

Agenda Item # 2

**INDIANA HORSE RACING COMMISSION
HEARING ON ADMINISTRATIVE COMPLAINT
BEFORE AN ADMINISTRATIVE LAW JUDGE**

INDIANA HORSE RACING)	
COMMISSION STAFF,)	
)	
Petitioner,)	
)	Administrative Complaint #215012
vs.)	
)	
JUAN DELEON GUERRERO,)	
)	
Respondent.)	

**FINDINGS OF FACTS,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

This matter came before Administrative Law Judge Pylitt for a hearing on April 25, 2016 following the issuance of Administrative Complaint #215012 against jockey Juan De Leon Guerrero (hereinafter “Guerrero”) on February 5, 2016 by the Indiana Horse Racing Commission (“Commission”) based upon his possession and/or use of an illegal “machine”¹ while riding Stone Toasted, a quarter horse, who was the betting favorite during the 10th and final race at Indiana Grand on Tuesday, August 11, 2015.

PROCEDURAL BACKGROUND

On Wednesday, August 12, 2015, the Stewards initially conducted a hearing and determined that Guerrero should be summarily suspended for using a “machine” during the 10th race the evening before. At the conclusion of their hearing, they issued Stewards Ruling #15576. (Exhibit 4 to IHRC Staff’s hearing Exhibit A).

On August 25, 2015, John Shanks entered his Appearance on behalf of Guerrero and requested a hearing before the Stewards.

¹ A “machine” is a phrase commonly used in the horse racing world to describe an electronic device applied to a horse by a jockey during a race to produce low current, high voltage pulses between the electronics having the effect of a taser or cattle prod.

Subsequently, on August 27, 2015, the Stewards conducted a hearing to determine whether or not to vacate their earlier summary suspension. Guerrero appeared in person and by his counsel, John Shanks. Evidence was heard and Guerrero's summary suspension remained in place.²

On February 5, 2016, Commission Staff issued Administrative Complaint #215012 against Guerrero, finding that:

- a. Guerrero violated 71 IAC 7.5-6-5(d)(4), which provides that possession of any electrical or mechanical stimulating or shocking device by a jockey shall be prima facie evidence of a violation of these rules and is sufficient grounds for the Stewards to scratch or disqualify a horse.
- b. Guerrero violated 71 IAC 7.5-6-5(f)(3), which provides that no electrical or mechanical device or other expedient designed to increase or retard the speed of a horse, other than the riding crop approved by the Stewards, shall be possessed by anyone or applied by anyone to a horse at any time on the grounds of the association during the meeting, whether in a race or otherwise.
- c. Guerrero violated IC 4-31-12-20(b)(3), which provides that the judges or Commission may suspend the license of a person who possesses a battery or other electrical or mechanical instrument that may be used to affect the speed or actions of a horse on the premises of a permit holder.
- d. Guerrero has violated 71 IAC 5.5-1-14(b)(4), 71 IAC 5.5-1-14(b)(10), and 71 IAC 5.5-1-14(b)(16), which provides that the Commission may suspend a license or otherwise penalize a licensee if:

² The Stewards are to be commended for their timely and professional handling of this matter.

(4) The person has violated or attempted to violate a provision of this article, these rules, or a law or rule with respect to horse racing in a jurisdiction.

(10) The person has engaged in conduct that is against the best interest of horse racing or compromises the integrity of operations at a track or satellite facility.

(16) The person has interfered with or obstructed a member of the commission, a commission employee, or a racing official while performing official duties.

Guerrero requested a hearing pursuant to 71 IAC 10-3-20(d) in a timely manner.

Bernard L. Pylitt was appointed to serve as the Administrative Law Judge on February 8, 2016 (“ALJ Pylitt”). Following an initial telephonic prehearing conference conducted on February 9, 2016, discovery was conducted, the hearing was subsequently continued twice by agreement of counsel, and finally scheduled for April 25, 2016.

PARTIES

1. Guerrero was at all relevant times a licensee of the IHRC having submitted his sworn 2015 jockey Multi-Purpose License Application signed on April 7, 2015. (Exhibit B). By submitting his application, Guerrero acknowledged under oath his understanding that:

- a. His participation in racing in Indiana was a privilege and not a right;
- b. He agreed to abide by the statutes of the State of Indiana relating to racing as well as the Indiana Thoroughbred Rules and Regulations;
- c. He was subject to the searches provided for by Indiana Code § 4-31-13 and the Indiana Thoroughbred Rules and Regulations; and
- d. He understood that participation in racing in Indiana is a privilege, not a right . . . By acceptance of said license, he agreed to abide by the statutes of the State of Indiana relating to racing.

2. The Indiana Horse Racing Commission (“Commission”) is an administrative agency created by the legislature pursuant to its enabling statute, I.C. § 4-31 *et seq.* The

Commission was created for the purpose of ensuring “that pari-mutuel wagering on horse races in Indiana will be conducted with the highest of standards and the greatest level of integrity.” I.C. § 4-31-1-2. The Commission has a long-standing directive in its governing statute and related administrative regulation that allows the Commission to sanction a licensee if the person has engaged in conduct that is against the best interest of horse racing or compromises the integrity of operations at a track or satellite facility. 71 IAC 5.5-1-14(a)(10).

3. The Commission Staff (“IHRC Staff”) is responsible for the day-to-day operations of the Indiana Horse Racing Commission, including enforcement of regulations, and prosecution of violations. The Commission Staff is distinct and separate from the Indiana Horse Racing Commission. The Commission Staff is the party to this proceeding.

4. The Board of Stewards during the 2015 Thoroughbred Racing Meet at Indiana Grand included Senior State Steward Stan Bowker, and Billy Troilo and Timothy Day, Associate Stewards.

HEARING BEFORE ALJ

On Monday, April 25, 2016, the hearing was commenced at 9:00 a.m. in the Indiana Horse Racing Commission Offices, located at 1302 North Meridian St., Suite 175, Indianapolis, Indiana. Guerrero appeared in person and with his counsel John Shanks. The IHRC Staff was represented by Lea Ellingwood. For several days prior to the hearing, counsel engaged in email discussions about who was responsible for providing Guerrero with an interpreter. Guerrero’s Wife was present throughout the hearing and assisted him. (Hearing transcript, TR p. 5)³ The IHRC Staff provided an independent interpreter while Guerrero testified. (TR p.182)

³ All further references to the testimony during the hearing shall be referenced as TR p. ____.

The parties agreed to the authenticity, relevance, and admissibility of eighteen exhibits, which were admitted into evidence as Staff Exhibit A through S by stipulation and without objection from Guerrero (TR p.24):

Exhibit A- Administrative Complaint with attachments

Exhibit B- Juan Guerrero's 2015 Sworn Multi-Purpose License Application submitted to the IHRC on April 7, 2015 (indicating that he was 27 years old on the date of the alleged violation.)

Exhibit C- Video of Race 10 on Tuesday, August 11, 2015 at Indiana Grand

Exhibit D- Gloves worn by Guerrero during the 10th race on August 11, 2015

Exhibit E- "Machine" found on roof of the Indiana Grand Casino on Wednesday morning, August 12, 2015

Exhibit F- Deposition of Kevin Tompkins-March 4, 2016

Exhibit G- Deposition of Juan DeLeon Guerrero-March 10, 2016

Exhibit H- Deposition of Melissa Montgomery-Wolf Technical Services-March 28, 2016

Exhibit I- CV for Melissa Montgomery, BSME, MSBE

Exhibit J- Melissa Montgomery's Forensic Report- dated March 17, 2016

Exhibit K- Melissa Montgomery's Supplemental Forensic Report- dated April 14, 2016

Exhibit L- Chain of custody report for 2 exemplar "machines" used in study

Exhibit M- Aerial view of Winner Circle and path to Paddock

Exhibit N- Schematic diagram of the Paddock/Jockey's quarters at Indiana Grand

Exhibit O- CV for Paul Thogersen, PE

Exhibit P- Paul Thogersen's Forensic Report about Guerrero's gloves and the "machine" located on the Indiana Grand Casino roof on August 12, 2015-dated March 16, 2016

Exhibit Q- IHRC ruling May 26, 1999 in the matter of *IHRC v. Dean Sarvis* suspending him for ten (10) years for possession of an electrical device

Exhibit R- consists of 2 separate documents:

- a. IHRC ruling in the matter of *IHRC v. Ruben Serna* on November 27, 2013 imposing a five (5) year suspension and a fine of \$7,500 following Serna's post-ruling admission to the violations and a Settlement Agreement dated September 13, 2013.
- b. ALJ's Recommended Order dated August 29, 2013 accepting the Executive Director's recommendation requesting a ten (10) year suspension and a fine of \$5,000.

