board for use may be administered to safeguard the health of the horse entered to race provided that:

- (f) Official blood test samples may contain the following drug substances, their metabolites and analogs, in an amount that does not exceed the specified levels in serum or plasma:
 - (4) Dexamethasone; 5 picograms per millileter

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

These three alleged positives (from two race horses) were combined into one hearing and both will be addressed here. Class I, II and III medication positives (a drug substance over the authorized decision level is considered a positive under CHRB Rules and Regulations), if proven, require a disqualification of the horse and redistribution of the purse (CHRB Rule 1859.5 Disqualification Upon Positive Test Finding). In the instant matter, the actual positive tests were not contested, both horses were disqualified and the purses were redistributed. Here we must determine whether the trainer is subject to some penalties for those underlying medication positives.

At the outset, we find it necessary to address two objections leveled by Respondent with respect to this matter. First, Respondent asserts that the Attorney General cannot simultaneously represent the tribunal (CHRB) and also represent the Complainant (CHRB). Counsel for Respondent advanced this argument both at hearing and again in his closing brief. We reject this argument because it is factually incorrect. The tribunal in this matter, this Board of Stewards is not the CHRB, nor are we represented by the Attorney General. In fact, Stewards in the State of California, contract with the CHRB in order to maintain an independence therefrom. Further, the Attorney General does not represent this Board of Stewards. The second objection that the Respondent asserted was that sildenafil is either not prohibited in California or if it is, was done so through an underground regulation, and therefore is not enforceable. This argument seemed to have several permutations, none of which we found persuasive. Sildenafil is specifically listed in the CHRB's drug classification system as a class 3 prohibited substance. Respondent attempted to further this argument through his expert by asserting that there was no evidence that sildenafil was performance enhancing in horses. This argument is incorrect on several levels. All three experts (Drs. Stanley, Arthur and Bertone) who testified agreed that there is only one study that has sought to determine whether administering Viagra to horses would influence performance. Apparently, a theory exists that since sildenafil is a vasodilator, it may help in preventing exercised induced pulmonary hemorrhaging (EIPH). The one study into this theory

(Colahan et al, University of Florida) failed to confirm that sildenafil had any effect on EIPH (although did speculate that increased heart rate due to the medication could have a performance enhancing effect). Respondent's expert, Dr. Joseph Bertone then asserted that it was improper to prohibit the use of sildenafil since it has no proven performance enhancing effects. Frankly, this is a nonsensical conclusion and has no basis in reality. First, even the study Dr. Bertone cited speculates that the drug could have performance enhancing properties even though none were demonstrated in the study. Second, the CHRB does not have to provide a reason for prohibiting a foreign substance in post race samples. And third, performance enhancement is not the only reason to prohibit a medication; medications could be prohibited because they are detrimental to performance, because they are not approved for equine use or they are detrimental to equine health. Therefore, we find that sildenafil has been properly prohibited by the CHRB, and overrule Respondent's objections.

The analysis must therefore turn to whether the trainer of the two horses should be penalized under the rules for the three medication positives. 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 that prima facie evidence of a positive. For many years, that rule, coupled with CHRB rule 1887 (Trainer to 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. 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.

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 the 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 regarding sildenafil here. (Note: there was scant evidence presented with respect to the dexamethasone. Therefore, regarding the Dexamethasone overage, we consider the factors to be neutral).

1. "The past record of the licensee regarding violations of Business and Professions Code section 19581." This factor is neutral because although Respondent has one violation of B & P Code 19851 (dexamethasone as well), it cannot be considered aggravating in light of the length of time he has been a trainer.
2. "The potential of the drug(s) to influence a horse's racing performance." While this was the topic of a significant amount of testimony at hearing, there is no evidence that sildenafil is performance enhancing. However, there is evidence that it has the

- potential* to be performance enhancing. Therefore this factor is slightly aggravating.
3. "The legal availability of the drug." Sildenafil, trade name Viagra, is legally available for humans with a prescription. Therefore, this factor is neutral.
 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 neutral because Mr. Mudaris, as the responsible party, did not know of the administration, but is not mitigating because his employees intentionally administered the drug.
 5. "The steps taken by the trainer to safeguard the horse." This factor is aggravating because evidence showed that Respondent: (a) made a mistake with respect to dexamethasone by his own admission; (b) was only at his barn in Del Mar 3-4 times a week and (3) left much of the responsibility for the care of his horses to his employees.
 6. "The steps taken by the owner to safeguard against subsequent medication violations..." This factor is the same as factor 5 because Mr. Mudaris also owns the horses. Aggravating.
 7. "The probability of environmental contamination or inadvertent exposure due to human drug use or other factors." This factor does not apply.
 8. "The purse of the race." This factor is neutral because the purse was not particularly high or low.
 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." This factor is aggravating because no evidence exists that either horse was receiving treatment under rule 1842 for sildenafil.
 10. "Whether there was any suspicious wagering pattern on the race." There was no evidence of wagering irregularities and therefore this is a mitigating factor.
 11. "Whether the licensed trainer was acting under the advice of a licensed veterinarian." Respondent was not acting under the advice of a veterinarian regarding sildenafil and therefore this factor is neutral.

Rule 1843.3 explains that the preceding factors can be mitigating or aggravating but that the list is not exhaustive. We find two other factors important to the analysis. First, the CHRB advocated treating the two sildenafil positives as first and second offenses because they occurred in two different horses, albeit on the same day. The CHRB has treated similar violations as only one violation because of their close proximity in time and the fact that the licensee was not afforded the opportunity to remedy the problem. We believe that the Sildenafil should be treated as two first offenses.

The second factor we believe to be important is the fact that evidence showed that Mr. Mudaris did not administer the Sildenafil but it was rather administered by his employees. While he is responsible for the employees he hires, and this does not rise to

the level of third party sabotage, Respondent is nevertheless somewhat a victim of behavior over which he did not have complete control. This factor would greatly mitigate any penalty. On balance, we find that the mitigating circumstances outweigh the aggravating ones and therefore require a departure from the minimum penalties described under the guidelines.

CONCLUSION/PROPOSED DECISION

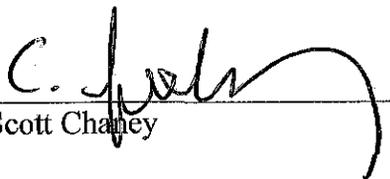
Given the foregoing, for the sildenafil positives, we recommend an eighteen (18) month suspension of all CHRB licenses and a fifteen thousand dollar (\$15,000.00) fine. For the dexamethasone, we recommend a twenty five hundred dollar (\$2,500).

DATED: September 4, 2017.

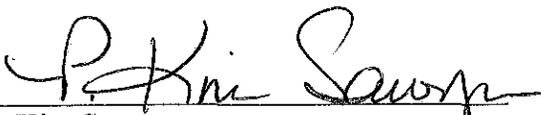
BOARD OF STEWARDS



Grant Baker



C. Scott Chaney



P. Kim Sawyer

2017 AUG 36 AM 7:39

