

Agenda Item #1



FILED:

September 27, 2023

**STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**

FINAL AGENCY AUTHORITY: Indiana Horse Racing Commission

**PETITIONER: CYNTHIA LOOMIS, DVM
RESPONDENT: INDIANA HORSE RACING COMMISSION STAFF
OALP CAUSE NUMBER: HRC-2302-000252
UNDERLYING ACTION OR ORDER NUMBER: Appeal of Administrative Complaint No. 223001**

**MODIFIED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND NONFINAL ORDER**

This matter came before Administrative Law Judge Michael Buker for hearing on the appeal of Administrative Complaint No. 223001 (the “Administrative Complaint”) issued by the Indiana Horse Racing Commission Staff (“Commission Staff”) against Petitioner, Dr. Cynthia Loomis, DVM. On July 21, 2023, a hearing was conducted on this matter (the “Hearing”). Commission Staff was represented by its co-counsel Matthew M. Eggiman and Mr. Dale Lee Pennycuff. Respondent was represented by her counsel, Mr. Darren A. Craig and Ms. Carolyn S. Trachtman of Frost Brown Todd LLC.

Petitioner is a veterinarian who at all times relevant was licensed by the IHRC to practice at its race tracks in Indiana. On January 17, 2023, Respondent filed the Administrative Complaint against Petitioner under 71 IAC 10-3-20 alleging a number of violations of the IHRC rules governing horse racing activities in Indiana. Petitioner timely requested a hearing under 71 IAC 10-3-20(d). On February 6, 2023, the matter was assigned to the undersigned Administrative Law Judge. The Administrative Complaint includes alleged violations by Petitioner of Indiana Horse

Nonfinal Order (Loomis4)

Racing Commission (“IHRC”) rules set forth generally as Paragraphs 21, 22, 25, 29 and 30 thereof.

In general, the Administrative Complaint alleges the following:

- Paragraph 21 – On July 4, 2022, Petitioner injected substances using hypodermic needles to the horses *Overthetopjustice* and *Justa Doll* in violation of 71 IAC 8.5-1-1.5(a) and 71 IAC 8.5-1-1.5(b)(1);
- Paragraph 22 – Petitioner injected the substance adrenocorticotrophic hormone (“ACTH”) using a hypodermic needle to the horse *Justa Doll* in violation of 71 IAC 4-31-12-2 and 71 IAC 8.5-1-2(a);
- Paragraph 25 – Petitioner failed to report to the IHRC veterinarian within 24 hours two intra-articular injections administered to the horse *Everwonder* in violation of 71 IAC 8.5-1-4.5(b)(3);
- Paragraph 29 – Petitioner administered the prohibited substance Baycox to horses stabled on the grounds at Horseshoe Indianapolis in violation of 71 IAC 8.5-5-2(c).

In addition to the foregoing, Respondent alleges Petitioner violated or attempted to violate IHRC rules and engaged in conduct that is against the best interest of horse racing or which compromises the integrity of operations at an IHRC facility in violation of 71 IAC 5-1-14.¹

On May 5, 2023, following discovery, Respondent timely filed a motion for summary judgment in its favor with respect to each of the allegations set forth in the Administrative Complaint (“Motion for Summary Judgment”). Petitioner timely filed her response thereto on June 2, 2023 (“Petitioner’s Response”). On June 12, 2023, pursuant to the Nonfinal Order Regarding Partial Grant of Summary Judgment (the “Summary Judgment Order”), Respondent’s

¹ Administrative Complaint, Paragraph 30

Motion for Summary Judgment was granted with respect to Paragraph 29 of the Administrative Complaint, and evidence was not heard at the Hearing with respect thereto.

On July 21, 2023, a Hearing was conducted with respect to the merits of Petitioner's appeal under I.C. § 4-21.5-3 and 71 IAC 10-3, *et seq.*, pursuant to which Respondent had the burden of proof to establish the penalties set forth in the Administrative Complaint should be sustained. At the Hearing, the parties were ordered to file additional evidence with respect to the sanctions imposed under the Administrative Complaint (the "Supplemental Evidence") and, although not required, each party filed its Proposed Findings of Fact, Conclusions of Law and Recommended Order.

In rendering findings and conclusions, I am required to weigh the credibility of witnesses about the matters to which they testified including each witness's interest, if any, in the outcome of the matter. Having considered the administrative record, the arguments of the parties, having conducted the Hearing, and being in all respects duly advised, the undersigned Administrative Law Judge now issues this Proposed Findings of Fact, Conclusions of Law, and Nonfinal Order. To the extent that any of the Findings of Fact are more appropriately considered Conclusions of Law, or conversely, they shall be so treated.

JOINT STIPULATIONS; EXHIBITS ADMITTED DURING THE HEARING

1. Joint Stipulations Nos. 1-12 and Exhibits 13(A)-13(EE) as filed on May 31, 2023 were admitted and incorporated herein by reference to this Nonfinal Order.
2. Three audio recordings of interviews conducted by Mr. Davis of Ms. Johnson (as each party is identified below) as follows.

- a. Audio recording conducted while Ms. Johnson was leading *Justa Doll*² from its stall to the IHRC test barn on July 4, 2022 (“Audio Recording 1”)
- b. Audio recording conducted while Ms. Johnson was leading *Overthetopjustice* from its stall to the IHRC test barn on July 4, 2022 (“Audio Recording 2”), and
- c. Audio recording conducted during an interview of Ms. Johnson at Mr. Davis’s office at Horseshoe Indianapolis on July 5, 2022 (“Audio Recording 3”).

As discussed below, Audio Recordings 1, 2 and 3 were admitted over Petitioner’s objections and played at the Hearing (collectively, the “Unsworn Statements”). [Tr. p. 73-79]. Each recording was subsequently transcribed by the court reporter and is referenced herein as Audio Tr. (i.e., Transcript) 1, Audio Tr. 2 and Audio Tr. 3.

WITNESSES WHO TESTIFIED AT THE HEARING

Respondent’s Witnesses:

1. Ms. Christy Johnson – assistant trainer of each of the horses identified herein.
2. Mr. Michael Morris – IHRC Director of Security and Investigations
3. Mr. John McAllister – IHRC Investigator
4. Mr. Harold Davis, Jr. – IRHC Investigator
5. Dr. Kerry Peterson, DVM – IHRC Equine Medical Director
6. Mr. Eric Smith – IHRC Senior State Steward

² It is not entirely clear from the transcripts which horse (i.e., *Overthetopjustice* or *Justa Doll*) was being led to the test barn in Audio Recording 1 and which horse was being led in Audio Recording 2, but it is undisputed (and not relevant to the matters at hand) the interviews occurred while those two horses were being led to the test barn.

Petitioner's Witness:

1. Dr. Cynthia Loomis, DVM (Petitioner)

RELEVANT STATUTORY AND REGULATORY AUTHORITY

Indiana Code § 4-31-12-2 *Foreign Substances; Medications*

Sec. 2. (a) Except as permitted by the rules of the commission, a horse participating in a race may not carry in its body any foreign substance.

(b) – (c)

71 IAC 8.5-1-1.5 *Medication*

Sec. 1.5. (a) No horse participating in a race or entered in a race shall carry in its body any foreign substance as defined in 71 IAC 1.5 or IC 4-31-2, except as provided for in this rule.

(b) No substance, foreign or otherwise, shall be administered to a horse entered to race by:

(1) injection;

(2) – (7) ...

within twenty-four (24) hours prior to the scheduled post time for the first race except furosemide as provided for in this rule. The prohibitions in this section include, but are not limited to, injection or jugging of vitamins, electrolyte solutions, and amino acid solutions. The prohibition also includes, but is not limited to, the topical, oral, or nasal administration of compounds, such as Traileze, Vapol, Vicks vapor-rub, wind-aid, exhale ease, or containing methylsalicylate, camphor, potassium iodide, or products containing “caine” derivatives or dimethylsulfoxide (DMSO).

(c) – (e)

71 IAC 8.5-1-2 *Foreign substances prohibited*

Sec. 2. (a) No horse participating in a race shall carry in its body any foreign substance except as provided by these rules. A finding by the chemist or commission designee that a foreign substance is present in the test sample shall be prima facie evidence that such foreign substance was administered and carried in the body of the horse while participating in a race. Such a finding shall also be taken as prima facie evidence that the trainer and his

or her agents responsible for the care or custody of the horse have been negligent in the handling or care of the horse.

71 IAC 8.5-1-4.5 *Corticosteroids, stacking violations, and intra-articular injection*

(a) ...

(b) The use of corticosteroid intra-articular injections shall be governed by the following conditions:

(1) – (2) ...

(3) A veterinarian who treats a horse by intra-articular injection shall report such treatment to the regulatory veterinarian within twenty-four (24) hours of the time of treatment. The treatment report shall be submitted on a form provided by the commission and the information to be reported shall include the following:

(A) The name of the horse treated and the name of the trainer responsible for the horse.

(B) The diagnosis indicating the need for the treatment.

(C) The medication or substance administered, the dosage administered, and the location or locations of the injection or injections.