The Serna Settlement Agreement was not received into evidence during the hearing

Exhibit S- Select Indiana statutes and Administrative Rules governing Pari-Mutuel Wagering, including portions found at Indiana Code 4-31 et seq.

During cross examination of Guerrero's witness, Randy Smith, IHRC Staff offered Exhibit T, a letter dated May 2, 2014 from Trainer Randy Smith to Holly Newell, legal counsel, IHRC Staff, requesting that Ruben Serna be allowed "topside" at the track following his suspension, which was admitted without objection.

Additionally, counsel entered into 17 Stipulations of Fact which were introduced into the record as Joint Exhibit A.

Guerrero offered no Exhibits during the hearing other than Exhibit G, the transcript of his deposition taken on March 10, 2016.

**GUERRERO'S MOTION TO ADMIT POST HEARING EXHIBIT
TO CLARIFY EXHIBIT R**

On Wednesday, April 27, 2016, two days following the hearing in this matter, and in response to a question from the ALJ about the content of Exhibit R as admitted into the record, counsel for Guerrero emailed a request to exclude the ALJ's August 29, 2013 Findings of Fact

and Recommended Order in the prior Serna matter, included as part of Exhibit R, and substitute it with a Settlement Agreement dated September 13, 2013 (hereinafter referred to the “Serna Settlement Agreement”), which was not offered as part of Exhibit R.

A flurry of email activity resulted in the ALJ, on Thursday, April 28, directing counsel for Guerrero to file a Motion outlining his request to substitute exhibits as well as the basis for said request by no later than noon on Friday, May 6, 2016. Counsel for the IHRC Staff was provided an opportunity to respond by May 13, 2016.

On May 5, 2016, Guerrero filed his Motion to Admit Post Hearing Exhibit. Guerrero suggests that the record is not complete since the Serna Settlement Agreement was “inadvertently” left out of Exhibit R. Counsel argues that this Settlement Agreement was entered into after the Serna hearing before the ALJ but before the final Ruling by the full Commission. Therefore, Guerrero argues that the IHRC Staff was not “awarded” a ten (10) year suspension initially sought since the final five (5) year penalty was substantially less harsh. To preserve the integrity of the record so it is accurate and complete, Guerrero contends that the ALJ’s August 29, 2013 Findings of Facts, Conclusions of Law and Proposed Order in the Serna matter be excluded from Exhibit R, and in its place, the Serna Settlement Agreement be substituted, or in the alternative that the Serna Settlement Agreement be admitted as a separate Post Hearing Exhibit.

Counsel for Guerrero represents that he reviewed the Commission’s 2013 Agendas and transcripts of Commission meetings in an effort to locate if, and when, the Commission entered a Final Order adopting the ALJ’s recommended penalty of a ten (10) year suspension prior to the Serna Settlement Agreement being approved and a Final Order issued, and offers the following:

- a. Serna failed to appear for his hearing before the ALJ on May 22, 2013.

- b. The ALJ issued his Recommended Order on August 29, 2013. (See Exhibit R).
- c. The ALJ's Findings of Fact, Conclusions of Law and Recommended Order in the Serna matter was listed as Item #1 on the September 17, 2013 Commission Agenda. However, the minutes of that meeting (approved on October 29, 2013) make no mention of any action by the Commission on the Serna case except that the item was withdrawn from the Agenda.
- d. Serna signed the Settlement Agreement on September 9, 2013 which was presented to the Commission for its approval at the October 29th meeting.
- e. On the October 29, 2013 Commission meeting Agenda (Item #6) indicates that the Serna Settlement Agreement was considered and approved by a 4-0 vote. The transcript of the hearing indicates that counsel for the IHRC Staff stated that the agreed five (5) year suspension was "consistent with the penalties previously assessed by the Commission for this particular violation".
- f. Counsel was unable to substantiate IHRC Staff's position that the Commission adopted the ALJ's Recommended Order recommending a ten (10) year suspension before the Settlement Agreement was approved on October 29, 2013.
- g. The October 29, 2013 Ruling imposing a reduced five (5) year suspension constituted the Final Order in the Serna case and specifically refers to the Settlement Agreement.

Therefore, Guerrero argues that "extenuating circumstance" exist which justify his request to admit a post hearing exhibit which will clarify Exhibit R, which he alleges was mischaracterized by the IHRC Staff as the ruling in the Serna case.

In IHRC Staff's Objection to Guerrero's Motion to admit Post Hearing Exhibit, filed on May 12, 2016, counsel for the IHRC Staff acknowledged at footnote 2 that she previously misstated the timing of the Serna Settlement Agreement which was in fact entered into before the Commission had an opportunity to consider the ALJ's Recommended Order of a ten (10) year suspension.

IHRC Staff argues that extenuating circumstances do not exist justifying the admission of a post hearing exhibit which it claims is irrelevant and would be misleading for the Commission. Finally, IHRC Staff contends that the penalty imposed was based upon the facts in each of the “machine” cases.

While IHRC Staff correctly suggests that this ALJ recommended a ten (10) year suspension in Sarvis and Serna, it erroneously states that the Staff “has consistently sought a ten (10) year suspension” as evidenced by its Agreement with Serna to a reduced five (5) year suspension pursuant to the missing Settlement Agreement, which is referenced as part of the document admitted as IHRC Staff Exhibit R. As a result, the only ruling IHRC Staff received in the Serna matter was a five year penalty even though it original sought a ten (10) year suspension.

Finally, IHRC Staff contends at page 7 of its objection that “the Serna and Sarvis penalties are consistent in that both were modified post hearing to a five (5) year suspension”. However, it references an inaccurate date in footnote 9 of when Sarvis was suspended. A careful review of the Sarvis Settlement Agreement shows that his ten (10) year suspension was lifted approximately four (4) years after imposed; not five (5).

71 IAC 10-3-12 (k) provides that an ALJ may allow a party to offer an exhibit into evidence after the close of the hearing only upon a showing of “extenuating circumstances” and a certificate of service on each party of record. While the term “extenuating circumstances” is not defined by a Commission regulation, or any Court Order, there is a need for clarity about what occurred in two (2) prior “machine” cases to avoid any confusion on the part of the Commission. Counsel created this confusion which hopefully this Recommended Order will clarify.

Pursuant to the April 4, 2016 Order continuing the hearing in this matter, IHRC Staff Exhibits, including Exhibit R, were pre-marked, and provided to counsel for Guerrero by April 18, 2016. When counsel for Guerrero was initially asked to explain what “extenuating circumstances” existed two days after the conclusion of the hearing justifying the admission of the proposed additional Exhibit into evidence, he stated that Exhibit R was discovered to be incomplete following the hearing (and arguably after the ALJ’s inquiry) because it referenced a Settlement Agreement which reduced Serna’s suspension to five (5) years.

Counsel for Guerrero knew, or should have known, at least 10 days prior to the hearing of his obligation to review IHRC Staff’s proposed Exhibits. Yet Guerrero failed to object to IHRC Exhibit R during the hearing, and failed to offer the Serna Settlement Agreement as part of his presentation. Regardless, counsel for IHRC Staff created this confusion by introducing a “Licensing Report” in the Serna matter, as part of Exhibit R, indicating that a five (5) year suspension was imposed pursuant to an “Agreement” dated September 13, 2013, despite the fact that the ALJ originally recommended ten (10) year suspension.

