

BEFORE AN ADMINISTRATIVE LAW JUDGE
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

INDIANA HORSE RACING
COMMISSION STAFF,

Petitioner,

v.

DIDIEL A. OSORIO,

Respondent.

ADMINISTRATIVE COMPLAINT NO.
217006

NOTICE OF OPPORTUNITY TO PRESENT BRIEFS AND ORAL ARGUMENT

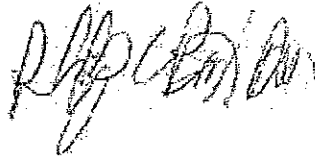
This matter is pending before the Indiana Horse Racing Commission (“Commission”) on the Recommended Administrative Penalty against Didiel A. Osorio (“Osorio”). On May 21, 2018, the Administrative Law Judge (“ALJ”) designated by the Commission, Ernest E. Yelton, issued his Amended Recommended Findings of Fact, Conclusions of Law, Ultimate Finding of Fact and Order (“Recommended Order”) in this case. On June 5, 2018, the Commission received Osorio’s Objections to Administrative Law Judge’s Findings of Fact, Conclusions of Law, and Recommended Order.

Notice is hereby given that the Commission will afford both parties an opportunity to present briefs concerning the filing of Osorio’s objections and the merits of this case. Any briefs filed by Osorio or the Commission Staff must be received in the offices of the Commission by noon on June 22, 2017. The Commission will accept electronic filing at DPennycuff@hrc.IN.gov. No late filings will be accepted and/or considered.

The Commission will also consider oral argument at its meeting on June 27, 2018. The oral argument will be limited to ten minutes per side.

SO ORDERED, 7th day of June, 2018.

THE INDIANA HORSE RACING COMMISSION



By: _____

Philip C. Borst
Chairperson
Indiana Horse Racing Commission

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BEFORE AN ADMINISTRATIVE LAW JUDGE
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

INDIANA HORSE RACING COMMISSION
STAFF,

Petitioner,

v.

DIDIEL OSORIO,

Respondent.

In Re: Administrative Complaint No. 217006

INDIANA
HORSE RACING COMMISSION
2018 FEB -9 AM 9:03

**INDIANA HORSE RACING COMMISSION STAFF'S MOTION FOR
SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF**

The Indiana Horse Racing Commission Staff (hereinafter the "Commission Staff"), by counsel, pursuant to Ind. Code § 4-21.5-3-23, respectfully submits its Motion for Summary Judgment requesting that the Administrative Law Judge (hereinafter the "ALJ") issue a recommended Order in favor of the Commission Staff that affirms the violation found in and the sanctions proposed by Administrative Complaint No. 217006 (the "Complaint" or "Admin. Compl."). In support of this motion, the Commission Staff designates the: (1) Affidavit of IHRC Executive Director Michael Smith (with attached exhibits); (2) Affidavit of Toni Sperle, IHRC Investigator; and (3) relevant portions of the Transcript of the Deposition of Didiel Osorio ("Osorio"). The Commission Staff respectfully submits that there is no genuine issue of material fact with respect to the matters referenced in the Administrative Complaint. In support of its motion, the Commission Staff submits the following Memorandum:

I. INTRODUCTION

The Indiana Horse Racing Commission has been established by the Indiana Pari-Mutuel Wagering on Horse Races Act (the "Horse Racing Act"), codified at Ind. Code § 4-31 *et seq.* The Horse Racing Act provides that the purpose of the article is to "permit pari-mutuel wagering

on horse races in Indiana and to ensure that pari-mutuel wagering on horse races in Indiana will be conducted with the highest of standards and the greatest level of integrity.” Ind. Code § 4-31-1-2 (emphasis added).

The Indiana Legislature provided specific direction to the Commission with respect to the use of an electromechanical appliance for the purpose of stimulating a horse or affecting its speed in a race. Chapter 12 of the Horse Racing Act makes clear that there is an absolute prohibition against allowing the use of “a battery or other electrical or mechanical instrument that may be used to affect the speed or actions of a horse” in a race without suffering an appropriate sanction. Ind. Code § 4-31-12-20(b)(3). The sanction allows for the suspension of the license of the person possesses such a device. *Id.* An additional sanction allows the Commission to “permanently revoke the license of a person who uses an electrical, a mechanical, or other appliance ... for the purpose of stimulating a horse or affecting its speed in a race.” Ind. Code § 4-31-12-18(3). This absolute prohibition and the related legislative forfeiture directive have been incorporated into the applicable Commission regulations at 71 IAC 7.5-6-5.

In addition, the Commission has delegated to its Executive Director the authority to issue an administrative complaint in order to propose the assessment of administrative sanctions when it has been determined that a licensee has committed a violation of the Horse Racing Act or of applicable Commission regulations. 71 IAC 10-3-20. Mike Smith, the Commission’s Executive Director, issued the Complaint at issue to Didiel Osorio on or about September 8, 2017, in which he proposed a penalty consisting of a ten (10) year suspension, a \$5,000 fine, and a redistribution of the purse. The proposed fine is consistent with the proposed fine issued by the IHRC Staff in previous disciplinary actions involving the possession of an electrical shocking device.

II. UNDISPUTED MATERIAL FACTS

Osorio was licensed as a Jockey by the Commission in 2017 and was at all times subject to the jurisdiction of the IHRC. (Affidavit of Mike Smith ("Smith Aff."), ¶¶ 6 and 7; Admin. Compl., p. 2, Finding of Fact #1.) Osorio was the jockey riding the thoroughbred race horse Deep Explorer in Race 5 on August 10, 2017, at Indiana Grand Racing and Casino. (Smith Aff. ¶ 5). Osorio finished the race in first place. (Smith Aff. ¶ 5). Upon finishing the race, Osorio dismounted Deep Explorer in the Winner's Circle. (Affidavit of Antionette Sperle ("Sperle Aff.") ¶ 6). Osorio was approached by IHRC Investigator Toni Sperle, who advised Osorio that she saw a shocking device in his hand. (Sperle Aff. ¶¶ 9, 10, and 11). Osorio was escorted to the jockey's quarters and searched. (Transcript of Osorio Deposition, pp. 33, 34; lines 22-1). Upon being searched, a shocking device was found on Osorio's person. (Transcript of Osorio Deposition, pp 35, 36; lines 19-2). On September 8, 2017, IHRC Executive Director issued Administrative Complaint No. 217006 against Osorio. On October 10, 2017, this matter was assigned to the Honorable Ernest Yelton, to serve as Administrative Law Judge. (Smith Aff. ¶ 12). During a deposition of Osorio, Osorio admitted to having a machine on his person, as well as to hiding the machine from IHRC Investigator Sperle. (Transcript of Osorio Deposition pg. 28, line 18; pg. 29, lines 24, 25; pg. 32, lines 23, 24; pg. 35, lines 2, 3, 11-16).