(D) The date, time, and place of treatment.

(4) The trainer of the treated horse shall be responsible for ensuring that these reporting requirements have been met.

PETITIONER’S MOTION TO EXCLUDE

On May 5, 2023, Petitioner timely filed her Motion to Exclude Unsworn Statements Made During Investigation (“Motion to Exclude”)³ to exclude the certain recordings of interviews conducted by Mr. Davis of Ms. Johnson. Petitioner asserted the statements on the recordings were (1) excludable hearsay, (2) unreliable because the interrogations were conducted in a threatening and coercive manner, and (3) unnecessary and cumulative because Ms. Johnson was scheduled to testify at the evidentiary Hearing. At the Hearing, Petitioner objected to the admission of Audio Recordings 1, 2 and 3 (as defined hereunder) on substantially the same basis as her Motion to

³ Respondent timely filed its response thereto on May 18, 2023.

Exclude. As discussed below, the Audio Recordings were admitted at the Hearing pursuant to I.C. § 4-21.5-3-26(a) which generally permits admission of hearsay evidence. Relevant portions of the audio recordings and sworn testimony of Ms. Johnson is set forth chronologically below:

1. Audio Recording 1 on July 4, 2022:
 - a. When asked what had occurred in a stall, Ms. Johnson responded “[Petitioner] just gave her ACTH” and identified the horse as *Justa Doll*. [Audio Tr. 1, pp. 3, 5]
 - b. Ms. Johnson acknowledged and understood that because of the injection administered by Petitioner, the horse would not be permitted to run under the race day administration rules. [Audio Tr. 1, p. 3]
2. Audio Recording 2 on July 4, 2022 – Ms. Johnson stated Petitioner provided ACTH to a horse. [Audio Tr. 2, p. 9]
3. Audio Recording 3 on July 5, 2022 – Ms. Johnson stated Petitioner injected *Justa Doll* in Barn 10 between 5:30 and 6:00 a.m. on a morning the horse was scheduled to race at 12:00 noon. [Audio Tr. 3, pp. 3-6]
4. Ms. Johnson has testified under oath on three occasions with respect to this matter:⁴
 - a. At a stay hearing conducted on July 28, 2022 (the “Stay Hearing”), she testified the horse she led to Petitioner for treatment was *Justa Doll*, and that she believed that Petitioner likely treated *Justa Doll* with an injection of ACTH.

⁴ The underlying facts with respect to both the Stay Hearing and the Stewards Hearing were substantially identical to the facts set forth in this Nonfinal Order. Petitioner was represented by counsel and witnesses were called and cross examined at both hearings.

- b. At a Stewards Hearing conducted on December 28, 2022 (the “Stewards Hearing”), she testified Petitioner may have treated a horse with ACTH, but that she was not certain [December 28, 2022 Hearing Tr. at 0:54:35 – 0:55:23]; and
 - c. At the Hearing conducted on July 21, 2023, when asked about her testimony at the Stay Hearing, she testified she could not “remember for sure” to what she had testified, she “was probably confused on horses or something” and did not “remember exactly what [she] said”. [Tr. p. 31]
- 5. Petitioner is correct that the hearsay statements on the Audio Recordings may be excluded under I.C. § 4-21.5-3-26(a). However, exclusion is at the discretion of the administrative law judge and, as set forth below, I find the statements were properly admitted at the Hearing and may be considered during my deliberations in this matter.
- 6. Ms. Johnson’s testimony under oath has not been consistent in this matter. Specifically, her testimony at the Stewards Hearing and at the Hearing has been ambiguous with respect to the identification of, and the treatment, if any, provided to, the horse led by Ms. Johnson to Petitioner to which she testified at the Stay Hearing. The Unsworn Statements are helpful in resolving the ambiguities because they reflect Ms. Johnson’s most contemporaneous impressions and statements of the events at issue in this matter. Her July 4, 2022 statements, made within approximately one hour after the alleged violations occurred afforded her with especially little time for reflection or recharacterization of the events.
- 7. Petitioner contends the interviews of Ms. Johnson were conducted by Mr. Davis in a threatening and coercive manner. Having heard the Audio Recordings and after reviewing the transcripts, I do not agree. Specifically, Ms. Johnson responded to Mr. Davis’s

questions in a cooperative, friendly and talkative manner throughout the interviews. She joked, and seemed comfortable and relaxed in discussing matters with Mr. Davis. [See e.g., Audio Tr. 1, pp. 4, 9-10; Audio Tr. 2, pp. 7-10; Audio Tr. 3, pp. 22-3].

8. Finally, the interviews are not unnecessarily cumulative as contended by Petitioner because, as set forth above, Ms. Johnson's statements and her sworn testimony differ in material respects.
9. Based on the foregoing, I find as follows: (a) the Unsworn Statements reflect Ms. Johnson's impressions and statements of the relevant events at issue in this matter without significant time for reflection and thus, are relevant and reliable with respect to clarifying her inconsistent sworn testimony, (b) the Unsworn Statements were not elicited during interviews conducted in a threatening or coercive manner, and (3) the Unsworn Statements are not cumulative. Accordingly, Petitioner's Motion to Strike is hereby DENIED.
10. The extent to which the Unsworn Statements may form a basis for this Nonfinal Order is discussed below.

FINDINGS OF FACT

- A. **Substantial and reliable evidence exists to support a conclusion that Petitioner injected Lasix and ACTH to horses within 24 hours prior to the scheduled post time for a race in which those horses were scheduled to run in violation of 71 IAC 8.5-1-1.5(a) and 71 IAC 8.5-1-1.5(b)(1).**

1. Petitioner admitted she injected furosemide (i.e., Lasix)⁵ into a horse and Lasix and adrenocorticosteroid hormone (“ACTH”) into another horse on July 2, 2022. [Joint Stipulations, Paragraphs 5, 6 and 7; Tr. pp. 133-5]
2. Petitioner contends the two horses injected by her were *Majestic Climb* and *Lilmissassypants*, neither of which was scheduled to race on July 2, 2022. Respondent contends the two horses injected by Petitioner were *Overthetopjustice* and *Justa Doll*, each of which was scheduled to race on July 2, 2022.
3. Petitioner did not use a microchip reader or lip tattoos to positively identify either horse she treated.
 - a. In Barn 10, Petitioner identified the first horse (i.e., *Majestic Climb* or *Overthetopjustice*) by sight based on the horse’s color and markings.
 - b. In Barn 11, Ms. Johnson led the second horse (i.e., *Lilmissassypants* or *Justa Doll*) to Petitioner for treatment.
4. All of the horses in question (i.e., *Majestic Climb*, *Lilmissassypants*, *Overthetopjustice* and *Justa Doll*) were trained by Mr. Marvin Johnson on July 4, 2022. Ms. Johnson, his wife, was an assistant trainer working under Mr. Johnson on July 4, 2022.
5. At the time Petitioner treated the horses, “In-Today” signs (i.e., signage on a horse’s stall to indicate it was scheduled to race on that day) had not been posted.
6. On the morning of July 4, 2022, Petitioner was distraught because her dog was severely ill.

⁵ Lasix is permitted to be injected within 24 hours of race day but only in accordance with specific requirements set forth in 71 IAC 8.5-1-3 and 71 IAC 8.5-1-5. Petitioner does not contend the relevant injections of Lasix in this matter were injected in accordance with those provisions.

7. The injections occurred in Barns 10 and 11 at Horseshoe Indianapolis in Shelbyville, Indiana prior to 7:00 a.m. Horseshoe Indianapolis is a property under the jurisdiction of the IHRC. [Joint Stipulations, Paragraph 8]
8. Petitioner was surveilled by IHRC investigators at Barn 10 and Barn 11 on the morning of July 2, 2022.
9. From their vantage points, the IHRC investigators could not directly observe the horses being treated. Specifically, neither Mr. Morris, Mr. McAllister nor Mr. Davis directly observed Petitioner administering medications to any horse. [Tr. pp. 38; 46-7; 60; 83]
10. Mr. Morris identified the two stalls that he observed Petitioner enter and directed investigators Davis and McAllister to go to Barns 10 and 11 to identify the horses, identify anyone else in the barns and bring the horses to the test barn. [Tr. p. 44]
 - a. In Barn 11, Mr. McAllister spoke to a groom, Mr. Chris Riggan, who stated Petitioner had entered the stall of *Overthetopjustice* and the horse was an in-today horse.⁶ Tr. pp. 56-7]
 - b. In Barn 10, Mr. Davis spoke to Ms. Johnson who stated Petitioner had treated *Justa Doll* with ACTH. [Tr. p. 72]⁷
11. Petitioner departed from the barns shortly after she treated the horses on July 4, 2022. [Tr. pp. 44, 70].

⁶ The hearsay testimony by Mr. McAllister with respect to his conversation with Mr. Riggan was not objected to by Petitioner.

⁷ Mr. Davis's testimony in regards to Mr. Riggan's statements was admitted over objection by Petitioner as hearsay. As reflected elsewhere in this Nonfinal Order, hearsay evidence is admissible under I.C. § 4-21.5-3-26(a) but may not be used as the sole basis for an Order.