Therefore, the ALJ finds that due to the confusion created by Exhibit R, extenuating circumstances exist, and hereby GRANTS Guerrero’s Motion to admit the Serna Settlement Agreement to clarify the apparent inconsistencies in IHRC’s Exhibit R. A copy is attached hereto, and shall be identified for the record as Guerrero Exhibit 1. It is clear that Rueben Serna ultimately received a five (5) year suspension for his possession of an illegal electronic device after he admitted to possessing an illegal “machine” in his dorm room regardless of the ten (10) year suspension original sought by the IHRC Staff, and recommended by the ALJ in his Recommended Decision.

The Court Reporter is directed to supplement the record to include Guerrero Exhibit 1.

WITNESSES AT HEARING

The following witnesses testified on behalf of the IHRC Staff:

- I. Kevin Tompkins - Investigator for the IHRC
- II. Jeffery Vinson - Valet who assisted Guerrero during the evening in question
- III. Billy Troilo – Associate Steward at Indiana Grand on the evening in question and retired jockey (age 54)
- IV. Melissa Montgomery, BSME, MSBE, - Wolf Technical Services

Trainer Randy Smith testified on behalf of Guerrero. Ironically, Smith was also the trainer for a horse Reuben Serna rode while possessing an illegal “machine” three years earlier. While Smith testified that possession of a “machine” is a serious violation (TR p. 174), and he would “get rid of” anyone working for him, he requested that Serna be allowed back to the “topside” of the track where the public views racing after his suspension (TR p.178 and Exhibit T). Fast forward to October 2015, and another of his jockeys, Guerrero, is accused of possessing an illegal “machine”.

Juan De Leon Guerrero did not testify on his own behalf. However, he offered the transcript from his deposition. IHRC Staff then called him as a witness in Rebuttal.

At the conclusion of the hearing, counsel mutually agreed to accelerate the deadlines for the submission of proposed Findings of Fact and written exceptions to the ALJ’s Recommended Order to help expedite the process and allow the full Commission to consider this Recommended Order during its next scheduled meeting on June 6, 2016.

ANALYSIS BY WOLF TECHNOLOGY SERVICES

Paul Thogersen (“Thogersen”), of Wolf Technology Services Inc., was retained on February 9, 2016 by Commission Staff and asked to perform an analysis of an electrical item and gloves admitted as Exhibits D and E.

On March 16, 2016, Thogersen submitted his Summary (Exhibit P) which included an analysis of the gloves and “machine” based on the laws of physics, mathematical computations, published data, education, background, and experience in the fields of Materials Science and Electrical Engineering. As outlined in his CV (Exhibit O), Thogersen has extensive education and experience in mechanical, electrical, and electronic failure analysis, consumer and industrial product design, materials selection and evaluation, and product design review and reliability assessment.

Guerrero stipulated that Paul Thogersen, P.E., C.F.E.I., is qualified by training and experience to issue expert opinions with respect to electrical and mechanical engineering issues in the Guerrero matter and takes no issue with the contents of, or the conclusions drawn, in his forensic report (Joint Exhibit A, Stipulation 16).

Thogerson noted that this “machine” was very similar in design and construction to one he examined in 2012 for the IHRC Staff. (Exhibit P, pg. 5). Due to the timing of his prior analysis, and the testimony in the record of two prior incidents where machines were located in Indiana, it seems logical to the ALJ that the earlier “machine” was Reuben Serna’s.

Thogerson concluded that the effects of low current, high voltage pulses applied to the skin through devices such as this is well known to produce a similar effect to a taser or a cattle prod. The electrical device is designed to cause muscle spasms and incapacitation of a horse.

The structure of the electrical shocking device allows the 2000V current to flow, repeating the cycle of at a rate of approximately 400 times per second. (Exhibit P, p. 5). A 700V current with pulses a second or two apart is the minimum necessary to energize a fence to control cattle; a 2000V to control longer-haired animals like sheep. Cattle prods use somewhat higher voltages, with electrodes spaced about an inch apart. The electrical shocking device found in this case is a smaller device which functions in a similar way to a cattle prod—to produce low current, high voltage pulses between electrodes. (Exhibit P, pgs. 19, 20).

Thogersen's technical opinion concluded that:

1. The electrical device is powered by a single AAA battery. It produces a high voltage between two terminals at one end of the device when a moveable contact is depressed to connect the circuitry to the positive terminal of the battery. It produces a measurable peak voltage of 2000 V into a 1.0 megohm load. The "machine" will produce this high voltage when the contacts are pressed against an object.
2. Actuation of this device will produce an electrical shock to an animal, such as a horse, when pressed against the skin.
3. The racing gloves received from Juan Guerrero have been modified by adding holes which allow the user to conceal the body of the "machine" inside the glove while the electrodes pass through. This enables the user to conceal most of the "machine" and press the electrodes against the skin of the horse, to produce an electrical shock to the animal.

Additionally, Thogersen determined that the racing gloves, which have been marked with Guerrero's initials, have been modified by adding holes that allow the user to conceal the body of the "machine" inside the glove while allowing electrodes to pass through, allowing contact with the skin of a horse. (Exhibit P, p. 2).

The holes in Guerrero's gloves are clearly not a result of wear and are only present in the left glove. The wear patterns demonstrate that the right glove was subjected to heavier wear than the left glove; however, no holes appear in the right glove. (Exhibit P, p. 11)

The gloves worn by Guerrero have no fingers, consistent with the description provided by the confidential informant. (Exhibit P, p. 12; TR pgs. 19- 20).

Thogersen determined that the holes located in the left glove are located in two small groupings, and there is a pattern within the spacing; an approximate half inch spacing is observed between several hole pairs. This is the same as the spacing between the electrodes. Therefore, it is highlight likely that the holes were created specifically to accommodate this machine. (Exhibit P, p. 17)

SUMMARY OF GUERRERO'S DEFENSE

While the IHRC Staff has the burden of proof in this matter, Guerrero, from his opening statement, cross-examination of witnesses, witness, and his closing argument, maintains his innocence. His defense can be summarized as follows:

1. Stone Toasted was the favorite in the 10th race on August 11, 2015 so there would be no reason to use a “machine”.
2. This is a “witch hunt” to get Guerrero who was the leading winning jockey at Indiana Grand during 2015.
3. Some unknown person “planted” the “machine” on the roof of Indiana Grand Casino.
4. Guerrero does not speak English and therefore did not understand what Investigator Tompkins was instructing him on August 11, 2015.
5. Guerrero ran from Investigator Kevin Tomkins since he was afraid, scared, tired, and needed to use the restroom.
6. There is no credible evidence to link the “machine” found the following morning to Guerrero.
7. There is no clear evidence that this was Guerrero’s “machine”.
8. There were no fingerprints found on the “machine”.

9. If the IHRC Investigator and the Stewards had reliable information the morning of the race that Guerrero would have or use a “machine” during the 10th race, they had a duty to stop Guerrero from carrying a “machine” before the 10th race. Their failure to do so was a violation of their statutory duties and “irresponsible”.
10. The proposed sanctions are unreasonable and inappropriate.

GUERRERO’S ADMISSION IN HIS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agreed to present proposed findings of fact and conclusions of law for the ALJ to utilize in preparing his Recommended Decision. Contrary to his denial of any wrongdoing, Guerrero admits in paragraphs 30-32 for the first time in his proposed findings and conclusions that he committed a portion of the violations in the Administrative Complaint:

VIII. The Substantial and Reliable Evidence Supports the Conclusion that Guerrero violated 71 IAC 5.5-1-14(b)(10) and 71 5.5-1-14(b)(16):

30. When Guerrero, Vinson and Tompkins arrived at the paddock area Guerrero ran from Tompkins, past the rest room in the jockey quarters onto the enclosed patio despite Tompkins instructions to “stop”. (TR, p. 11)
31. Although there is substantial and reliable evidence that although Guerrero was excited and agitated during his encounter with Tompkins, is not fluent in English, he could understand basic words in English such as “stop” but continued to run from Tompkins.
32. Guerrero’s conduct was not in the best interest of horse racing and interfered with or obstructed a commission employee while performing official duties.