III. PROCEDURAL HISTORY

Mike Smith, as the Executive Director of the Commission, is charged with the responsibility and authority for the implementation, administration, and enforcement of the Horse Racing Act, Ind. Code § 4-31 *et. seq.* See also 71 IAC 2-5-1(a). As previously stated, on or about September 8, 2017, Mr. Smith issued Administrative Complaint No. 217006 recommending that Osorio be assessed an administrative penalty of a ten-year suspension, fined Five Thousand Dollars (\$5,000) and that the (first place win) purse at issue be forfeited and

redistributed. Osorio timely requested a hearing on the matter. The matter was assigned to ALJ Ernest Yelton and subsequently, a scheduling order was issued.

IV. ARGUMENT

A. Summary judgment standard in administrative proceedings.

Ind. Code § 4-21.5-3-23 provides that “[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.” Ind. Code § 4-21.5-3-23(a). The 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.” Ind. Code § 4-21.5-3-23(b).

Indiana Trial Rule 56(C) provides that summary judgment is appropriate when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Ind. R. Trial P. 56(C); *Parker v. Ind. State Fair Bd.*, 992 N.E.2d 969, 976 (Ind. Ct. App. 2013). “A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue.” *Parker*, 992 N.E.2d at 976 (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 a 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 a genuine issue of material fact by setting forth specifically designated facts.” *Id.* Here, the Commission has shown that it is entitled to summary judgment in these proceedings because there can be no dispute that: (1) Osorio was the jockey riding Deep Explorer in Race 5 on August 10, 2017, at Indiana Grand; (2) Osorio finished Race 5 in first place; (3) Osorio was subsequently searched because IHRC Investigator Toni Sperle

saw Osorio with a machine; (4) Osorio hid the machine from IHRC Investigator Sperle, specifically, Osorio put the machine in his boxer shorts; (5) Osorio confessed to possessing a machine during the race; and (6) the sanction recommended to be imposed by the Commission Staff on Osorio is reasonable, appropriate, and consistent with previous penalties recommended for possession of a machine.

B. Osorio admitted to possession of a shocking device, a violation that is so contrary to the high standards and integrity of horse racing and pari-mutuel wagering that it is strictly verboten and severely punished.

The Legislature has given wide deference to the IHRC for purposes of regulating horse racing and pari-mutuel wagering. The IHRC is charged statutorily with ensuring that pari-mutuel wagering on horse races will be conducted with the highest of standards and the greatest level of integrity. To discharge this duty, the Legislature has specifically provided that the IHRC shall “prescribe the rules and conditions under which horse racing at a recognized meeting may be conducted” and empowers the IHRC to “adopt rules under IC 4-22, including emergency rules under IC 4-22-2-37.1, to implement (the Act), including rules that prescribe: (G) fines and penalties.” See *Ind. Code 4-31-1-2 and Ind. Code § 4-31-3-9(a)(1)(G)*. Although the Legislature has entrusted the regulation of horse racing and pari-mutuel wagering to the IHRC, the Legislature has identified certain violations that are so egregious, they bear mentioning in statute. Possession of a shocking device is one of these violations. Ind. Code § 4-31-12-20. The Legislature further provides that a license may be permanently revoked when a shocking device is used for purposes of stimulating a horse or affecting its speed in a race.¹ Ind. Code § 4-31-12-18.

¹ Ind. Code § 4-31-12-18 also provides that a person who injects a drug or administers a drench *for the purpose of stimulating a horse or affecting its speed in a race* may have their license permanently revoked. Emphasis added.

Pursuant to Ind. Code § 4-31-12-20(b)(3), there is an absolute prohibition against allowing the use of “a battery or other electrical or mechanical instrument that may be used to affect the speed or actions of a horse” in a race without suffering an appropriate sanction. The sanction allows for the suspension of the license of the person possesses such an appliance. *Id.* This absolute prohibition and the related legislative forfeiture directive have been incorporated into the applicable Commission regulations at 71 IAC 7.5-6-5.

Osorio not only knew that participating in horse racing in Indiana is a privilege, he knew that possession of a shocking device was in violation of commission rules, and chose to do so because he wanted to win. Furthermore, he intentionally hid the machine while questioned about its presence by IHRC Investigator Sperle.

Q: Okay. Do you understand what it means when I say that racing in Indiana is a privilege and not a right?

A: I do.

Q: Okay. Are you aware, Didiel, that all licensees are required to cooperate with Commission investigations?

A: Yes, I do know that. (Osorio Deposition Transcript, pp. 22, 23, lines 21-25, 1-3)

.....

Q: Are you aware, Didiel, that as a jockey, just having a stimulating or a shocking device is evidence of a violation of the Commission rules?

A: I do understand that. (Osorio Deposition Transcript, pg 24, lines 7-10)

.....

Q: What do you mean when you made a mistake?

A: I did something that I wasn't supposed to ever do it – or do it.

Q: What did you do?

A: That I had a machine on me, on myself. (Osorio Transcript, pg. 28, lines 14-18)

.....

Q: Do I remember correctly, Didiel, that the Kentucky suspension was a three-day suspension for August 6th, 11th, and 12th of 2017?

A: I'm not exactly sure.

Q: Okay

A: But I do think those are the days.

Q: and the day that you rode with the machine in Indiana was August 10th; is that correct?