12. Shortly after Dr. Loomis left the racetrack, Ms. Johnson was directed to bring *Overthetopjustice* and *Justa Doll* to the test barn at Horseshoe Indianapolis for out-of-competition testing.
13. Mr. Davis recorded two interviews of Ms. Johnson as she led *Justa Doll* and *Overthetopjustice* to the test barn (i.e., Audio Recordings 1 and 2). On July 5, 2022, Mr. Davis recorded an interview of Ms. Johnson in his office at Shelbyville (i.e., Audio Recording 3). [Tr. p. 74-8]
14. Ms. Johnson was not aware any of the three interviews were being recorded. [Tr. pp. 77-79]
15. Petitioner's day sheets (i.e., her treatment records) for July 4, 2022 reflect Petitioner injected *Majestic Climb* with Lasix and *Lilmissassypants* with Lasix and ACTH.
16. Based on the foregoing, including the discussion above regarding Ms. Johnson's Unsworn Statements in the previous section of this Nonfinal Order, I find as follows:
 - a. Petitioner administered an injection of Lasix to the horse *Overthetopjustice* in violation IHRC rules, and
 - b. Petitioner administered (i) an injection of Lasix and (ii) an injection of ACTH to the horse *Justa Doll* in violation IHRC rules.

B. Substantial and reliable evidence exists to support a conclusion that Petitioner failed to report the administration of two intra-articular injections to the track veterinarian within 24 hours of the treatment in violation of 71 IAC 8.5-1-4.5(b)(3).

1. On May 20, 2022, Petitioner administered two intra-articular injections to the horse *Everwonder*, neither of which were reported to the regulatory veterinarian within 24 hours of each treatment. [Joint Stipulations, Paragraph 11]

2. When an intra-articular joint is injected, the horse will not be permitted to race for at least fourteen days. [Tr. p. 130]
3. *Everwonder* did not race within the fourteen days after it received the intra-articular injections. [Tr. p. 131]
4. No harm resulted to *Everwonder* from Petitioner's failure to report the injections. [Tr. p. 130]
5. Petitioner was issued forms for reporting intra-articular injections in the packet of information she received at the beginning of the 2021 racing season but not the 2022 season. [Tr. p. 129]
6. Intra-articular joint injection reporting forms are available at the racing office at the racetrack. [Tr. p. 102]
7. Petitioner had reported intra-articular injections many times in the past and is aware of the requirement in the IHRC rules. [Tr. p. 102]
8. The IHRC track veterinarian accepts reports sent by text messages and emails and telephone calls. [Tr. p. 102]
9. Petitioner was aware she could have requested the reporting forms from the IHRC track veterinarian office and knew how to contact him. [Tr. p. 142]
10. Based on the foregoing, I find the following:
 - a. Petitioner was aware of the requirement to report intra-articular joint injections;
 - b. Although Petitioner was not issued reporting forms from the IHRC, she could have readily obtained them at the IHRC office or reported the injections by some other manner (e.g., by telephone, text message or email message) but did not do so;

- c. Petitioner violated 71 IAC 8.5-1-4.5(b)(3) by failing to report the two intra-articular joint injections to the horse *Everwonder* on May 20, 2022 within 24 hours of administration.

UNSWORN STATEMENTS AS BASIS FOR NONFINAL ORDER

Under I.C. § 4-21.5-3-26(a):

“[an] administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence.”

At the Hearing, Petitioner argued that because IHRC investigators did not have personal knowledge with respect to which horses were treated, the identification of the horses as in-today horses would be based solely on the hearsay testimony of Ms. Johnson in her Unsworn Statements and, under I.C. § 4-21.5-3-26(a), an Order cannot be based solely on such evidence. For the following reasons, I disagree: (1) this Nonfinal Order is supported by the testimony of Mr. McAllister who testified Mr. Riggan identified the Barn 10 horse as *Overthetopjustice*; (2) as found above, Petitioner violated the same day administration rules when she injected *Overthetopjustice* which suggests a willingness and ability to commit a second violation with respect to *Justa Doll*; (3) this Nonfinal Order is supported by the testimony of Mr. Davis that Ms. Johnson stated Petitioner injected *Justa Doll* with ACTH, and (4) the Unsworn Statements constitute Statements Against Interest under Indiana Rules of Evidence 804(b)(3) which provides:

“[a] statement [that] a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary

to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability.”⁸

Under Indiana Rules of Evidence 804, a Statement Against Interest cannot generally be admitted unless the declarant is unavailable as a witness, which includes when a witness “testifies to not remembering the subject matter”.⁹ As set forth above, Ms. Johnson testified at the Hearing she “did not recall” or may have been confused about the events, and she testified she was uncertain at the Stewards hearing with respect to her prior testimony.¹⁰ Based on Ms. Johnson’s ambiguous testimony at the Stay Hearing and the Stewards Hearing, I find Ms. Johnson was not available as a witness under Indiana Rules of Evidence 804(a)(3).

Moreover, as set forth above in her Unsworn Statements, Ms. Johnson acknowledged an understanding that injections were not permitted under the same day administration rules. Presumably, Ms. Johnson would not have made such a statement unless she believed it to be true because the statement would expose Ms. Johnson to civil liability – for which, in fact, she and her husband currently are being prosecuted. Accordingly, I find the Unsworn Statements to be Statements Against Interest under Indiana Rules of Evidence 804(b)(3).

As discussed above, Ms. Johnson is unavailable as a witness under Ind. Rules of Evidence 804(a). Statements Against Interest constitute an exception to hearsay under Ind. Rules of

⁸ In its response to Petitioner’s Motion to Exclude, Respondent argued the Unsworn Statements were not hearsay under the Excited Utterance exception in Indiana Rules of Evidence Rule 803(2). Because I find the Unsworn Statements to be excepted from hearsay under Indiana Rules of Evidence Rule 804(b)(3), Respondent’s argument is not addressed in this Nonfinal Order.

⁹ Specifically, “[a] declarant is considered to be unavailable as a witness if the declarant... (3) testifies to not remembering the subject matter...” Ind. Rules of Evidence 804(a).

¹⁰ In her Proposed Findings of Fact, Conclusions of Law and Nonfinal Order, Petitioner acknowledged “[t]he testimony given on multiple occasions by Christy Johnson was inconsistent and vague such that Christy Johnson is neither reliable nor credible as a witness.”

Evidence 804(b). Accordingly, because the Unsworn Statements are not excluded by the hearsay rule as Statements Against Interest, a nonfinal Order may be based solely on the Unsworn Statements.

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over this matter pursuant to his appointment by the Indiana Office of Administrative Proceedings and the provisions of I.C. § 4-21.5, *et seq.* and 71 IAC 10-3-7.
2. The IHRC has promulgated rules, consistent with its legislative directive, that provide for the assessment of sanctions, including license suspension, revocation and/or fines to those who violate its rules.
3. At all times relevant, Petitioner was duly licensed by the IHRC as a veterinarian and subject to all rules and statutes that regulate pari-mutuel horse racing in Indiana.
4. The Administrative Complaint was issued in accordance with Indiana statutes and IHRC rules and were supported by substantial, reliable and credible evidence presented to the undersigned administrative law judge.
5. The Unsworn Statements were properly admitted at the Hearing.
6. Ms. Johnson was not available as a witness under Ind. Rules of Evidence 804(a)(3).
7. The Unsworn Statements constitute Statements Against Interest under Ind. Rules of Evidence 804(b)(3).
8. This Nonfinal Order may be based solely on the Unsworn Statements.

9. Commission Staff had the burden of persuasion and the burden of going forward with proof on the Amended Complaint by a preponderance of the evidence pursuant to I.C. § 4-21.5-3-14.
10. By a preponderance of the evidence, Commission Staff met its burden of proof with respect to each of the following:
 - a. Petitioner violated 71 IAC 8.5-1-1.5(a) and 71 IAC 8.5-1-1.5(b)(1) on three occasions when she administered Lasix to *Overthetopjustice* Lasix and ACTH to *Justa Doll* on July 2, 2022;
 - b. Petitioner violated 71 IAC 8.5-1-4.5(b)(3) when she failed to report administration of two intra-articular joint injections to the horse *Everwonder* to the track veterinarian within 24 hours after administration.
11. As set forth in the Summary Judgment Order, Petitioner violated 71 IAC 8.5-5-2(c) on multiple occasions when she administered the prohibited substance Baycox to horses in May and June, 2022 at Horseshoe Indianapolis; and
12. The foregoing violations of the IHRC rules were contrary to the best interests of horse racing in Indiana.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff met its burden of proof by a preponderance of the evidence that Petitioner violated 71 IAC 8.5-1-1.5(a) and 71 IAC 8.5-1-1.5(b)(1) when (a) she injected Lasix and ACTH into the horses *Overthetopjustice* and *Justa Doll* on July 4, 2022, a date on which each horse was scheduled to race.

2. Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff met its burden of proof by a preponderance of the evidence that Petitioner violated 71 IAC 8.5-1-4.5(b)(3) when she failed to report to the regulatory veterinarian within 24 hours two intra-articular joint injections she administered to the horse *Everwonder* on the grounds of Horseshoe Indianapolis.
3. As set forth in the Summary Judgment Order, Summary Judgment was granted in favor of Respondent and against Petitioner with respect to Paragraph 29 of the Administrative Complaint, and Petitioner.

NONFINAL ORDER

1. As set forth above, Commission Staff may recommend penalties and an administrative law judge may accept, reject or modify the recommended penalty. 71 IAC 10-3-12(f).
2. The six year suspension and fine of Ten Thousand Dollars (\$10,000) recommended in the Administrative Complaint against Petitioner are each reasonable in light of the substantial, credible and reliable evidence presented during the Hearing and in the Supplemental Evidence.
3. Having considered all of the facts and evidence presented by the parties, including facts in mitigation, I recommend a Final Order be entered by the Indiana Horse Racing Commission in favor of the Indiana Horse Racing Commission Staff and against Petitioner affirming the Administrative Complaint in all material respects, and sanctions be adopted recommending that Petitioner:
 - (a) Be suspended for a period of six years, and

(b) Be fined in the amount of Ten Thousand Dollars (\$10,000)

In accordance with I.C. § 4-15-10.5-12(b), the undersigned administrative law judge's order disposing of this matter is not final. Specifically, this Nonfinal Order is subject to review by the Indiana Horse Racing Commission. Pursuant to I.C. § 4-21.5-3-29(d), Petitioner has fifteen (15) calendar days following receipt of this Nonfinal Order to file written exceptions with the Indiana Horse Racing Commission.

ORDERED: September 27, 2023

/S/ Michael Buker

Hon. Michael Buker
Administrative Law Judge
Office of Administrative Law Proceedings

Distributed to Parties:

Petitioner, Dr. Cynthia Loomis – served by Co-Counsel by OALP EService email: Darren A. Craig, Frost Brown Todd LLC at dcraig@fbtlaw.com, and Cameron S. Trachtman, Frost Brown Todd LLC at ctrachtman@fbtlaw.com.

Respondent, Indiana Horse Racing Commission Staff (Agency) – served by Co-Counsel by OALP EService email: Matthew M. Eggiman at MEggiman1@hrc.in.gov, Dale L. Pennycuff at DPennycuff@hrc.in.gov, and David Rothenberg at drothenberg@hrc.in.gov.



FILED:

June 12, 2023

**STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**

FINAL AGENCY AUTHORITY: Indiana Horse Racing Commission

PETITIONER: CYNTHIA LOOMIS

RESPONDENT: INDIANA HORSE RACING COMMISSION STAFF

OALP CAUSE NUMBER: HRC-2302-000252

UNDERLYING ACTION OR ORDER NUMBER: Appeal of Administrative Complaint No. 223001

NONFINAL ORDER REGARDING PARTIAL GRANT OF SUMMARY JUDGMENT

As set forth below and pursuant to Ind. Code § 4-21.5-3-23, Respondent's Motion for Summary Judgment is GRANTED with respect to Paragraph 29 of the Administrative Complaint. Respondent's Motion for Summary Judgment is DENIED with respect to all remaining charges set forth in the Administrative Complaint (i.e., all charges other than Paragraph 29 thereof) which are set for Hearing on June 27, 2023.

In accordance with I.C. § 4-15-10.5-12(b), the foregoing grant of summary judgment with respect to Paragraph 29 of the Administrative Complaint is not final. Specifically, this Nonfinal Order (with respect to Paragraph 29) is subject to review by the Indiana Horse Racing Commission. Pursuant to I.C. § 4-21.5-3-29(d), Petitioner has fifteen (15) calendar days following receipt of this Nonfinal Order to file written objections with the Indiana Horse Racing Commission.

The attached Findings of Fact (Exhibit A), Conclusions of Law (Exhibit B), and Ultimate Finding of Fact and Recommended Order (Exhibit C) are hereby incorporated by reference to this Nonfinal Order. To the extent any Finding of Fact is more properly considered a Conclusion of Law, or conversely, they shall be so treated.

Petitioner is a veterinarian who at all times relevant was licensed by the IHRC to practice at its race tracks in Indiana. On January 17, 2023, Respondent filed Administrative Complaint number 223001 against Petitioner under 71 IAC 10-3-20 alleging a number of violations of the IHRC rules governing horse racing activities in Indiana. Petitioner timely requested a hearing under 71 IAC 10-3-20(d). On February 6, 2023, the matter was assigned to Administrative Law Judge Michael Buker. The Administrative Complaint includes alleged violations by Petitioner of Indiana Horse Racing Commission ("IHRC") rules set forth generally as Paragraphs 21, 22, 25, 29 and 30 thereof. In general, the Administrative Complaint alleges the following:

- On July 4, 2022, Petitioner injected substances using hypodermic needles to the horses "Overthetopjustice" and "Justa Doll" in violation of 71 IAC 8.5-1-1.5(a) and 71 IAC 8.5-1-1.5(b)(1) (Para. 21 of the Administrative Complaint);

- Petitioner injected the substance adrenocorticotrophic hormone (“ACTH”) using a hypodermic needle to the horse “Justa Doll” in violation of 71 IAC 4-31-12-2 and 71 IAC 8.5-1-2(a) (Para. 22 of the Administrative Complaint);
- Petitioner failed to report to the IHRC veterinarian within 24 hours two intra-articular injections administered to the horse “Everwonder” in violation of 71 IAC 8.5-1-4.5(b)(3) (Para. 25 of the Administrative Complaint);
- Petitioner administered the prohibited substance Baycox to horses stabled on the grounds at Horseshoe Indianapolis in violation of 71 IAC 8.5-5-2(c) (Para. 29 of the Administrative Complaint); and
- Petitioner violated or attempted to violate IHRC rules and has engaged in conduct that is against the best interest of horse racing or which compromises the integrity of operations at an IHRC facility in violation of 71 IAC 5-1-14.

On May 5, 2023, following discovery, Respondent timely filed a motion for summary judgment in its favor with respect to each of the allegations set forth in the Administrative Complaint (“Motion for Summary Judgment”). Petitioner timely filed her response thereto on June 2, 2023 (“Petitioner’s Response”).

Indiana Code Section 4-21.5-3-23(a) provides “[a] party may, at any time after a matter is assigned to an administrative law judge, move for a summary judgment in the party’s favor as to all or any part of the issues in a proceeding”. I.C. § 4-21.5-3-23(b) provides “an administrative law judge shall consider a motion filed under subsection (a) as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.”

Indiana Trial Rule 56(C) provides that summary judgment is appropriate when there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A genuine issue of material fact exists where facts concerning the issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences of such an issue. *Parker v. Ind. State Fair Bd.*, 992 N.E. 2d 969, 976 (Ind. Ct. App. 2013) (internal citations omitted). “The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law.” *Id.* “Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of material fact by setting forth specifically designated facts.” *Id.* Any doubt as to a fact or inference to be drawn therefrom is resolved in favor of the party opposing the motion for summary judgment. *Poxon v. General Motors Acceptance Corp.*, 407 N.E. 2d 1181, 1184 (Ind. Ct. App. 1980). The contents of all pleadings, affidavits, and testimony are liberally construed in the light most favorable to the nonmoving party. *Ayres v. Indian Heights Vol. Fire Dept.*, 493 N.E. 2d 1229 (Ind. 1986).

- A. **Substantial and reliable evidence exists to support a conclusion that a genuine issue of material fact exists with respect to whether Petitioner improperly injected the two horses “Overthetopjustice” and “Justa Doll”.**

1. Respondent argues Petitioner improperly injected two horses, “Overthetopjustice” and “Justa Doll” on the morning of July 4, 2022. At least in part, Petitioner bases its allegations on observations by IHRC staff,¹ discussions with Ms. Christy Johnson (assistant trainer of the two horses), and Mr. Christopher Riggan (groom).
2. Petitioner acknowledges she injected two horses on the morning of July 4, 2022. However, she contends she injected the horses “Majestic Climb” and “Lilmissassypants”, neither of which were scheduled to race on July 4, 2022. At least in part, Petitioner bases her position on the following:
 - a. A lack of positive drug test results for “Overthetopjustice” and “Justa Doll” drawn shortly after the time at which Petitioner was alleged to have injected the horses on July 4, 2022. [Petitioner’s Ex. 4]
 - b. Petitioner’s daysheet treatment records on which the horses “Majestic Climb” and “Lilmissassypants” were identified as having received the injections in question. [Petitioner’s Ex. 5]
 - c. Lack of independent identification of the horses allegedly observed by Mr. Morris, Mr. Davis and Mr. McAllister. [Petitioner’s Ex. 1 at 14:24; 26:22; 35:40]
 - d. Inconsistent and ambiguous testimony of Ms. Johnson regarding which horses were injected by Petitioner. Ms. Johnson testified at the July 28, 2022 Stay Hearing that Petitioner injected “Justa Doll”; however, her subsequent testimony at the December 28, 2022 Stewards Hearing was ambiguous with respect to identification of the two horses. [*see generally*, Petitioner’s Ex. 1 at 54:54 – 57:19].
3. Based on the foregoing, I find a genuine issue of material fact exists with respect to whether the two horses injected by Petitioner on July 4, 2022 were, in fact, “Overthetopjustice” and “Justa Doll.” Accordingly, Respondent’s Motion for Summary Judgment with respect to this charge is DENIED.