Guerrero suggests that he be suspended for 43 weeks from the summary suspension, or around June 2016, that no fine be imposed, and that Stone Toasted be ordered placed in first position and the purse money be distributed.

However, Guerrero maintains his innocence and claims that there is no evidence that he possessed an electronic shocking device. Therefore, this Recommended Decision will primarily focus on whether said violation occurred and, if so, what penalty is appropriate.

PENALTY RECOMMENDED BY EXECUTIVE DIRECTOR

Pursuant to the powers delegated by Indiana Code § 4-31-3 and 71 IAC 10-3-20(b), Michael Smith, as Executive Director of the Indiana Horse Racing Commission, issued Administrative Complaint No. 215012 on February 5, 2016. In this Administrative Complaint, the Executive Director recommended that Guerrero be fined Five Thousand Dollars (\$5,000) and be ineligible for licensure for a period of ten (10) years.

At all times relevant, Mr. Smith was delegated by the Commission with the authority to prepare and issue Administrative Complaints pursuant to the provisions of 71 IAC 10-3-20. As the Commission's Executive Director, it is Mr. Smith's responsibility to propose sanctions for violations that a Commission investigation reveals have been committed. In proposing a penalty, the IHRC Staff is to consider the facts specific to and the severity and seriousness of the violation(s). 71 IAC 2-11-1; 71 IAC 10-3-20(b).

Based upon his review of the facts giving rise to Board of Stewards Ruling No. 12690, the Executive Director determined that Guerrero possessed an "electrical device" (or "machine") on grounds within the jurisdiction of the IHRC. Based upon his review of sanctions assessed for two similar violations in Indiana, he felt that the penalties which he proposed for Guerrero were appropriate.

The Executive Director considered the prior ruling in the Serna matter as well as the ALJ's Finding of Fact in that case that the possession of an electrical device was a serious violation, considering the following factors:

- a. Possession of an electrical device is expressly prohibited by state statute and Commission regulation;
- b. Possession of an electrical device negatively impacts the integrity of the sport since it upsets fair play in both betting and the athletic contest;
- c. Use of an electrical device is cruel to the animal on which it is used;
- d. Use of an electrical device is a safety issue; and
- e. A ten (10) year suspension and \$5,000 fine is consistent with two similar cases in Indiana involving the possession of an electrical device.

The Commission is responsible for protecting the integrity of horse racing and pari-mutuel wagers. Electrical shocking devices not only put other jockeys and horses at risk, but they potentially impact the outcome of the event and therefore, impact the integrity of the sport.

Pursuant to 71 IAC 10-3-12(f), the special skills and knowledge of the Commission and Staff may be used in evaluating the evidence. In addition, during the course of the proceedings, the Commission Staff may recommend that imposition of penalties and sanctions authorized by statute which the ALJ may in his discretion accept, reject, or modify.

Pursuant to IC 4-21.5-3-27(d), the Administrative Law Judge's experience, technical competence, and specialized knowledge may be used in evaluating evidence.

This is the third case involving the unauthorized possession or use of a "machine" by a jockey during the past 16 years in Indiana. The IHRC Staff requested a ten (10) year suspension in each of these three matters.⁴ IHRC Staff has historically proposed a ten (10) year suspension and a fine for violations alleging possession of electrical shocking devices in the regulated area. In both of the prior disciplinary actions concerning possession of an electrical shocking device, the ALJ has held that a ten (10) year suspension and fine is appropriate. (Exhibit Q, pgs. 2-7; Exhibit R, pgs. 2-18).

⁴ ALJ Pylitt was assigned to all three of these matters.

The first case involved jockey Dean Sarvis, who at the conclusion of a race, ran from the IHRC Investigator to prevent discovery of a “machine” he possessed during the race. Sarvis threw away the “machine” while being chased. Exhibit Q is the prior ruling by the IHRC on December 21, 1999. Following the hearing, the Commission approved the ALJ’s Recommended Order and imposed a 10 year suspension but reduced the ALJ’s recommended fine to \$1,000. Apparently, without any involvement of the ALJ, that suspension was lifted just four (4) years later pursuant to a Settlement Agreement also not offered into the record but discussed at length by IHRC Staff in its Objection to Guerrero’s Motion to Admit a Post Hearing Exhibit.

The second case involved jockey Reuben Serna. Serna failed to appear for his hearing before the ALJ. The evidence presented to the ALJ at his hearing included a summary of testimony from investigators who found a “machine” hidden under Serna’s jeans in a dorm room where he was living. Exhibit R includes the ALJ’s August 29, 2013 Recommended Decision recommending a ten (10) year suspension which was accepted by the IHRC, but later modified to a five (5) year suspension, without any involvement of the ALJ, with an increased fine of \$7,500, apparently following Serna’s post-ruling admission to the violations apparently made in a Settlement Agreement dated September 13, 2013, which was not admitted into the record.

In the Serna matter, the ALJ found (Exhibit R, Finding of Fact 20) that:

- a. Possession of an electrical device is expressly prohibited by state statute and Commission regulation.
- b. Possession of an electrical device negatively impacts the integrity of the sport since it upsets fair play in both betting and the athletic contest.
- c. Use of an electrical device is cruel to the animal on which it is used.
- d. Use of an electrical device is a safety issue.

- e. A ten (10) year suspension and \$5,000 fine is consistent with other similar cases involving the possession of an electrical device.

BASIS FOR RECOMMENDED DECISION

Based upon a careful and complete review of the entire record, the credibility of the witnesses, and argument of counsel, ALJ Pylitt rejects each of the arguments made in Guerrero's Defense, particularly that he did not possess an illegal "machine", and renders the following Findings of Fact, Conclusions of Law, and Recommended Order pursuant to Indiana Code § 4-21.5-3-27. Any Finding of Fact that is more properly a Conclusion of Law shall be deemed a Conclusion of Law. Any Conclusion of Law that is more properly a Finding of Fact shall be deemed a Finding of Fact.

FINDINGS OF FACT

A. The Substantial and Reliable Evidence Supports the Conclusion that Guerrero was in possession of an electrical shocking device in a regulated area on August 11, 2015.

1. On the morning of August 11, 2015, Tompkins received a specific tip from a credible confidential informant. The tip stated that Guerrero would be using a "machine" in the 10th race while riding the race horse Stone Toasted. Furthermore, Tompkins was advised that Guerrero would be wearing gloves with the fingers cut out and punched holes in the gloves through which brass prongs could come through to make contact with the horse when he rides. (Exhibit A, TR pgs. 19-20).

2. Tompkins communicated the specific information received by way of a tip from a credible source (TR p. 21) to the Stewards. As a result, a plan was developed by the group for Tompkins to intercept Guerrero after the 10th race and escort him to the film room in the jockey's quarters to be searched (TR p. 21) rather than confronting him prior to the race.

3. The Stewards deem all information about rule violations to be credible. (TR p. 137)

4. Guerrero won the 10th race and returned to the winner's circle immediately after the race for his weigh-in. After his weigh-in, Tompkins approached Guerrero and his valet, Jeff Vinson ("Vinson"). TR p. 28).

5. Tompkins' regular practice was to wear his Commission Staff identification badge. Tompkins was wearing his identification badge around his neck when he approached Guerrero and Vinson and identified himself. (TR pgs. 29-30).

6. Guerrero knew Tompkins was a Commission Investigator having met for a urine test on Guerrero on June 5, 2015, approximately two (2) months prior. (TR pgs. 25 and 63). Tompkins spent approximately half of his work day during the racing season in the restricted area with jockeys and other licensees. (TR pgs. 17 and 102).

7. Tompkins advised Guerrero and Vinson that he would be conducting a search of Guerrero and Guerrero's equipment in the film room in the paddock based upon a tip. (TR p. 30).