A: It is.

Q: So you were probably under a lot of pressure; is that right?

A: I was.

Q: Is that why you decided to use the machine?

A: Not so much. I just wanted to win. (Osorio Deposition Transcript, pg. 29, lines 9-25)

.....

Q: When you apologized (to the Stewards), were you apologizing for using the machine or for something different?

A: I was apologizing for having the machine with me. (Osorio Deposition Transcript, pg 31, lines 6-8)

.....

Q: I'm curious. Are you reluctant to use a machine on a horse if the horse has never had a machine used on it before?

A: By all means.

Q: Why run the risk?

A: As I explained to you before, I just wanted to win. (Osorio Deposition Transcript, pg. 32, lines 19-24)

.....

Q: Okay. When you came off of the horse, Deep Explorer, in the winner's circle, were you escorted back to the paddock judge's office for a search?

A: Yes. That lady [(IHRC Investigator Sperle)] told me that I had a machine on my hand.

Q: Okay. Did you say anything to her when she said that?

A: I asked her what was – what she was talking about. (Osorio Deposition Transcript, pp. 33, 34, lines 22-4)

.....

Q: Where did you hide the machine?

A: I had it in my pants from the time when I got out – when I got out with the horse.

Q: Could you be more specific where in your pants you had it?

A: In my boxers.

.....

Q: ... [W]hy didn't you give the machine to Toni when she asked you for it?

A: Because she was very sure that I had it in my hands.

Q: Why didn't you give it to her then?

A: Because I didn't want in any trouble. (Osorio Deposition Transcript, pg. 35, lines 1-6,

11-16)

Osorio is clearly admittedly in violation of IHRC statute and rules and admits that his violations were for purposes of winning his race.

C. The recommended sanctions imposed upon Mr. Osorio are both reasonable and appropriate.

Possession of a shocking device is one of the most serious offenses that can be committed in a regulated area; it is an assault on the integrity of horse racing and pari-mutuel wagering, and puts into jeopardy all jockeys, horses, and potentially spectators at a race where the machine is present. Accordingly, the IHRC's Executive Director has long proposed a serious suspension and fine for these violations—a ten (10) year suspension and \$5,000 fine.² With exception of those cases that have been settled prior to adjudication,³ the Commission has consistently upheld the proposed penalty.

In addition to possession of a shocking device, Osorio has admitted that he did not cooperate with IHRC Investigator Toni Sperle while she was conducting an investigation into Osorio's possession of the shocking device. All licensees, as a condition of licensure, are required to cooperate with IHRC investigations.

Not only is the severity of the proposed penalty consistent with the clear statutory prohibition against possession and use of a shocking device, the proposed penalty is reasonable in light of the fact that his admitted possession of a machine is coupled with his admitted interference with the IHRC investigation.

The Executive Director's recommended penalty is clearly reasonable in light of statutory prohibitions against possession of a shocking device, as well as penalties assessed in previous

² Pursuant to IC 4-31-12-16, \$5,000 is the maximum fine that can be assessed by the Commission.

³ In the IHRC vs. Ruben Serna, the Executive Director proposed a ten (10) year suspension and \$5,000 fine. Based on mitigating circumstances, Mr. Serna signed a settlement agreement with the IHRC Staff resulting in a five (5) year suspension and \$7,500 fine.

disciplinary actions involving the possession of a shocking device and accordingly, cannot be determined to be unreasonable.

V. CONCLUSION

As an IHRC licensee, Osorio is responsible for being knowledgeable of and following the IHRC's administrative rules and statutes. As a licensee, Osorio is strictly prohibited from possessing an electrical shocking device in a regulated area, and is required to cooperate with IHRC investigations. Osorio has admitted to violating both of those provisions and the penalty proposed by the Executive Director is appropriate.

WHEREFORE, the Indiana Horse Racing Commission Staff respectfully requests that the Administrative Law Judge enter an Order granting Summary Judgment in favor of the Commission Staff, thereby adopting the sanctions proposed by the Commission Staff and imposing the recommended penalty for Osorio of a ten (10) year suspension, a Five Thousand Dollar (\$5,000) fine, the forfeiture and redistribution of the first place purse for the fifth race at Indiana Grand on August 10, 2017, and Deep Explorer be disqualified from the fifth race.

Respectfully submitted,



Lea Ellingwood, # 22346-49

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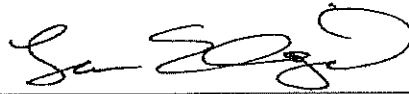
Attorney for Indiana Horse Racing Commission Staff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon the following counsel of record by first class U.S. Mail, postage prepaid, and email this 9th day of February, 2018:

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BEFORE THE ADMINISTRATIVE LAW JUDGE
 THE HONORABLE ERNEST YELTON
 APPOINTED BY THE INDIANA HORSE RACING COMMISSION

2018 MAR 12 P 1:27

INDIANA HORSE RACING)	
COMMISSION STAFF,)	
Petitioner)	
)	
v.)	ADMINISTRATIVE
)	COMPLAINT NO. 217006
)	
DIDIEL OSORIO,)	
Respondent)	

INDIANA
HORSE RACING COMM

**RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY
 JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF**

The Respondent, Didiel Osorio, ("Didiel") by counsel, hereby responds to the Motion for Summary Judgment filed by the Indiana Horse Racing Commission Staff (the "Commission Staff." Respondent respectfully requests the Administrative Law Judge (the "ALJ") deny the same as there are material issues of genuine fact in dispute. In support of this response, Didiel designates the following: Ex. A - relevant portions of the Transcript of the Deposition of Didiel; Ex. B - Affidavit of Didiel; Ex. C - the Settlement Agreement from *IHRC v. Ruben Serna*; and Ex. D - Findings of Fact and Conclusions of Law from the matter *IHRC v. Juan Guerrero*.¹ In support of his response, Didiel submits the following Memorandum:

I. Introduction

Didiel has consistently admitted he impermissibly used an electronic device on his horse in Race 5 on August 10, 2017 at Indiana Grand Racing and Casino, including when it was discovered by the investigator on race day, during his deposition, and now. In short, he does not – nor has he ever – contest liability (*i.e.*, that he committed a violation) in this matter. Rather, Didiel disputes the Commission Staff's unsupported, conclusory representation that the \$5,000

¹ Only the relevant portion of the Findings of Fact was produced; however, the remaining can be produced upon request, if necessary.

fine and 10 year suspension is “reasonable, appropriate, and consistent with previous penalties recommended for possession of a machine.” In fact, the Commission Staff has previously been corrected in official proceedings that it has not consistently sought a 10 year suspension in machine cases. Considering the mitigating factors, including Didiel’s cooperation, openness, and truthfulness in this matter, there is a material fact in dispute regarding the penalty sought.