B. Substantial and reliable evidence exists to support a conclusion that no genuine issues of material fact exist with respect to whether Petitioner administered the prohibited substance Baycox in violation of IHRC rules.

4. Petitioner admitted to having administered Baycox to multiple horses on the grounds of Horseshoe Indianapolis on multiple occasions during May 2022 and June 2022. [Commission Staff’s Ex. E., para. 40]

¹ Specifically, Mr. Michael Morris, IHRC Director of Security; and IHRC Investigators Mr. J.R. Davis and Mr. John McAllister.

5. In her sworn affidavit, Dr. Kerry Peterson, IHRC Equine Medical Director, testified as follows:
 - a. The substance Baycox (a tradename for Toltrazuril) is not approved by the U.S. Food and Drug Administration (“FDA”) for use in animals in the United States. [Commission Staff’s Ex. P, para. 11].
 - b. Dr. Peterson did not grant, “and to [her] knowledge no one else at the IHRC” granted, permission for Petitioner to use Baycox on race horses. [Commission Staff’s Ex. P, para. 11 – 13]
6. Petitioner provided no evidence to the contrary with respect to Paragraph 5(a) above.²
7. With respect to Paragraph 5(b), Petitioner argues she had implicit authorization to use Baycox based on a review of her treatment records conducted by Dr. Peterson in 2021. [Petitioner’s Response, p. 12, 13]
8. Indiana Code § 4-21.5-3-27(d) provides “[t]he administrative law judge’s experience, technical competence, and specialized knowledge may be used in evaluating evidence.”
9. Petitioner’s argument with respect to having implicit authorization from the IHRC by virtue of the June 2021 records review conducted by Dr. Peterson has been considered previously and rejected. Specifically, Petitioner put forth a substantially identical argument in her appeal of Stewards Ruling No. IG-2022-2876. As set forth in Section B of the Proposed Findings of Fact, Conclusions of Law and Nonfinal Order issued March 17, 2023 with respect to that action (the “March 17 Nonfinal Order”),³ the undersigned administrative law judge ruled Petitioner did not have authorization to administer drugs on IHRC grounds that were not specifically “flagged” in connection with the June 2021 review of Petitioner’s treatment records.
10. Petitioner further argues that her use of Baycox was warranted because the FDA approved version of Baycox (i.e., ponazuril) was on lengthy backorder and was unavailable to Petitioner. [Petitioner’s Response, p. 12, 13]
11. As set forth above, Dr. Peterson testified neither she nor anyone else at the IHRC had granted permission for Petitioner to use Baycox on race horses. [Commission Staff’s Ex. P, para. 13]
12. Based on the foregoing after resolving any doubt as to a fact or inference therefrom in Petitioner’s favor, I find the following:

² In her sworn affidavit, Dr. Clara Fenger, Petitioner’s expert witness, testified “[t]here is no FDA approved version of Toltrazuril [i.e., Baycox]”. [Petitioner’s Ex. 7, para. 44]

³ The March 17 Nonfinal Order is hereby incorporated by reference to this Nonfinal Order.

- a. Petitioner administered Baycox to multiple horses on the grounds of Horseshoe Indianapolis on multiple occasions during May 2022 and June 2022.
- b. Baycox is not approved by the FDA for use in animals in the United States.
- c. Petitioner did not receive explicit authorization from anyone at the IHRC to administer Baycox on race horses at Horseshoe Indianapolis.
- d. Pursuant to I.C. § 4-21.5-3-27(d), based on the personal knowledge and experience of the undersigned administrative law judge with respect to the March 17 Nonfinal Order, Petitioner did not have implicit authorization to use Baycox based on the June 2021 records review conducted by Dr. Peterson.
- e. There is no genuine issue of material fact with respect to whether Petitioner administered the prohibited substance Baycox to multiple horses at Horseshoe Indianapolis during May 2022 and June 2022 in violation of IHRC rules. Accordingly, Respondent's Motion for Summary Judgment with respect to this charge is GRANTED.

C. Substantial and reliable evidence exists to support a conclusion that a genuine issue of material fact exists with respect to whether Petitioner administered intra-articular injections to the horse "Everwonder" at Horseshoe Indianapolis and failed to report the injections to the IHRC's regulatory veterinarian within 24 hours in violation of IHRC rules.

17. Petitioner admitted she administered two intra-articular injections to the horse "Everwonder", recorded the injections on her daysheet treatment records, billed the applicable trainer and did not report the injections to the IHRC regulatory veterinarian. [Commission Staff's Ex. E, para. 36 – 39]
18. Administrative regulation 71 IAC 8.5-1-4.5(b)(3) provides with respect to reporting intra-articular injections "[t]he treatment report shall be submitted on a form provided by the commission...".
19. Petitioner contends the IHRC failed to provide Petitioner with the applicable form on which to report the intra-articular injections thus rendering compliance with the IHRC rule impossible.
20. Respondent did not provide evidence with respect to whether the required form was provided to Petitioner.
21. Based on the foregoing, I find a genuine issue of material fact exists with respect to whether Petitioner failed to report the intra-articular injections administered to "Everwonder" as set forth in IHRC rules. Accordingly, Respondent's Motion for Summary Judgment with respect to this charge is DENIED.

ORDERED: June 12, 2023

/S/ Michael Buker _____

Hon. Michael Buker
Administrative Law Judge
Office of Administrative Law Proceedings

Distributed to Parties:

Petitioner, Dr. Cynthia Loomis – served by Co-Counsel by OALP EService email: Darren A. Craig, Frost Brown Todd LLC at dcraig@fbtlaw.com, and Cameron S. Trachtman, Frost Brown Todd LLC at ctrachtman@fbtlaw.com.

Respondent, Indiana Horse Racing Commission Staff (Agency) – served by Co-Counsel by OALP EService email: Matthew M. Eggiman at MEggiman1@hrc.in.gov, Dale L. Pennycuff at DPennycuff@hrc.in.gov, and David Rothenberg at drothenberg@hrc.in.gov.

EXHIBIT A

FINDINGS OF FACT

Pursuant to Ind. Code § 4-21.5-3-27, the following Findings of Fact were used as the basis for the accompanying Nonfinal Order Regarding Partial Grant of Summary Judgment. Unless otherwise defined herein, capitalized terms shall have the same meaning as set forth in the accompanying Order.

1. Petitioner was at all times relevant to this appeal a veterinarian licensed by Respondent who acknowledged being subject to the statutes, regulations and rules governing horse racing in Indiana. [Commission Staff's Ex. E, para. 2; Ex. F]
2. On July 4, 2022, Petitioner injected the foreign substance furosemide (tradename Lasix) into a horse via hypodermic needle in a stall in Barn 11 at Horseshoe Indianapolis. [Commission Staff's Ex. E para. 5; Ex. G, p. 19]
3. On July 4, 2022, Petitioner injected the foreign substances furosemide (tradename Lasix) and ACTH into a horse via hypodermic injections in a stall in Barn 10 at Horseshoe Indianapolis. [Commission Staff's Ex. E, para. 9; Ex. G, p. 32]
4. During the months of May 2022 and June 2022, Petitioner administered the substance toltrazuril (tradename Baycox) to multiple horses at Horseshoe Indianapolis. [Commission Staff's Ex. E, para. 40]
5. Baycox is not approved by the FDA for use in animals in the United States.
6. Petitioner did not have explicit authorization from anyone at the IHRC to administer Baycox on race horses at Horseshoe Indianapolis.
7. Pursuant to I.C. § 4-21.5-3-27(d), based on the personal knowledge and experience of the undersigned administrative law judge with respect to the March 17 Nonfinal Order, Petitioner did not have implicit authorization to use Baycox based on the June 2021 records review conducted by Dr. Peterson.
8. On May 20, 2022, Petitioner administered two intra-articular injections to the horse "Everwonder" and did not report either of the two injections to the regulatory veterinarian within 24 hours of such treatment. [Commission Staff's Ex. E, para. 38]

EXHIBIT B

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over this matter pursuant to his appointment by the Indiana Office of Administrative Proceedings and the provisions of I.C. § 4-21.5, *et seq.* and 71 IAC 10-3-7.
2. The IHRC has promulgated rules, consistent with its legislative directive, that provide for the assessment of sanctions, including license suspension, revocation and/or fines to those who violate its rules.
3. An administrative law judge shall regulate the course of a proceeding in conformity with any prehearing order in an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts. Ind. Code § 4-21.5-3-25(b).
4. Summary judgment is appropriate when there are no genuine issues of material fact and which the moving party is entitled to judgment as a matter of law under Ind. Trial Rule 56(c).
5. The party moving for summary judgment bears the burden of making a *prima facie* showing that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Parker v. Ind. State Fair Bd.*, 992 N.E. 2d 969, 976 (Ind. Ct. App. 2013) (internal citations omitted).
6. Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court. Ind. Trial Rule 56(C).
7. There is no genuine issue of material fact with respect to whether Petitioner administered the prohibited substance Baycox to multiple horses at Horseshoe Indianapolis during May 2022 and June 2022 in violation of IHRC rules and as set forth in Paragraph 29 of the Administrative Complaint.
8. A genuine issue of material fact exists with respect to the remainder of charges set forth in the Administrative Complaint (i.e., all charges other than Paragraph 29).