8. It was the standard practice not to search jockeys in public. (TR p. 83)

9. Guerrero understood that he was about to be searched. (TR p. 103). Guerrero said nothing would be found. (TR p. 30). Guerrero "chuckled". (TR p. 103).

10. Tompkins escorted Guerrero and Vinson to the jockeys' quarters via a direct path from the winner's circle to the entrance of the jockey's quarters. The distance of that path is approximately 300 feet and walking the path took between one to three minutes at most. (TR pgs. 32 and 104).

11. Tompkins walked between Guerrero and Vinson, shoulder-to-shoulder, with approximately one foot of space between them each so he could observe Guerrero's hands. (TR p. 33).

12. Although Guerrero is not fluent in English, he understood and communicated with Tompkins on August 11, 2015 and previously during the June 5th urine test. (TR pgs. 76 and 98).

13. During the walk from the winners circle to the jockey's quarters ("the walk"), Guerrero discussed the 10th race and showed Tompkins a \$100 bill, a tip Guerrero received while in the winner's circle. (TR pgs. 34-35).

14. During the walk, Tompkins observed Guerrero "fidget" and act in such a way to obscure Tompkins' view of Guerrero's left hand. (TR pgs. 33-34).

15. During the walk, Tompkins did not act toward Guerrero in an aggressive, confrontational, adversarial, or angry manner. (TR pgs. 105-106). Tompkins did not raise his voice or touch Guerrero. (TR p. 35). The walk was "uneventful". (TR p. 37).

16. While Guerrero, Tompkins, and Vinson entered the door to the jockeys' quarters, Tompkins entered after Guerrero so that Tompkins could continue to observe Guerrero's hands to ensure he did not drop or toss anything. (TR pgs. 38 and 40).

17. Upon entering the jockeys' quarters, Tompkins observed that the door to the film room was already open. Tompkins pointed to the door and directed Guerrero to go to the film room. (TR p. 41).

18. Approximately three seconds after entering the jockey's quarters, Guerrero said he "had to pee" and took off running. Tompkins told him "no" loudly enough for Guerrero to have heard him. (TR pgs. 41-42 and 107-108).

19. Guerrero ignored Tompkins' direction to stop and ran to evade Tompkins in an apparent effort to avoid being searched. Despite having been in the jockeys' quarters on numerous occasions, Guerrero ran past the only restroom, and onto an enclosed patio.

20. Tompkins gave chase after Guerrero who went out a door to an enclosed patio. (TR pgs. 42-43).

21. Immediately upon entering the enclosed patio, Tompkins observed Guerrero throw an item smaller than a baseball in an "overhand baseball style" throw "as hard as humanly possible" while running toward the privacy fence. (TR pgs. 48-49).

22. Immediately after Guerrero threw the small item, his disposition changed. (TR pgs. 51-52). Tompkins asked him twice what he threw and Guerrero responded "nothing". (TR p. 51).

23. Tompkins and others immediately searched the grounds outside the patio wall and were unable to locate anything and abandoned their search for the evening. (TR p. 58).

24. Tompkins directed casino security to focus surveillance cameras on the area overnight to make sure no one could locate the object thrown. (TR p. 58).

25. Approximately one hour later, Tompkins returned to the jockey's quarters and interviewed and searched Guerrero, and confiscated the gloves worn by Guerrero during the 10th race. A translator was provided to Guerrero during the interview. Guerrero indicated, through his translator, that the gloves were his and the holes in the gloves were from wear and tear. (TR pgs. 53-54).

26. Guerrero did not use the restroom during this entire time.

27. An electrical device was found early the following morning on the casino building roof adjacent to the enclosed patio where Guerrero was observed throwing an object. (TR pgs. 51, 57-60).

28. The roof was smooth, in “pristine” condition, and had no debris. (TR p.60).

29. Tompkins believed that it was highly unlikely that someone other than Guerrero put the “machine” locate on the roof as suggested by counsel for Guerrero. (TR p. 143).

30. The machine found by Tompkins on the casino roof on August 12, 2015 was relatively new. As outlined by Thogersen in his forensic Evidence Inspection Report, the battery found in the machine is a Duracell MN2400, date code Dec 2024. The measured no-load voltage was 1.556V, indicating that the battery was relatively fresh when found. (Exhibit P).

31. Wolf Technology Services, Inc. was contacted by IHRC Staff and asked to determine whether it was feasible for Guerrero to throw the machine found from the enclosed patio to the roof of the adjacent casino building. (TR p. 147).

32. Melissa Montgomery, Biomedical and Mechanical Engineer, Wolf Technology, conducted a “throw feasibility analysis” of the machine found on the casino roof based upon previous surveys, the laws of physics, mathematical computation, published data, education, background, and experience in the fields of biomedical and mechanical engineering. (Exhibit J).

33. Guerrero agreed that Montgomery, MS Biomedical Engineering, is qualified by training and experience to issue expert opinions. (Joint Exhibit A, Stipulation 15).

34. As outlined in her CV (Exhibit I), Montgomery has an extensive education in Biomedical and Mechanical Engineering.

35. The evidence presented to Wolf Technical Services, Inc. for evaluation and comparison included:

- Staff Exhibit E (Machine found on the roof of the Indiana Downs casino on the morning of August 12, 2015).
- Two exemplar machines nearly identical in size, weight, and shape, which were used in a proof of concept throw during which Guerrero's throw was recreated.

(TR pgs. 147 and 160).

36. Montgomery issued forensic reports (Exhibits J and K) outlining her findings. Montgomery determined that, it is feasible that a healthy, 27 year-old professional jockey could throw an object having the mass and dimensions of the machine found with enough energy for the machine to land in the location where Exhibit E was found on August 12, 2015. (Exhibit J, p. 2) (TR pgs. 157-158).

37. Montgomery used conservative industry standards to make the calculations in her report and findings. (TR p.155).

38. In her survey, Montgomery did not consider that Guerrero used a "running start". (TR p. 149).

39. In her survey, Montgomery did not consider the impact of adrenalin while Guerrero was being chased by Tompkins. (TR p.156)

40. To further demonstrate that it is feasible for Guerrero to have been able to throw the electrical shocking device from the enclosed patio behind the jockeys' quarters to the roof of the adjacent casino building, IHRC Staff conducted an experiment utilizing Associate Steward and former jockey, Billy Troilo (TR pgs. 68 and 120) to recreate the Guerrero's throw using two exemplar machines nearly identical in shape and size to the machine found on August 12, 2015. (TR pgs. 121, 124,158 and 161).

41. Billy Troilo was similar in height and weight to Guerrero (TR p. 68), although he was 27 years older. (TR p. 20).

42. As a professional jockey, Billy Troilo participated in more than 22,000 races, winning 2,514 races nationwide and having been awarded the title of leading rider more than ten times in his career, is qualified by training and experience to issue expert opinions with respect to the physical fitness and training required to be a competitive jockey. (TR p. 136)

43. Montgomery observed Troilo throw four similar “machines” with two landing on the casino roof where Tompkins located the “machine” thrown by Guerrero. (TR p. 158). The two that landed on the casino roof did not make any noise. (TR p. 74).

44. Upon his subsequent review of the video of Race 10, Exhibit C, Tompkins observed Guerrero, immediately after the 10th race, appear to adjust an object in his left hand glove, which is consistent with the tip indicating Guerrero would be carrying an electrical shocking device in his glove. (TR pgs. 26-28).

B. The Substantial and Reliable Evidence Supports the Conclusion that Guerrero, fearing he would be caught, interfered with or obstructed a commission employee while performing official duties.

45. As a condition of having a license, Guerrero acknowledged that he would be subject to searches of his person.

“I hereby acknowledge that I will be subject to the searches, either in my presence or absence, provided for in Indiana Code 4-31-31, as amended, and the Indiana Rules and Regulations that authorize personal inspections, inspection of any personal property, and inspections of premises and property related to my participation in a race meeting by persons authorized by the Indiana Horse Racing Commission.” (Emphasis added.) (Exhibit B).