II. Additional Material Facts Not in Dispute

1. This was the first time Didiel used any ‘machine,’ ‘buzzer,’ or electronic device. [Ex. A (Didiel Depo. (31:14)); Ex. B (Didiel Aff., ¶2).]
2. After initial questions by the investigator, Didiel quickly recognized his mistake and obligation to cooperate, and he produced the machine soon thereafter. [Ex. B (Didiel Aff., ¶3).]
3. Didiel has been or is licensed in Arkansas, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, New Jersey, New York, Oklahoma, and West Virginia. [Ex. B (Didiel Aff., ¶4).]
4. Didiel has never been suspended by any licensing agency for the use of a machine. [Ex. B (Didiel Aff., ¶5).]
5. In *IHRC vs. Ruben Serna*, involving a violation for the possession of a machine, the executive director of the Commission and the Commission agreed to a five (5) year suspension for a violation for the possession of a machine. [Ex. C (R. Serna Settlement Agreement).]
6. In *IHRC v. Sarvis*, involving a violation for the possession of a machine, the executive director of the Commission and the Commission agreed to lift the suspension after approximately 4 years, pursuant to a settlement agreement. [Ex. D (J. Guerrero Findings of Fact and Conclusions of Law, p. 9).]

III. Material Facts in Dispute or not Support by the Record

The Commission Staff failed to provide any citation to the record or evidentiary support for the following representations:

- A. “[T]he sanction recommended to be imposed by the Commission Staff on Osorio is reasonable, appropriate, and consistent with previous penalties recommended for possession of a machine.” [MSJ, p. 5.]
- B. “The proposed fine is consistent with the proposed fine issued by the IHRC Staff in previous disciplinary actions involving the possession of an electrical shocking device.” [*Id.* at 2.]
- C. “[T]he sanction recommended to be imposed by the Commission Staff on Osorio is reasonable, appropriate, and consistent with previous penalties recommended for possession of a machine.” [*Id.* at 5.]

The same representations are also contradicted by the known evidence. [*See* J. Guerrero Findings of Fact and Conclusions of Law, p. 9); *see also* R. Serna Settlement Agreement; §(IV)(A), *supra.*]

The Commission Staff also failed to provide any citation to the record or evidentiary support for the following representations regarding the severity of a ‘machine violation’:

- D. The possession of a machine “is an assault on the integrity of horse racing and pari-mutuel wagering.” [*Id.* at 9.]
- E. “[It] puts into jeopardy all jockeys, horses, and potentially spectators at a race where the machine is present.” [*Id.*]

IV. Argument

- A. There is a material fact in dispute regarding whether the penalty imposed is reasonable, appropriate, and consistent with previous penalties recommended for possession of a machine.

Indiana Trial Rule 56 (C) provides, in relevant part, that judgment shall only be rendered “if the designated evidentiary matter shows that there is no genuine issue as to any material fact.”

- i. There is no evidence that a 10 year suspension is consistent with previous penalties for possession of a machine or is an egregious violation.*

While the Commission Staff went to great lengths to argue that a 10 year suspension is “consistent with previous penalties recommended for possession of a machine,” it provided no evidence to support the same [MSJ, p. 5] or other, similar representations [see § (III) (Material Facts in Dispute or not Support by the Record,’ ¶¶A-C), *supra*.] Similarly, while the Commission Staff argues the present violation is “one of the most serious offenses” and “an assault on the integrity of horse racing and pari-mutuel wagering [that] puts into jeopardy all jockeys, horses, and potentially spectators,” it again provides no evidentiary support.² [See MSJ, p. 9] Of note, none of the foregoing representations were included in the Commission Staff’s section containing the ‘Undisputed Material Facts.’ [MSJ, p. 3]. Accordingly, the same should be stricken and not considered by the ALJ. *See* Ind. T.R. 56(C).

- ii. *The only evidence actually cited by the Commission Staff and known to the Respondent shows the 10 year suspension is not consistent with previous penalties for possession of a machine.*

In two of the three recent ‘machine’ cases known to Respondent, the suspension actually served by the violator was 5 years or less. In *IHRC vs. Ruben Serna*, which the Commission Staff cited, the jockey received a five (5) year suspension for possession of a machine. [R. Serna Settlement Agreement.] In *IHRC v. Sarvis*, which the Commission Staff did not disclose in this matter, the Commission lifted the suspension after approximately four (4) years pursuant to a settlement agreement with the executive director. [J. Guerrero Findings of Fact and Conclusions of Law, p. 9.] In the third case, *IHRC v. Juan Guerrero*, in which a ten (10) year suspension was issued, there were distinguishable circumstances. The licensee (a jockey) did not accept responsibility for his actions, claimed it was “witch hunt” and that the ‘machine’ was planted,

² Those representations are further undermined when the Commission Staff claims “[a]ccordingly, the IHRC’s Executive Director has long proposed a serious suspension and fine for these violations—a ten (10) year suspension and \$5,000 fine,” which, as discussed below, is simply not true.

and ran from the investigator and never produced the machine to investigators. [J. Guerrero Findings of Fact and Conclusions of Law, p. 14-15.]