EXHIBIT C

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ultimate Finding of Fact

The foregoing findings, pleadings and all other evidence presented establish that: (1) Respondent has satisfied its burden of making a *prima facie* showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law with respect to Paragraph 29 of the Administrative Complaint as set forth in the Nonfinal Order below, and (2) Respondent is not entitled to summary judgment with respect to the remaining charges in the Administrative Complaint as set forth in the Nonfinal Order below.

Nonfinal Order

Pursuant to I.C. § 4-21.5-3-23(b), Respondent's Motion for Summary Judgment is GRANTED with respect to Paragraph 29 of the Administrative Complaint; i.e., based on all of the evidence presented, substantial and reliable evidence exists that Petitioner violated 71 IAC 8.5-5-2(c) by injecting the prohibited substance Baycox to horses located on the grounds of an IHRC facility.

In accordance with I.C. § 4-15-10.5-12(b), the foregoing grant of summary judgment with respect to Paragraph 29 of the Administrative Complaint is not final. Specifically, this Nonfinal Order (with respect to Paragraph 29) is subject to review by the Indiana Horse Racing Commission. Pursuant to I.C. § 4-21.5-3-29(d), Petitioner has fifteen (15) calendar days following receipt of this Nonfinal Order to file written objections with the Indiana Horse Racing Commission.

Pursuant to I.C. § 4-21.5-3-23(b), Respondent's Motion for Summary Judgment is DENIED with respect to the remaining charges set forth in the Administrative Complaint (i.e., all charges other than Paragraph 29) which are set for Hearing on June 27, 2023.

FILED BEFORE

THE OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS

Administrative Cause No.: HRC-2302-000252

Underlying/State Agency Action No.: Appeal of Administrative Complaint No. 223001

IN THE MATTER OF:

Cynthia Loomis, DVM (License # 2018-01403)

Petitioner,

v.

Indiana Horse Racing Commission,

Respondent.

PETITIONER’S OBJECTIONS TO NONFINAL ORDER

INTRODUCTION

The Modified Nonfinal Order (the “**Order**”) ordered by Administrative Law Judge Buker on September 27, 2023, recommended that a Final Order be entered by the Indiana Horse Racing Commission in favor of the Indiana Horse Racing Commission (“**IHRC**”) and against Petitioner Dr. Cynthia Loomis (“**Dr. Loomis**”).

In accordance with the instructions of Judge Buker contained in the Order, Petitioner Dr. Loomis hereby submits her objections to the IHRC with regard to the Order.

OBJECTIONS

Dr. Loomis objects to the Order with respect to the decision on Paragraphs 21, 22, and 25 of the Administrative Complaint. Paragraph 21 of the Administrative Complaint states “On July 4, 2022, Petitioner injected substances using hypodermic needles to the horses *Overthetopjustice* and *Justa Doll* in violation of 71 IAC 8.5-1-1.5(a) and 71 IAC 8.5-1-1.5(b)(1). Paragraph 22 of the Administrative Complaint states “Petitioner Injected the substance adrenocorticotrophic hormone

(“ACTH”) using a hypodermic needle to the horse *Justa Doll* in violation of 71 IAC 4-31-12-2 and 71 IAC 8.5-1-4.5(b)(3). Paragraph 25 of the Administrative Complaint states that “Petitioner failed to report to the IHRC veterinarian within 24 hours two intra-articular injections administered to the horse *Everwonder* in violation of 71 IAC 8.5-1-4.5(b)(3). In the Order, Judge Buker found as follows with respect to the allegation in Paragraphs 21, 22, and 25 of the Administrative Complaint:

1. “Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff met its burden of proof by a preponderance of the evidence that Petitioner violated 71 IAC 8.5-1-1.5(a) and 71 IAC 8.5-1-1.5(b)(1) when (a) she injected Lasix and ACTH into the horses *Overthetopjustice* and *Justa Doll* on July 4, 2022, a date on which each horse was scheduled to race.”
2. “Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff met its burden of proof by a preponderance of the evidence that Petitioner violated 71 IAC 8.5-1-4.5(b)(3) when she failed to report to the regulatory veterinarian within 24 hours two intra-articular joint injections she administered to the horse *Everwonder* on the grounds of Horseshoe Indianapolis.”

Dr. Loomis objects to the Order with respect to Paragraphs 21, 22, and 25 of the Administrative Complaint. The basis of this objection stems from the lack of non-hearsay evidence regarding whether Dr. Loomis administered Lasix and ACTH into the horses *Overthetopjustice* and *Justa Doll* on July 4, 2022, and the IHRC’s failure to provide proper forms such that Dr. Loomis failed to report two intra-articular injections to *Everwonder* within 24 hours of the injections.

Testimony from the July 21 , 2023, evidentiary hearing demonstrated the following facts with regard to whether Dr. Loomis administered Lasix and ACTH into the horses

Overthetopjustice and Justa Doll on July 4, 2022, and whether she wrongfully failed to report two intra-articular injections to Everwonder within 24 hours of the injections.

On the morning of July 4, 2022, Dr. Loomis made her morning rounds at Horseshoe Indianapolis to provide medication to racehorses. [Tr. 131:2-132:7]. To keep track of the treatments she provided, Dr. Loomis recorded all provided treatments on a log known as a “day sheet.” [Tr. 132:15-133:4]. Dr. Loomis administered necessary medications to horses by the name Majestic Climb and Lilmissassypants on the morning of July 4, 2022. [Tr. 133:5-134:5; 134:23-25]. Dr. Loomis identified Majestic Climb and Lilmissassypants clearly through visual markers. [Tr. 134: 6-7; 135:12-16]. Neither Majestic Climb nor Lilmissassypants were scheduled to race on July 4, 2022. [Tr. 134:21-22; 135:19-136:2]. Shortly after Dr. Loomis administered medications to Majestic Climb and Lilmissassypants, Dr. Loomis left the grounds of Horseshoe Indianapolis for the day. [Tr. 137:12-15]. That same morning, IHRC investigators took two horses named Overthetopjustice and Justa Doll to the test barn at Horseshoe Indianapolis. [Tr. 44:17-21; 45:6-7]. Each of these two horses were tested for out-of-competition violations. Neither horse tested positive for any substance for which it was tested. [Tr. 108:22-24]. Neither Majestic Climb nor Lilmissassypants were tested for out-of-competition violations [Tr. 109:21-23].

Christy Johnson has testified on this subject on multiple occasions. [Tr. 31:10-18]. During an unsworn conversation with IHRC investigators on July 4, 2022, Christy Johnson indicated that Dr. Loomis may have treated an in-today horse with ACTH. [Audio Transcription 1,2,3.] During a stay hearing on this subject on July 28, 2022, Christy Johnson testified that she did not know what medication Dr. Loomis administered to a horse on the morning of July 4, 2022. [July 28, 2022 Stay Hearing Tr. 37:20-38:2.] Later during that hearing, Christy Johnson testified that the medication that Dr. Loomis provided may have been ACTH, but that she was not certain. [July 28, 2022 Stay

Hearing Tr. 39:19-40:8]. During a hearing on this subject on December 28, 2022, Christy Johnson testified that when she was speaking with investigators on July 4, 2022, she informed investigators that Dr. Loomis may have treated a horse with ACTH, but that she was not certain. [December 28, 2022 Hearing Tr., p. 33.] During the evidentiary hearing in this matter held on July 21, 2023, Christy Johnson testified that in her prior testimony, when asked if she observed Dr. Loomis administer medications on the morning of July 4, 2022, she responded that she did not see Dr. Loomis with a needle or syringe for the horses scheduled to race on July 4, 2022. [Tr. 34:14-22.] Christy Johnson also testified that in a conversation with trainer Marvin Johnson on July 4, 2022, Christy Johnson told Marvin Johnson that the horses Overthetopjustice and Justa Doll needed to be scratched from racing because the investigators believed that in-today horses had been treated. [Tr. 33:15-348.] Additionally, Michael Morris, John McAllister, and J.R. Davis each did not see Dr. Loomis administer medications on the morning of July 4, 2022. [Tr. 46:24-47:1; 60:16-18; 83:14-16.]