46. Indiana Administrative Code provides, in pertinent part, that the Commission may suspend a license if the suspension or other penalty is in the public interest for the purpose of maintaining proper control over horse race meetings or pari-mutuel wagering; and if the person

has interfered with or obstructed a Commission employee while performing official duties. 71 IAC 5.5-1-14(a), (b)(16).

47. Indiana Administrative Code also provides, in pertinent part, that (a) all licensees shall cooperate fully with all investigations and inquiries made by commission representatives; and (b) all licensees shall obey instructions from commission representatives. 71 IAC 5.5-1-28(a), (b).

48. During the course of the walk, Tompkins observed Guerrero fidget and act in such a way to obscure Tompkins' view of Guerrero's left hand. (TR pgs. 33-35)

49. Guerrero, knowing a search of his person was imminent, ran from Commission's Investigator to avoid detection of the electrical shocking device in his possession.

50. Approximately three seconds after entering the jockey's quarters, Guerrero said he "had to pee" and took off running past the only restroom in the jockey's quarters, Tompkins told him no loudly enough for Respondent to have heard him. (TR pgs. 41-42 and 107-108).

51. Guerrero ignored Tompkins' direction to stop and ran to evade Tompkins and avoid being searched. Despite having been in the jockeys' quarters on numerous occasions, Guerrero ran past the only restroom and onto an enclosed patio. Tompkins gave chase after Guerrero. (TR pgs. 42-43)

52. Immediately upon entering the enclosed patio, Tompkins observed Guerrero throw an item smaller than a baseball in an "overhand baseball style" throw "as hard as humanly possible" while running toward the privacy fence. (TR pgs. 48-49).

53. Immediately after Guerrero threw the small item, his disposition changed. (TR pgs. 51-52)

C. The Substantial and Reliable Evidence Supports the Conclusion that Guerrero Refused to be Truthful and Forthcoming to Commission Staff During the Course of its Investigation.

54. Guerrero lied about having to use the restroom in an effort to evade Commission Investigator in the execution of their official duties and to conceal evidence of his violation of Commission statute and rule. (TR pgs. 42-44 and 54-55)

55. Guerrero knew who Tompkins was, despite testifying in his deposition that he did not recognize Tompkins. (TR pgs. 16-17, 45, 47)

56. Guerrero was afraid of being discovered with an electrical shocking device rather than being afraid for his personal safety. (TR pgs. 55, 62, and his Deposition transcript Exhibit G, pgs. 63-65 and 67)

57. Based upon the substantial, credible, reliable, and circumstantial evidence produced during the hearing, Guerrero was in possession of this electrical device at Indiana Grand on Tuesday, August 11, 2015.

58. The “machine” possessed by Guerrero was designed to increase or retard or otherwise affect the speed or actions of the horse which was a violation of Indiana law.

59. The Board of Stewards then notified Guerrero that he was to meet with them the next morning.

60. Guerrero attended a hearing before the Stewards on Wednesday morning, August 12, 2015 at their offices located at Indiana Grand and denied possessing the “machine”.

61. The Stewards provided Guerrero with a translator for this summary suspension hearing.

62. Following the hearing on August 12, 2015, the Stewards issued Ruling No. 15576 (Exhibit 4 to Exhibit A), and determined that there was sufficient evidence that Guerrero had in

his possession an electronic device on the property at Indiana Grand on August 11, 2015, in violation of 71 IAC 7.5-6-5(f). Guerrero was summarily suspended and denied access to all facilities under the jurisdiction of the Indiana Horse Racing Commission, and the matter was referred to the IHRC for additional action as it may deem necessary.

63. Subsequently, on August 27, 2015, the Stewards conducted a hearing to determine whether or not to vacate their earlier summary suspension. Guerrero appeared in person, and with his legal counsel, John Shanks. Testimony was heard again and the summary suspension remained in place.

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over this matter pursuant to his appointment by the Commission and the provisions of I.C. 4-21.5 et seq. and 71 IAC 10-3-7.

2. The Commission 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 impermissibly medicate race horses on race day.

3. Guerrero was duly licensed by the Indiana Horse Racing Commission a jockey on August 11, 2016, and was at all times relevant, subject to the jurisdiction of the Indiana Horse Racing Commission.

4. Administrative Complaint No. 215012 was issued in accordance with Indiana statutes and Commission rules, and was supported by substantial and reliable evidence.

5. Indiana Code § 4-31-3-11.5 empowers the Commission to employ Stewards to attend horse race meets. After the Stewards are employed or otherwise retained, they are empowered to conduct inquiries and disciplinary hearings on behalf of the IHRC pursuant to and within the limitations set forth by Indiana Code § 4-31-13-2.

6. At all times relevant, Indiana Code § 4-31-1-2 was in full force and effect and provided in its entirety:

The purpose of this 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.

7. At all times relevant, the Board of Stewards were authorized to initiate an inquiry pursuant to the provisions of 71 IAC 10-2-2.

8. At all times relevant, the Commission had in full force and effect 71 IAC 5.5-1-28, which provided:

(a) All licensees shall cooperate fully with all investigations and inquiries made by the commission representatives or association security, or both.

(h) All licensees shall obey instructions from commission representative or association security, or both.

9. At all times relevant, Indiana Code § 4-31-12-20 was in full force and effect and provided, in pertinent part:

(b) The judges or the commission may suspend the license of a person who possesses:

(3) A battery or other electrical or mechanical instrument that may be used to effect the speed or actions of a horse; on the premises of a permit holder.

10. At all times relevant, the Commission had in full force and effect 71 IAC 7.5-6-5 which provided in pertinent part:

(d) The following shall apply to disqualifications during the race:

(4) Possession of any electrical or mechanical stimulating or shocking device by a jockey, horse owner, trainer, or other person authorized to handle or attend to a horse shall be prima facie evidence of a violation of these rules and is sufficient grounds for the Stewards to scratch or disqualify the horse.

(f) The following shall apply to the use of riding crops during the race:

(3) No electrical or mechanical device or other expedient designed to increase or retard the speed of a horse, other than, the whip approved by the Stewards, shall be possessed by anyone or applied by anyone to a horse at any time on the grounds of the association during the meeting, whether in a race or otherwise.

11. At all times relevant, the Commission had in full force and effect 71 IAC 5.5-1-14, which provided in pertinent part:

(a) The commission may refuse or deny a license application, revoke or suspend a license, or otherwise penalize a licensee, or other person, if:

(1) The refusal, denial, revocation, suspension or other penalty is in the public interest for the purpose of maintaining proper control of horse racing meeting or pan-mutual wagering; and

(2) Any of the conditions listed in subsection (b) apply to the applicant or licensee or person.

(b) The conditions referred to in subsection (a) include, but are not limited to, the following:

(4) The person has violated or attempted to violate a provision of this article, these rules, or a law or rule with respect to horse racing in a jurisdiction.

(10) The person has engaged in conduct that is against the best interest of horse racing or compromises the integrity of operations at a track or satellite facility.

12. At all times relevant, the Commission had in full force and effect 71 IAC 2-10-1(a), which provided in pertinent part:

(1) The judges, executive director or commission may order an individual ejected or excluded from all or part of any premises under

the regulatory jurisdiction of the commission if the judges, executive director or commission determines that the individual may be ejected or excluded under IC 4-31-13-1(a)(3); and

(2) The individual's presence on association grounds is inconsistent with maintaining the honesty and integrity of racing.

13. In his Proposed Findings of Fact and Conclusions of Law, Guerrero admits to violating 71 IAC 5.5-1-14(b)(10) and 71 5.5-1-14(b)(16) and that his conduct was not in the best interest of horse racing and interfered with or obstructed a commission employee while performing official duties.

14. IHRC Staff has proven, by a preponderance of the evidence, that Guerrero was in possession of an electronic device (or "machine") on the grounds of Indiana Grand on August 11, 2015.