Further, *Serna* and *Sarvis* also contradict the Executive Director's sworn affidavit that a 10 year suspension is "consistent with prior penalties handed down by the Commission." [M. Smith Aff., ¶11.] As shown by the evidence, in *Serna* and *Sarvis*, the executive director of the Commission signed the settlement agreement and Commission approved the five (5) year and four (4) year suspensions, respectively. [J. Guerrero Findings of Fact and Conclusions of Law, p. 9; R. Serna Settlement Agreement.]

The Commission Staff's unsupported representations that contradict the known evidence are interesting considering that the Commission Staff was previously admonished by an administrative law judge on this exact issue when it "erroneously state[d] that the Staff 'has consistently sought a ten (10) year suspension'" in 'machine cases.' [J. Guerrero Findings of Fact and Conclusions of Law, p. 9.] In that case, the ALJ cited the *Serna* decision as evidence to the contrary.

B. All evidence referenced in the Motion for Summary Judgment but not attached thereto should be excluded.

The Commission Staff relies on an affidavit of the Commission's Executive Director, Michael Smith, which references Exhibits 1-3. [Affidavit of M. Smith, ¶¶5, 6, 10, 13-16.] However, those exhibits were not attached. Therefore, any evidence from or reference to those Exhibits should be stricken and not relied on by the ALJ. *See* Ind. T.R. 56(C).

C. The 10 year suspension is not reasonable or appropriate considering the mitigating circumstances.

Other than the violation itself, the Commission Staff did not cite any aggravating circumstances particularized to the situation or involving Didiel that supports a ten (10) year

suspension. Such suggests the Commission Staff agrees that none exist. Conversely, numerous mitigating circumstances exist.

First and foremost, Didiel has fully cooperated in this matter and truthfully answered all questions posed to him by the Commission Staff's attorney during a deposition, including questions regarding any other individual who was involved in Didiel using and obtaining the machine. While the Commission Staff argues Didiel "admitted interference with the IHRC investigation," that argument is a stretch, as it is most likely based on his initial reaction to hide the machine rather than produce it. [MSJ, p. 9.] Recognizing his mistake and obligation to cooperate, Didiel quickly rectified the situation and produced it soon thereafter to the investigators. [Ex. B (Didiel Aff., ¶3).] Based on those circumstances, the Commission Staff and Stewards both made the choice, independently, not to bring any violation under 71 IAC 5-1-26 for failing to cooperate with a violation, which is noteworthy as to whether they truly believe he interfered with the investigation.

Just as important, the Commission Staff did not offer any evidence of Didiel's history that supports a ten (10) year suspension. [See generally, MSJ.] Again, such suggests that the Commission Staff – which has full access to Didiel's history – did not find anything of substance of in support. Regardless, this was the first time he used any 'machine,' 'buzzer,' or electronic device, and he has never been accused of or suspended for the same. [Ex. B (Didiel Aff., ¶¶2,5).]

Additional mitigating factors include that Didiel has admitted the violation, admitted it was a mistake, and expressed remorse for his actions. That remorse was shown initially to the investigators, then to the Commission Staff during his deposition and continues to this day.

V. Conclusion

In short, a ten (10) year suspension is not reasonable considering the circumstances, not consist with prior penalties for this violation, and not appropriate for Didiel considering the mitigating circumstances.

Respectfully submitted,

ZIEMER, STAYMAN, WEITZEL & SHOULDERS, LLP

By: /s/ Clifford R. Whitehead

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, service of a true and complete copy of the foregoing pleading or paper was made on the following, by depositing the same in the United States Mail, properly addressed and with first class postage prepaid, and by e-mail:

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By: /s/ Clifford R. Whitehead

BEFORE THE ADMINISTRATIVE LAW JUDGE
THE HONORABLE ERNEST YELTON
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INDIANA HORSE RACING COMMISSION STAFF,)
Petitioner,)
)
v.) ADMINISTRATIVE COMPLAINT
) NO. 217006
)
DIDIEL OSORIO,)
Respondent)
)

INDIANA
HORSE RACING COMM.

**IHRC STAFF'S REPLY TO RESPONDENT'S RESPONSE
TO STAFF'S MOTION FOR SUMMARY JUDGMENT**

The Indiana Horse Racing Commission Staff (hereinafter the "Staff" or "Petitioner"), by counsel, pursuant to Ind. Code § 4-21.5-3-23, respectfully submits its Reply to Respondent's Response to Staff's Motion for Summary Judgment. The Staff respectfully maintains that it has established that it is entitled to summary judgment, and Respondent's Response to Staff's Motion for Summary Judgment ("Response") has designated no genuine issue of material fact with respect to the matters alleged in Administrative Complaint No. 217006, making an entry of summary judgment in favor of Staff appropriate. In support thereof, the Staff submits the following Memorandum.

I. INTRODUCTION

On February 9, 2018, Staff filed its Motion for Summary Judgment ("Motion") in accordance with the deadlines established by the Pre-Hearing Order governing this matter. In support of its Motion, Staff provided affidavits from the Indiana Horse Racing Commission's ("IHRC") Executive Director Mike Smith ("Smith") and IHRC Investigator Antionette Sperle ("Sperle"); as well as Respondent Didiel Osorio's ("Respondent" or "Osorio") deposition transcript; Staff also set forth the "undisputed material facts," all of which it maintains support

the entry of summary judgment in the Staff's favor. (Indiana Horse Racing Commission Staff's Motion for Summary Judgment and Memorandum in Support Thereof, pp. 12-67)

On March 9, 2018, Respondent timely filed his Response to Staff's Motion for Summary Judgment, which included incomplete portions of the transcript from Osorio's deposition, an affidavit signed by Osorio, a settlement agreement between the IHRC Staff and Ruben Serna, and incomplete portions of ALJ Pylitt's Findings of Facts, Conclusions of Law and Recommended Order in the matter of the IHRC Staff vs. Juan Guerro. Respondent argues that: 1) there is no evidence that a ten (10) year suspension is consistent with previous penalties¹; 2) Exhibits 1-3 referenced in the Mike Smith Affidavit were referenced but not attached; and 3) ten (10) years isn't an appropriate penalty given the mitigating circumstances. Respondent considers the mitigating factors to be: Osorio's cooperation and truthfulness during his deposition; Osorio quickly rectifying his interference with Staff's investigation by producing the machine "soon after", as outlined in Osorio's Affidavit; and the fact that Osorio expressed remorse for his actions.