In the Order, Judge Buker found that Christy Johnson's unsworn statements from July 4 and 5, 2022 sufficed as a basis for the Order despite the fact that these statements constitute hearsay. While hearsay is admissible in administrative proceedings, hearsay statements cannot make up the entirety of an administrative order. I.C. § 4-21.5-3-26(a). Judge Buker presented four reasons to explain why such statements could constitute the basis for the Order, including that:

1. The Order was supported by the testimony of Mr. McAllister who testified Mr. Riggan identified the Barn 10 horse as Overthetopjustice;
2. Mr. McAllister's testimony regarding Mr. Riggan's identification of the horse proves that Petitioner violated the same day administration rules when she injected Overthetopjustice which suggests a willingness and ability to commit a second violation with respect to Justa Doll;

3. The Order was supported by the testimony of Mr. Davis that Ms. Johnson stated Petitioner injected Justa Doll with ACTH, and
4. The Unsworn Statements constitute Statements Against Interest under Indiana Rules of Evidence 804(b)(3) which provides: “[a] statement [that] a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability.”

Each of the purported justifications, however, fails to provide a non-hearsay basis for the Order. To begin, Mr. McAllister’s testimony regarding Mr. Riggan relies solely on a hearsay statement, as Mr. Riggan’s alleged statement about the identification of the horse is an out of court statement offered to prove the truth of the matter asserted. *See* Rule 801 of the Indiana Rules of Evidence. And while hearsay is admissible in this proceeding, it cannot be the sole basis for the Order. The second purported justification asserts that Dr. Loomis was willing and able to commit a second violation with regard to race-day administrations. However, the first alleged violation, again, relies wholly on the hearsay statements allegedly made by Mr. Riggan. More importantly, Mr. McAllister’s testimony about Mr. Riggan simply states that Mr. Riggan saw Dr. Loomis enter into a stall—but he did not see what activity she engaged in while in the stall. [Tr. 60:23-25]. Entering a stall is not a race day violation, and entering a stall does not confirm in any way that Dr. Loomis provided medication to any horses while in that stall.

The third purported justification also relies solely on a hearsay statement; that is, Ms. Johnson’s alleged statement about the identification of the horse (as testified to by Mr. Davis). But Ms. Johnson’s statement—just like Mr. Riggan’s statement—is an out of court statement offered to

prove the truth of the matter asserted. Lastly, there is no evidence to support that Ms. Johnson knew or should have known that the alleged actions of a veterinarian—not her own actions—would impact her and potentially expose her to any sort of penalties, civil or otherwise. Indeed, Indiana courts have held that for a statement against interest to be admissible “the statement ‘must be incriminating on its face.’” *J.B. v. State*, 205 N.E.2d 244, 250 (Ind. Ct. App. 2023) (citing *Webb v. State*, 149 N.E.3d 1234, 1240 (Ind. Ct. App. 2020)). Ms. Johnson’s admission that she knew a veterinarian’s alleged actions constituted a violation of the Indiana horse racing rules is not “incriminating on its face” with regard to Ms. Johnson, and therefore does not surmount the high bar for a statement against interest under the Indiana Rules of Evidence. Further, Ms. Johnson was not “unavailable as a witness” such that a Statement Against Interest is admissible under Rule 804 of the Indiana Rules of Evidence. Under Rule 804(a)(3) of the Indiana Rules of Evidence, “[a] declarant is considered to be unavailable as a witness if the declarant...(3) testifies to not remembering the subject matter.” But Ms. Johnson clearly testified that Dr. Loomis treated two horses on July 4, 2022, including Majestic Climb and Lilmissassypants. [Tr. 29:2-23]. To the extent Ms. Johnson had a lapse in memory, *it was about her prior testimony, not about the subject matter*—that is, the lapse in memory did not pertain to Ms. Johnson’s testimony in the evidentiary that Dr. Loomis treated Majestic Climb and Lilmissassypants on July 4, 2022. She simply testified contrarily to another hearing on the same subject matter.

Dr. Loomis also provided treatment to horses in May 20, 2022. On May 20, 2022, Dr. Loomis provided an intra-articular injection to the horse Everwonder. Intra-articular injections with corticosteroids are required to be reported to the regulatory veterinarian. However, the 2022 form to report intra-articular injections was never provided to Dr. Loomis, as required by the horse racing rules. Veterinarians do not have an independent duty to seek out the reporting form; rather,

such form should be provided by the Indiana Horse Racing Commission. Moreover, Everwonder, the horse that received the intra-articular injection, did not race until July of 2022 after receiving the intra-articular injection in late May of that year. Accordingly, no harm resulted to the horse who received the intra-articular injection from the failure to report.

No evidence (besides hearsay evidence) exists to support the conclusion that Dr. Loomis provided race-day administrations to “In Today” horses. Contrarily, the IHRC’s investigators acknowledged that they did not observe Dr. Loomis provide any treatments during the morning of July 4 and lacked personal knowledge of what horses she treated or treatments she provided. The testimony given on multiple occasions by Christy Johnson was inconsistent and vague such that Christy Johnson is neither reliable nor credible as a witness. The horses that Dr. Loomis allegedly treated did not test positive for any substance for which they were tested. Moreover, the IHRC never tested the horses that Dr. Loomis did treat on July 4, 2022, to confirm that Dr. Loomis accurately treated non-racing horses. Dr. Loomis’s daysheets, as well as her personal knowledge of the horses treated, confirm that Dr. Loomis treated Majestic Climb and Lilmissassypants on July 4, 2022, neither of whom was scheduled to race on that day.

Additionally, with regard to the intra-articular injection provided to the horse Everwonder, compliance with the reporting statute was impossible because the IHRC did not provide the proper form for reporting to Dr. Loomis. It is the responsibility of the IHRC to provide such form, and responsibility does not fall on the veterinarian to independently seek out the reporting form which was required by statute to be provided to the veterinarian for reporting. Dr. Loomis therefore objects to the Order to the extent that it recommends that penalties be imposed against her for alleged race-day administration and intra-articular reporting violations.

OBJECTIONS: PARTIAL GRANT OF SUMMARY JUDGMENT

The Administrative Complaint also included an allegation that Dr. Loomis violated certain Indiana horse racing rules by administering the prohibited substance Baycox to horses on the grounds of Horseshoe Indianapolis. Paragraph 29 of the Administrative Complaint states “Dr. Loomis violated 71 IAC 8.5-5-2(c) when she administered the prohibited substance Baycox to horses stabled on the grounds at Horseshoe Indianapolis.” Administrative Law Judge Buker, on the IHRC’s motion, granted summary judgment in favor of the IHRC with regard to Paragraph 29 of the Administrative Complaint. Specifically, Dr. Buker found that

1. Dr. Loomis administered Baycox to multiple horses on the grounds of Horseshoe Indianapolis on multiple occasions during May 2022 and June 2022.
2. Baycox is not approved by the FDA for use in animals in the United States.
3. Dr. Loomis did not receive explicit authorization from anyone at the IHRC to administer Baycox on race horses at Horseshoe Indianapolis.
4. Pursuant to I.C. § 4-21.5-3-27(d), based on the personal knowledge and experience of Judge Buker with respect to the March 17 Nonfinal Order, Dr. Loomis did not have implicit authorization to use Baycox based on the June 2021 records review conducted by Dr. Peterson.
5. Dr. Loomis objects to the Order with respect to Paragraph 29 of the Administrative Complaint. The basis of this objection stems from the existence of a genuine issue of material fact regarding whether Dr. Loomis was authorized to administer Baycox on the grounds of Horseshoe Indianapolis.

Because Judge Buker granted summary judgment in favor of the IHRC regarding this allegation, evidence on this allegation was not heard regarding this allegation during the July 21, 2023

evidentiary hearing. To preserve her right to object, Dr. Loomis submits the following objections with regard to the allegations in Paragraph 29 of the Administrative Complaint.

Testimony from the December 13, 2022, evidentiary hearing demonstrated the following facts with regard to the use of Baycox. In June 2021, Dr. Kerry Peterson, the IHRC's Equine Medical Director, requested treatment daysheets from IHRC licensed veterinarians to review the treatment that IHRC licensed veterinarians provided to racehorses and the documentation of that treatment. [Dec. 13 Tr. 94:1-15.]. Dr. Loomis provided Dr. Peterson with two months of daysheets outlining all treatment provided to racehorses. [*Id.* at 114:13-16; Ex. 14.] In her review of the daysheets, Dr. Peterson flagged Dr. Loomis's use of the medication omeprazole. [*Id.* at 94-16-22.] Dr. Peterson and Dr. Loomis met to discuss Dr. Loomis's use of omeprazole, and Dr. Loomis implemented Dr. Peterson's suggestions. [*Id.* at 94:22, 116:1-25.] In reviewing the daysheets, Dr. Peterson did not flag issues with any other medications. [*Id.* at 117:3-10]. Because no medications besides omeprazole had been flagged in Dr. Peterson's review of Dr. Loomis's daysheets, Dr. Loomis continued to use many medications indicated on her daysheets in 2022, including Baycox.