15. For the reasons stated herein, on August 11, 2015, Guerrero violated:

- a. 71 IAC 7.5-6-5(d)(4),
- b. 71 IAC 7.5-6-5(f)(3), and
- c. IC 4-31-12-20

16. For the reasons stated herein, on August 11, 2015, Guerrero's actions fall within the provisions of:

- a. 71 IAC 7.5-1-14(b)(4),
- b. 71 IAC 7.5-1-14(b)(10), and
- c. 71 IAC 7.5-1-14(b)(16).

17. Guerrero's violations of the noted regulations were contrary to the best interests of horse racing in the State of Indiana.

18. It was illegal for a licensee to possess the electrical device on the grounds of Indiana Grand during August 2015.

19. The facts in this case are almost identical to those in the earlier Dean Sarvis matter who ran from a Commission Investigator following his race and threw away his “machine”.

20. The facts in this case are distinguishable from those in the Reuben Serna matter since his “machine” was located in a dorm room at the track.

21. The Executive Director’s ten (10) year recommended suspension in Administrative Complaint No. 215012 is reasonable, appropriate and supported by substantial, reliable, and circumstantial evidence, and is consistent with the penalty imposed in two (2) prior cases in Indiana involving possession of a “machine”.

22. Guerrero’s suspension should begin on August 12, 2015, the date of the summary suspension.

23. The recommended Five Thousand Dollars (\$5,000) fine of the Executive Director in the Administrative Complaint No. 215012 is reasonable, appropriate and supported by substantial, reliable, and circumstantial evidence, and is consistent with the fine imposed in two (2) prior cases in Indiana involving possession of a “machine”.

24. The law and facts are with the IHRC and against Guerrero.

RECOMMENDED ORDER

Although not before the ALJ, the ALJ finds that the Board of Stewards Ruling No.15576 issued on August 12, 2015 was appropriate since there was substantial and reliable evidence, exceeding the preponderance of evidence standard, to support their finding that following the 10th race on Tuesday, August 11, 2015, at Indiana Grand, Guerrero possessed an illegal electronic device in violation of Indiana Code § 4-31-12-20(b)(3) and 71 IAC 7.5-6-5(d)(4) and (f)(3).

This type of violation is among the most serious that affects the integrity of horse racing. For those reasons, the Executive Director recommended ten (10) year suspension of Juan De Leon Guerrero in Administrative Complaint No. 215012 is appropriate. 71 IAC 10-3-20(b) authorized the Executive Director to make a recommendation as to the penalty or sanction to be imposed which the Administrative Law Judge may in his or her discretion accept, reject, or modify. Indiana General Assembly clearly set forth its concern about regulating pari-mutuel racing. Indiana Code § 4-31-1-2 provides that:

The purpose of this 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.

By comparison, courts in criminal cases regularly consider a Defendant's attitude and expressed remorse for their behavior when imposing reduced sentences. Guerrero persists denying any knowledge about the "machine" recovered which was clearly his right and he is entitled to require that the IHRC Staff prove a violation by a preponderance of the evidence. What is troublesome is the fact that the "leading jockey" in 2015 testified that he was unaware that possession of an illegal electrical "machine" was prohibited by the Commission regulations (TR p. 188). While Guerrero had no obligation to prove anything during his hearing, he chose not to offer any evidence to justify a reduction of the ten (10) year suspension sought by the Executive Director.

Contrary to the arguments made by counsel for Guerrero, the facts and circumstances in this matter are distinguishable from the Serna case. Serna's "machine" was located in his dorm room. Additionally, Serna admitted to possessing an illegal "machine".

Therefore, the Administrative Law Judge finds that the Executive Director's proposed penalty in Administrative Complaint No. 215012 is appropriate, reasonable, and fair considering

the factors utilized by the Commission in previous cases, as well as the facts of this case, and recommends that Guerrero's license be suspended and he remain ineligible for licensure for a period of ten (10) years from the date of his summary suspension, August 12, 2015. During the period of his suspension and ineligibility for licensure, Guerrero should be excluded and denied access to all grounds under the jurisdiction of the IHRC.

The ALJ believes that a monetary fine is also appropriate and should be imposed. IHRC Staff was required to retain the services of Wolf Technical Services to conduct an analysis and survey. Given the range of monetary fines recommended and/or imposed in the two prior cases (\$1,000-\$7,500), and severity of this violation, it is recommended that a fine of \$5,000 is reasonable and appropriate.

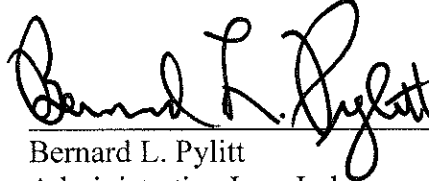
Specifically, the ALJ adopts the following recommended sanctions from Administrative Complaint No. 215012, and recommends that Guerrero:

- a. Be suspended and remain ineligible for licensure for a period of ten (10) years from the date of the summary suspension (August 12, 2015) up to and including August 12, 2025;
- b. During the period of suspension, Guerrero be excluded and denied access to all grounds under the jurisdiction of the Indiana Horse Racing Commission;
- c. Stone Toasted be unplaced and the Purse from the 10th race on August 11, 2015 is to be redistributed; and
- d. Be fined \$5,000.00.

Pursuant to Indiana Code § 4-21.5-3-29(d), either party normally has fifteen (15) days following receipt of this Recommended Order to file written exceptions with the Indiana Horse Racing Commission. However, at the conclusion of the hearing, counsel for the parties agreed and stipulated to shorten the period of time to file written exceptions authorized under the statute, to no later than noon on Friday, May 27, 2016, which would allow for an expedited appeal of

this matter which could be heard by the full Indiana Horse Racing Commission at its next scheduled meeting on Monday, June 6, 2016.

IT IS SO ORDERED THIS 16th DAY OF MAY, 2016.



Bernard L. Pylitt
Administrative Law Judge

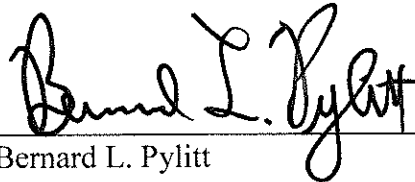
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served via first-class United States mail, postage prepaid, and via e-mail, this 16th day of May, 2016 to the following:

John N. Shanks II
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SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into between the Indiana Horse Racing Commission ("Commission"), by Joe Gorajec, Executive Director of the Indiana Horse Racing Commission Staff ("Commission Staff") and Ruben Serna ("Serna"), a licensee subject to regulation by the Commission. Collectively, the Commission Staff and Serna shall be referred to herein as "the Parties." This Agreement is subject to the review and approval of the Commission.

RECITALS

1. The Indiana Horse Racing Commission is the administrative agency in the State of Indiana that regulates horse racing pursuant to provisions of the Indiana Code, Title 4, Article 31.
2. Serna was duly licensed as a thoroughbred/quarter horse exercise rider and jockey for the 2012 race meet and was at all times relevant subject to regulation by the Commission.
3. On or about On or about September 14, 2012, after Race Number 9, an electrical device was discovered at the starting gate of Hoosier Park. Ruben Serna rode in three of the 11 races that night, including Race Number 9.
4. On or about September 20, 2012, a distinct additional electrical device was discovered in the dorm room where Ruben Serna resided.
5. A technical review of the device discovered on September 14, 2012 by Wolf Technical Service, Inc. determined: "The electrical device is designed to affect the speed or actions of a horse."
6. 71 IAC 7.5-6-5(d)(4) provides:

(d) The following shall apply to disqualifications during the race:

(4) Possession of any electrical or mechanical stimulating or shocking device by a jockey, horse owner, trainer, or other person authorized to handle or attend to a horse shall be prima facie evidence of a violation of these rules and is sufficient grounds for the stewards to scratch or disqualify the horse.
7. 71 IAC 7.5-6-5(f)(3) provides:

(f) The following shall apply to use of riding crops during the race:

(3) No electrical or mechanical device or other expedient designed to increase or retard the speed of a horse, other than the riding crop approved by the stewards, shall be possessed by anyone or applied by anyone to a horse at any time on the grounds of the association during the meeting, whether in a race or otherwise.