II. ANALYSIS

A. Summary judgment standard in administrative proceedings.

Ind. Code § 4-21.5-3-23 provides that "[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." Ind. Code § 4-21.5-3-23(a). The 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." *Id.*

¹ To the extent that Respondent fails to address the reasonableness of the purse redistribution and \$5,000 fine proposed by the Commission Staff, Staff will limit its response to Respondent's arguments regarding the ten (10) year suspension.

Ind. Trial Rule 56(C) provides that summary judgment is appropriate when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Parker v. Ind. State Fair Bd.*, 992 N.E.2d 969, 976 (Ind. Ct. App. 2013). “A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue.” *Parker*, 992 N.E.2d at 976 (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 a 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 a genuine issue of material fact by setting forth specifically designated facts.” *Id.* The court may permit affidavits to a motion for summary judgment to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. Ind. Trial Rule 56(E).

Here, the Staff has shown that it is entitled to summary judgment in these proceedings because there can be no dispute that: (1) Didiel Osorio participated in a race at Indiana Grand while in possession of an electrical shocking device, which is strictly prohibited by Commission statute and rule; (2) the Staff has regularly proposed a ten (10) year suspension in cases involving the possession of an electrical shocking device; and (3) there are no mitigating circumstances in this case. Therefore, the sanction recommended to be imposed by the Staff on Osorio is reasonable and appropriate.

B. Osorio's Response

- 1. The Staff has regularly proposed a ten (10) year suspension in cases involving the possession of an electrical shocking device.**

Respondent alleges Petitioner has failed to provide any citation to the record for evidentiary support for Staff's representations that the sanctions proposed by Staff in its administrative complaint are consistent with previous penalties proposed by the IHRC Staff². Respondent ignores the fact that Petitioner's Motion for Summary Judgment was supplemented with a sworn affidavit³, signed by Smith, which was made on his personal knowledge. Executive Director Smith is a person who is competent to testify to the matters stated therein. Smith has been the Executive Director of the Indiana Horse Racing Commission since 2016 and as such, has familiarity with the rules and regulations regarding the possession or use, or both, of an electrical shocking device. (Smith Aff., Pg. 1, Para. 4) Smith specifically states that he has done a review of prior cases for the same violation, and based on that review, determined that a ten (10) year suspension was appropriate⁴. (Smith Aff., Pg. 2, Para. 11). In the time Smith has served as Executive Director, the Staff has prosecuted two "machine cases" – the matter at hand, as well as the IHRC Staff vs. Juan Guerrero, in which the IHRC issued a final order calling for a ten year suspension.

Respondent states that Petitioner's representations regarding the recommended penalties are "also contradicted by known evidence"; Respondent refers to the settlement agreement

² Respondent also states that there is no evidence in the record that possession of a machine is an assault on the integrity of horse racing and pari-mutuel wagering and puts into jeopardy all jockeys, horses, and potentially spectators at a race where a machine is present. This Court no more needs Petitioner to explain to it why Osorio was afraid to have the machine in his boxers (as he testified in his deposition, pg. 35, lines 4-8) than it needs Petitioner to explain why a machine is an assault on the integrity of horse racing and pari-mutuel wagering and poses a danger to the race participants.

³ Petitioner's Motion was supported by two sworn affidavits—one by Smith and one by Sperle, as well as the Osorio deposition transcript.

⁴ The Smith Affidavit specifically states that a penalty consisting of a ten year suspension, purse redistribution, and a \$5,000 fine is fair and consistent with prior penalties handed down by the Commission.

between Staff and Ruben Serna, as well as “cherry-picked” portions of the Findings of Fact issued in matter of the IHRC Staff vs. Juan Guerrero. Respondent seems confused by the words “proposed” and “recommended”. Even before Mike Smith was hired as the IHRC Executive Director, the Staff has recommended in every administrative complaint alleging a violation of the prohibition against the possession of an electrical shocking device within the past twenty (20) years, a ten (10) year suspension. (Exhibits 1, 3, & 5) Furthermore, the Administrative Law Judge has always recommended a ten (10) year suspension. (See Exhibits 2, 4, & 6) Respondent refers to two cases in which the penalty *served* (not the penalty recommended) was less than ten (10) years. In each of those two cases, mitigating circumstances existed to justify a reduction in the sentence, either after the issuance of the ALJ’s Proposed Findings of Fact and Conclusions of Law, or after the Commission board had issued its final order⁵. As Petitioner will address later herein, there are no mitigating circumstances in this case. Accordingly, Respondent’s arguments that two other licensees served a shorter suspension than was originally proposed by the IHRC’s Executive Director is wholly irrelevant.

Respondent implies that Staff did not disclose, or hid, information regarding the IHRC Staff vs. Dean Sarvis matter from him. (Response, pg. 2) Although not clearly stated by Respondent, Staff presumes that Respondent is alleging that Staff failed to disclose the Sarvis matter in Staff’s answers to Respondent’s Interrogatory No. 6, which requested the following:

INTERROGATORY NO. 6.: Describe each violation of 71 IAC 7.5-6-5(d)(4) involving the possession of an electrical device from August 1, 2012 to the present of which the IHRC Staff and/or IHRC is aware. For each violation, describe the person

⁵ Respectfully and with deference to the ALJ in the Guerrero matter, IHRC Staff believes there existed a misunderstanding or miscommunication regarding the terms “proposed” and terms of the settlement agreement. IHRC Staff does not consider settlement terms to be terms sought by the Commission (as are the proposed penalties included in the administrative complaints issued pursuant to 71 IAC 10-3-20), but rather to be terms settled upon after negotiation.

who violated the rule, each investigator involved, each steward who issued the ruling, and the disciplinary action taken against the violator.