Moreover, the testimony of Dr. Clara Fenger indicates that at the time that Dr. Loomis administered Baycox, the FDA-approved version of ponazuril (known by the brand name Marquis) was on a lengthy backorder and was unavailable for Dr. Loomis to use in the treatment of her racehorses. [Fenger Aff. at ¶ 44]. Therefore, Dr. Loomis used her professional medical judgment as a veterinarian to administer and prescribe Baycox (toltrazuril), a medication that was medically necessary for the horses for which she is responsible. Dr. Fenger's testimony from July 21, 2022, revealed that compounded Toltrazuril was the only option for treatment of certain serious and life-threatening diseases in horses given the backorder. [Fenger Aff. at ¶¶ 44; 46]. Moreover, this testimony demonstrated that compounded copies of FDA approved products are appropriate and

legal when the FDA approved product is unavailable.” [Id. at 25]. Because Dr. Loomis was given implicit permission to use Baycox by Dr. Kerry Peterson after Dr. Peterson’s review of Dr. Loomis’s summer 2021 daysheets, and because the use of Baycox was medically necessary in Dr. Loomis’s professional veterinary opinion, there are genuine issues of material fact about whether Dr. Loomis’s administration of Baycox constituted administration of a prohibited substance under Indiana’s horse racing rules and regulations. Dr. Loomis therefore objects to the summary judgment order to the extent that the summary judgment order grants summary judgment to the IHRC with regard to Paragraph 29 of the Administrative Complaint.

CONCLUSION

For the foregoing reasons, Dr. Loomis objects to the Order recommending that a Final Order be entered in favor of the IHRC with regard to alleged violations pertaining to race-day administrations and intra-articular injection reporting, as alleged in Paragraph 21, 22, 25, and 29 of the Administrative Complaint, and therefore preserves her objections for judicial review. Dr. Loomis reserves the right to file further objections.

FROST BROWN TODD LLP

By: /s/Cameron S. Trachtman

Darren A. Craig, #25534-49

Cameron S. Trachtman, #36387-49

111 Monument Circle, Suite 4500

P.O. Box 44961

Indianapolis, IN 46204

Telephone: (317) 237-3800

Facsimile: (317) 237-3900

Email: dcraig@fbtlaw.com

ctrachtman@fbtlaw.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing documents was served by email on October 10, 2023.

Office of Administrative Law Proceedings	Indiana Horse Racing Commission, Respondent
Attn: Hon. Michael Buker	Matthew M. Eggiman
OALP@oalp.IN.gov	MEggiman1@hrc.in.gov
mbuker@oalp.IN.gov	David Rothenberg
	DRothenberg@hrc.in.gov
	Dale L. Pennycuff
	DPennycuff@hrc.IN.gov

/s/Cameron S. Trachtman

Cameron S. Trachtman

FILED BEFORE

THE OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS

Administrative Cause No.: HRC-2302-000252

Underlying/State Agency Action No.: Appeal of Administrative Complaint No. 223001

IN THE MATTER OF:

Cynthia Loomis, DVM (License # 2018-01403)

Petitioner,

v.

Indiana Horse Racing Commission,

Respondent.

**PETITIONER’S OBJECTIONS TO NONFINAL ORDER REGARDING PARTIAL
GRANT OF RESPONSE OF SUMMARY JUDGMENT**

INTRODUCTION

The Nonfinal Order Regarding Partial Grant of Summary Judgment (the “**Order**”) ordered by Administrative Law Judge Buker on June 12, 2023, granted in part and denied in part the Motion for Summary Judgment filed by Respondent Indiana Horse Racing Commission (“**IHRC**”).

In accordance with the instructions of Judge Buker contained in the Order, Petitioner Dr. Cynthia Loomis (“**Dr. Loomis**”) hereby submits her objections to the IHRC with regard to Paragraph 29 of the Administrative Complaint that is the subject of this appeal.¹

¹ As a preliminary matter, Dr. Loomis respectfully notes that under Indiana’s Administrative Orders and Procedures Act (“**AOPA**”), the filing of objections after the issuance of an order granting only partial summary judgment is premature. Indiana Code § 4-21.5-3-29 (“**Section 29**”) governs the filing of objections to orders issued by an administrative law judge where, as here, the administrative law judge is not the ultimate agency authority. Under I.C. § 4-21.5-3-23, Section 29 only “appl[ies] to an order granting summary judgment that disposes of all issues in a proceeding.” The Order here—a partial grant of summary judgment—disposes of only one of three issues in this matter. Therefore, Section 29 is inapplicable.

OBJECTIONS

Dr. Loomis objects to the Order with respect to the decision on Paragraph 29 of the Administrative Complaint. Paragraph 29 of the Administrative Complaint states “Dr. Loomis violated 71 IAC 8.5-5-2(c) when she administered the prohibited substance Baycox to horses stabled on the grounds at Horseshoe Indianapolis. In the Order, Judge Buker found as follows with respect to the allegation in Paragraph 29 of the Administrative Complaint:

1. Dr. Loomis administered Baycox to multiple horses on the grounds of Horseshoe Indianapolis on multiple occasions during May 2022 and June 2022.
2. Baycox is not approved by the FDA for use in animals in the United States.
3. Dr. Loomis did not receive explicit authorization from anyone at the IHRC to administer Baycox on race horses at Horseshoe Indianapolis.
4. Pursuant to I.C. § 4-21.5-3-27(d), based on the personal knowledge and experience of Judge Buker with respect to the March 17 Nonfinal Order, Dr. Loomis did not have implicit authorization to use Baycox based on the June 2021 records review conducted by Dr. Peterson.

Dr. Loomis objects to the Order with respect to Paragraph 29 of the Administrative Complaint. The basis of this objection stems from the existence of a genuine issue of material fact regarding whether Dr. Loomis was authorized to administer Baycox on the grounds of Horseshoe Indianapolis.

As more fully examined in Dr. Loomis’s Response to the IHRC’s Motion for Summary Judgment, testimony from the December 13, 2022, evidentiary hearing demonstrated the following facts with regard to the use of Baycox. In June 2021, Dr. Kerry Peterson, the IHRC’s Equine Medical Director, requested treatment daysheets from IHRC licensed veterinarians to review the

treatment that IHRC licensed veterinarians provided to racehorses and the documentation of that treatment. Dr. Loomis provided Dr. Peterson with two months of daysheets outlining all treatment provided to racehorses. In her review of the daysheets, Dr. Peterson flagged Dr. Loomis's use of the medication omeprazole. Dr. Peterson and Dr. Loomis met to discuss Dr. Loomis's use of omeprazole, and Dr. Loomis implemented Dr. Peterson's suggestions. In reviewing the daysheets, Dr. Peterson did not flag issues with any other medications. Because no medications besides omeprazole had been flagged in Dr. Peterson's review of Dr. Loomis's daysheets, Dr. Loomis continued to use many medications indicated on her daysheets in 2022, including Baycox.

Moreover, the testimony of Dr. Clara Fenger indicates that at the time that Dr. Loomis administered Baycox, the FDA-approved version of ponazuril (known by the brand name Marquis) was on a lengthy backorder and was unavailable for Dr. Loomis to use in the treatment of her racehorses. Therefore, Dr. Loomis used her professional medical judgment as a veterinarian to administer and prescribe Baycox (toltrazuril), a medication that was medically necessary for the horses for which she is responsible. Dr. Fenger's testimony from July 21, 2022, revealed that compounded Toltrazuril was the only option for treatment of certain serious and life-threatening diseases in horses given the backorder. Moreover, this testimony demonstrated that compounded copies of FDA approved products are appropriate and legal when the FDA approved product is unavailable. Because Dr. Loomis was given implicit permission to use Baycox by Dr. Kerry Peterson after Dr. Peterson's review of Dr. Loomis's summer 2021 daysheets, and because the use of Baycox was medically necessary in Dr. Loomis's professional veterinary opinion, there are genuine issues of material fact about whether Dr. Loomis's administration of Baycox constituted administration of a prohibited substance under Indiana's horse racing rules and regulations. Dr.

Loomis therefore objects to the Order to the extent that the Order grants summary judgment with regard to Paragraph 29 of the Administrative Complaint.

CONCLUSION

For the foregoing reasons, Dr. Loomis objects to the Order granting summary judgment in favor of the IHRC with regard to the use of Baycox as alleged in Paragraph 29 of the Administrative Complaint, and therefore preserves her objections for judicial review. Dr. Loomis reserves the right to file further objections.

FROST BROWN TODD LLP

By: /s/Cameron S. Trachtman

Darren A. Craig, #25534-49

Cameron S. Trachtman, #36387-49

111 Monument Circle, Suite 4500

P.O. Box 44961

Indianapolis, IN 46204

Telephone: (317) 237-3800

Facsimile: (317) 237-3900

Email: dcraig@fbtlaw.com

ctrachtman@fbtlaw.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing documents was served by email on June 27, 2023.

Office of Administrative Law Proceedings	Indiana Horse Racing Commission, Respondent
Attn: Hon. Michael Buker	Matthew M. Eggiman
OALP@oalp.IN.gov	MEggiman1@hrc.in.gov
mbuker@oalp.IN.gov	David Rothenberg
	DRothenberg@hrc.in.gov
	Dale L. Pennycuff
	DPennycuff@hrc.IN.gov

/s/Cameron S. Trachtman

Cameron S. Trachtman