Petitioner takes umbrage at the suggestion that it kept requested information from Respondent, which, if true, could potentially constitute a violation of rules of discovery, as well as rules of ethics. Petitioner provided the requested information regarding IHRC Staff vs. Ruben Serna, IHRC Staff vs. Juan Guerrero, and IHRC Staff vs. Didiel Osorio. Petitioner did not provide any information regarding the matter of the IHRC Staff vs. Dean Sarvis because the Sarvis matter fell **almost fifteen (15) years** outside of the time frame established by Respondent⁶.

2. There are no mitigating circumstances warranting a reduction in the Commission Staff's recommended penalty.

Respondent refers to three (3) mitigating circumstances in this case: 1) Osorio told the truth during his deposition; 2) Osorio "quickly recognized his mistake and obligation to cooperate, and he produced the machine soon thereafter. (Response, Pg. 2, para.2; Respondent's Response, Exhibit B); and 3) Osorio is remorseful.

Ind. Trial Rule 30(C) provides that an officer before whom a deposition is to be taken shall put the witness under oath. Court reporter Sherry Lenn did just that, and signed an affidavit attesting to the fact that Respondent swore under oath to tell the truth. (Motion, Osorio transcript, pp. 39, 40). During the course of the deposition, Petitioner twice asked Osorio if he understood that he was required to tell the truth; he answered unequivocally, "yes".

- Q: "There's no judge present, but it is a formal legal proceeding, which means that it's just like testifying in court. So you're required to tell the truth to the questions I ask.
A: (Witness nods head affirmatively.)

⁶ Mr. Sarvis' violation occurred in 1998. (Exhibit 5)

(Motion, Osorio transcript, pg. 7, lines 9-13.)

Q: Are you aware that licensees are required to tell the truth to the Commission employees during an investigation?

A: I do understand that.

Q: And do you know that you have to tell me the truth today?

A: I do understand.”

(Motion, Osorio transcript, pg. 23, lines 4-10.)

Petitioners do not dispute that Osorio told the truth during his deposition; however, fulfilling an oath, or rather, doing what one is required to do, does not entitle one to preferential treatment. In other words, Osorio should not be rewarded for doing that which he was already obligated by administrative rule and trial rule to do⁷.

Respondent includes in his Response the following statement as an “[A]dditional Material Fact Not in Dispute”: “2. After initial questions by the investigator, Didiel quickly recognized his mistake and obligation to cooperate, and he produced the machine soon thereafter.” This same statement also appears in Didiel’s sworn affidavit, attached to Respondent’s Response as Exhibit B. In further support thereof, Respondent included portions of the transcript of Osorio’s deposition (Response, Exhibit A). Exhibit A provides, in pertinent part, the following:

Q. “Okay. When – did Toni ask you to take your gloves off?”

A. She did.

Q. Okay. And did you take both of your gloves off right then, or did you only take one off?

A: I took both of them off.

Q: Okay.

A: That way she was able to see that I didn’t have anything.

Q: Had you hidden the machine in the back of your pants?

A: No, I didn’t.”

⁷ See 71 IAC 5.5-1-28, which provides, in pertinent part, that all licensees shall cooperate with all investigations and inquiries made by commission representatives.

Respondent failed to provide the rest of the relevant portion of that testimony, which is tantamount to misrepresentation by omission. The next line of remaining relevant testimony is as follow:

- Q: "Where did you hide the machine?"
A: I had it in my pants from the time when I got out -- when I got with the horse.
Q: Could you be more specific where in your pants you had it?
A: In my boxers.
.....
Q: Were you—why didn't you give the machine to Toni when she asked you for it?
A: Because she was sure that I had it in my hands.
Q: Why didn't you give it to her then?
A: Because I didn't want in any trouble.
Q: That's an honest enough answer. I can understand that. When you said that a deputy -- I'm sorry. You said that a sheriff and another person took you to the jockey's room, and they -- did they search you at that time?
A: Yes. They -- they actually took all my clothes off.
Q: Okay. **Is that when they retrieved the machine? Is that when they got the machine?**
A: **Yes."**

(Motion, Osorio transcript, pp. 35, 36) (*emphasis added*)

Despite the fact that Osorio's counsel represents in his Response, and Osorio represents under penalties for perjury in his affidavit, that he was cooperative and produced the machine, that is clearly not the case⁸.

3. **The lack of exhibits to the Smith affidavit is immaterial.**

Respondent bemoans the fact that Exhibits 1-3, referenced in the Smith Affidavit are not attached thereto and argues that same should not be considered by this Court with Staff's Motion. The missing Exhibits consist of the following documents:

⁸ Furthermore, Respondent's counsel was present during Osorio's deposition testimony and still chose to file with his Response an affidavit that directly contradicts what he knew to be his client's sworn testimony and failed to recognize that deposition testimony which is directly contrary to Respondent's position.

Exhibit 1—Race 5 Program at Indiana Grand on August 10, 2017
Exhibit 2 – Osorio’s 2017 license application
Exhibit 3 – Osorio’s 2017 ARCI record.

Exhibits 1 and 3 were part of the Staff’s Administrative Complaint against Respondent; Exhibit 2 was provided to Respondent in response to his discovery requests as IHRC Bates Nos. 00249-0050. Respondent argues that “evidence from or reference to those Exhibits should be stricken and not relied on by the ALJ” pursuant to Ind. Trial Rule 56(C). Respondent ignores Ind. Trial Rule 56(E), which allows affidavits to be supplemented by further affidavits; however, Staff believes the absence of the information on those Exhibits is immaterial to this Court’s decision regarding Staff’s Motion for Summary Judgment. The most relevant information referenced in those Exhibits is Osorio’s ARCI record, which Staff will agree shows that Osorio had no previous rulings against him for possession of an electrical shocking device. Staff’s position continues to be that the fact that Osorio had no previous rulings against him for the possession or use of a machine is irrelevant; none of the other licensees referenced by Respondent⁹ in his Response had previous rulings for possession of use of a machine. (See Exhibits 7-9)

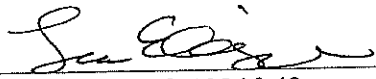
III. CONCLUSION

The Staff has shown that: (1) Didiel Osorio participated in a race at Indiana Grand while in possession of an electrical shocking device, which is strictly prohibited by Commission statute and rule; (2) the Staff has regularly recommended a ten (10) year suspension in cases involving the possession of an electrical shocking device; therefore, the sanction recommended to be imposed by the Staff on Osorio in Administrative Complaint No. 217006 is appropriate.

⁹ Serna, Guerrero, and Sarvis.

Staff has made its prima facie case. Osorio has not designated true facts that successfully create a genuine issue of material fact. Therefore an entry of summary judgment is appropriate. Staff has met its obligation pursuant to Ind. Trial Rule 56 and I.C. § 4-21.5-4-23.

WHEREFORE, the Staff respectfully requests that the Administrative Law Judge enter an Order granting its Motion for Summary Judgment.



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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2018, I served Cliff Whitehead with the foregoing via email and U.S. First Class Mail, postage paid.

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The Honorable Ernest Yelton
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Lea Ellingwood
General Counsel
Indiana Horse Racing Commission

STATE OF INDIANA
INDIANA HORSE RACING COMMISSION

2018 MAY 23 P 2:57

IN RE DIDIEL OSORIO

)
)

COMPLAINT NO. 217006

INDIANA
HORSE RACING COMM.

**Proposed Findings of Fact, Conclusions of Law and
Recommended Order**

The Indiana Horse Racing Commission having filed its Motion for Summary Judgment with Supporting Memorandum, the Respondent, Didiel Osorio, having filed his Reply Brief and the Commission having filed its Response Brief, the Administrative Law Judge now enters the following Proposed Findings of Fact, Conclusions of Law and Recommended Order:

Finding of Facts

1. Didiel Osorio was a licensed jockey by the Indiana Horse Racing Commission in 2017 and was at all times subject to the jurisdiction of the Commission.
2. Osorio was the jockey riding the thoroughbred horse Deep Explorer in Race 5 on August 10, 2017, at Indiana Grand Racing and Casino.
3. Deep Explorer finished first in the race.
4. While in the Winner's Circle shortly after the conclusion of the race, Commission Investigator Toni Sperle observed a shocking device in the possession of Osorio.
5. Osorio has admitted that he used the shocking device on Deep Explorer during that race.
6. After taking all the facts and circumstances under consideration, the Commission recommended that Osorio be fined \$5,000, that his license be suspended for ten (10) years and that the first place purse be forfeited.

Conclusions of Law

1. By using a battery or other electrical or mechanical instrument that may be used to affect the speed or actions of a horse in a race, Osorio violated IC 4-31-12-20(b)(3); IC 4-21-6-6; 71 IAC 5.5-1-14(b)(4); and 71 IAC 5.5-1-14(b)(10).
2. The penalties of a five thousand dollar (\$5,000) fine, a ten (10) year suspension and of a forfeiture of the first place purse are all reasonable and appropriate.
3. The law is with the Commission and against the Respondent.

Recommended Order

Upon the foregoing Findings of Fact and Conclusions of Law, the Administrative Law Judge determines there is no genuine issue of material fact and the Commission is entitled to judgment as a matter of law. Motion for Summary Judgment is granted pursuant to IC 4-21-5.3-23(b).

Pursuant to IC 4-21.5-3-29(d) either party hereto has 15 days following receipt of this Recommended Order to file written exceptions with the Horse Racing Commission.

IT IS SO RECOMMENDED this 21st day of May 2018.



Ernest E. Yelton

Administrative Law Judge

Notice to:

Dale Pennycuff, Counsel

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BEFORE THE INDIANA HORSE RACING COMMISSION

INDIANA HORSE RACING)
COMMISSION STAFF,)
Petitioner)

2018 JUN -5 P 4: 59

v.)

) ADMINISTRATIVE
) COMPLAINT NO. 217006

INDIANA
HORSE RACING COMM.

)
) DIDIEL OSORIO,
) Respondent)

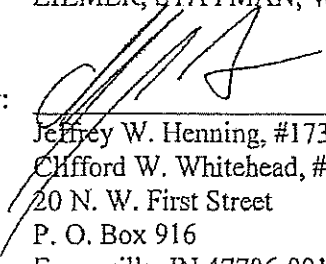
**RESPONDENT DIDIEL OSORIO'S OBJECTIONS TO ADMINISTRATIVE
LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER**

Respondent, Didiel Osorio ("Osorio"), by counsel, hereby files his objection to Administrative Law Judge Ernest E. Yelton's May 21, 2018 Proposed Findings of Fact, Conclusions of Law, and Recommended Order ("Recommended Order"). The Recommended Order is unsupported by the relevant Indiana Administrative Code or the evidence presented during the parties' summary judgment filings as to whether the five thousand dollar (\$5,000) fine, a ten (10) year suspension, and of a forfeiture of the first place purse are reasonable and appropriate. Further, considering the evidence presented by Osorio, there is a genuine issue of material fact as to whether the five thousand dollar (\$5,000) fine, a ten (10) year suspension and of a forfeiture of the first place purse are reasonable and appropriate. Further, the penalties are arbitrary and capacious given the magnitude of a jockey's interest in avoiding suspension and lack of sufficient evidence to support the conclusion that the penalties are reasonable and appropriate. Osorio adopts, by reference, the legal authority and argument for those objections raised in Osorio's Response to Motion for Summary Judgment filed with the ALJ.

Respectfully submitted,

ZIEMER, STAYMAN, WEITZEL & SHOULDERS, LLP

By:

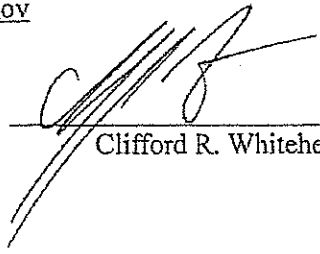


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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2018, service of a true and complete copy of the foregoing pleading or paper was made on the following, by depositing the same in the United States Mail, properly addressed and with first class postage prepaid, and by e-mail:

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Clifford R. Whitehead

Additional Exhibits belonging to the following
matter can be viewed @ the IHRC Office.

Didiel Osorio

v.

Indiana Horse Racing Commission Staff