8. Ind. Code Sec. 4-31-12-20(b) provides, in pertinent part:

(b) The judges or the commission may suspend the license of a person who possesses:
(3) a battery or other electrical or mechanical instrument that may be used to affect the speed or actions of a horse; on the premises of a permit holder.

9. Pursuant to the authority provided by 71 IAC 10-3-20, the Commission's Executive Director issued Administrative Complaint No. 213001 on or about January 4, 2013. The Executive Director's Administrative Complaint proposed the following penalty: a ten (10) year suspension and a \$5,000.00 fine.

10. The Commission's Executive Director, given Serna's willingness to enter into this Agreement, is executing this Agreement in lieu of seeking Commission approval of the Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommended Order, dated August 29, 2013.

11. Now, in full and complete resolution of any and all further administrative proceedings involving Serna relative to the violations referenced in Preliminary Report No. 213001, the Commission Staff and Serna agree to the terms and conditions set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, and the promises and covenants to be performed as set forth herein, the Parties agree as follows:

1. Serna admits that his behavior on or about September 14, 2012 and through and including September 20, 2012, as outlined in Administrative Complaint 213001 was in violation of 71 IAC 7.5-6-5 (d)(4), 71 IAC 7.5-6-5 (f)(3), and IC 4-31-12-20.

2. Serna agrees to a license suspension for a total of five (5) years beginning September 21, 2012 and a fine of \$7,500. Mr. Serna's re-licensure after the suspension is contingent upon payment in full of the fine referenced in this Agreement.

3. During the period of his suspension, Serna is prohibited from being on the grounds of any association under the jurisdiction of the Indiana Horse Racing Commission.

4. To the extent that Serna seeks licensure by the Commission after the duration of his suspension, any license issued will be a probationary license.

5. Upon approval from the Indiana Horse Racing Commission, Commission Staff will enter a ruling consistent with this Agreement, which will make clear that the sanctions set forth herein are the total sanctions for the violations referenced in this Settlement Agreement.

6. Any waiver of any provision of this Agreement must be in writing and must be approved by the Commission or the Commission Staff. No waiver of any provision of this Agreement shall constitute either a waiver of any provision hereof (whether or not similar) or a continuing waiver.

7. The Parties agree that this Agreement shall be interpreted, enforced, and governed by the laws of the State of Indiana.

8. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, fully enforceable counterpart of all purposes, but all of which constitute one and the same instrument.

9. Serna represents that he has carefully read and reviewed the foregoing Agreement, acknowledges its contents, has had the right to consult with his own counsel, and agrees to be bound by its terms. Serna acknowledges that he has voluntarily entered into this Agreement as of the date and year herein set forth.

IN WITNESS HEREOF, the Parties have executed this Agreement on the dates listed below.

I swear, under penalties for perjury, that the foregoing representations that have been made by me are true and correct.

9/13/13
Date

Ruben Serna
Ruben Serna

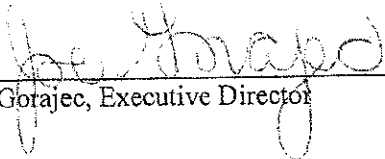
Witnessed and Approved:

[Signature]

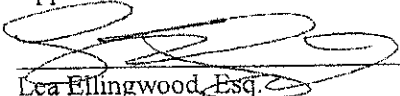
ON BEHALF OF THE INDIANA HORSE RACING COMMISSION:

Date

7/18/13


Joe Gorajec, Executive Director

Approved as to form:



Lea Ellingwood, Esq.
General Counsel
Indiana Horse Racing Commission
1302 North Meridian Street
Suite 174
Indianapolis, IN 46202

**BEFORE THE ADMINISTRATIVE LAW JUDGE
THE HONORABLE BERNARD PYLITT
APPOINTED BY THE INDIANA HORSE RACING COMMISSION**

INDIANA HORSE RACING COMMISSION STAFF,)	
Petitioner,)	
)	Administrative Complaint
vs.)	215012
)	
Juan DeLeon Guerrero,)	
Respondent.)	

**RESPONDENT’S OBJECTION TO RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE BERNARD L. PYLITT**

Comes now the Respondent, Juan DeLeon Guerrero (“Guerrero”), by counsel, and respectfully objects to the Findings of Facts, Conclusions of Law and Recommended Order (“Recommended Order”) offered to the Indiana Horse Racing Commission (“Commission”), by the Administrative Law Judge (“ALJ”), the Honorable Bernard L. Pylitt, dated the 16th day of May, 2016 and in support thereof says:

1. On August 27, 2015, a hearing was held before the Stewards at Indiana Grand and wherein the Summary Suspension ruling of August 12, 2015, was sustained by the Stewards Ruling #15576.
2. After a long delay of one hundred sixty-two (162) days, on February 5, 2016, an Administrative Complaint (#215012) was issued by the Commission Staff against the Respondent, to which appeal was timely filed.
3. Pursuant to 71 IAC 10-2-6(c) the burden of proof lays on the shoulders of the Commission Staff to show, by a preponderance of the evidence, that Guerrero violated specified Commission rules.
4. Guerrero reiterates and incorporates, by reference, the summary of his defenses described on Page 14 of the ALJ’s Recommended Order.
5. Upon reflection and consideration of the testimony of Security Officer Kevin Tompkins, corroborated by Valet Jeffery Vinson, presented at hearing, Guerrero understands that he made a mistake and violated 71 IAC 5.5-1-14(b)(10) and (b)(16), to-wit:
 - a. When he, Valet Jeffery Vinson and Security Officer Kevin Tompkins arrived at the paddock area from the winner’s circle on August 11, 2015, Guerrero ran from Tompkins, past the

restroom in the jockey quarters onto the enclosed patio despite Tompkin's instructions to "stop". (Hearing Transcript Page 11, line 6)

- b. Although there is substantial and reliable evidence that although Guerrero was excited and agitated during his encounter with Tompkins, is not fluent in English, he could understand basic words in English such as "stop" but continued to run from Tompkins.
 - c. Guerrero's conduct was not in the best interest of horse racing and interfered with or obstructed a commission employee while performing official duties.
6. Guerrero denies that he violated any other Commission rules, specifically 71 IAC 7.5-6.5(d)(4) and (f)(3) to-wit:

There is no substantial and reliable physical evidence to support the conclusion that Guerrero was in possession of an electrical shocking device on August 11, 2015; speculation and theory are insufficient.

- a. As stipulated by the parties, at all times relevant, the Respondent was a licensed jockey in the State of Indiana and the jockey of record riding the horse known as "Stone Toasted" in the 10th Race on August 11, 2015.
- b. Neither Investigator Toni Sperle nor anyone else testified to corroborated the testimony of Investigator Kevin Tompkins: a) as to the statements of the confidential informant, b) discovery of the electrical device ("machine") on the roof of the Casino on August 12, 2015, nor c) the alleged "throwing" actions of Guerrero on the patio adjacent to the jockey quarters.
- c. No substantial and reliable evidence was presented that anyone saw a machine in Guerrero's possession on August 11, 2015.
- d. No substantial and reliable evidence was presented that Guerrero had touched or otherwise had any contact with the machine found on the roof of the Indiana Grand Casino on the morning of August 12, 2015, nor were any items connecting him to the machine found during the search of his person or locker.
- e. The Stewards were informed on the morning of August 11, 2015, by Kevin Tompkins that a "credible" tip from a confidential informant that Guerrero would have an electrical device ("machine") in his possession during Race No. 10 that day. (Hearing Transcript page 21, lines 10 -22 and page 137, lines 5 – 19)

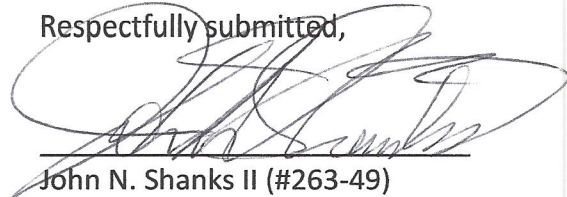
- f. No evidence was presented by the Commission Staff that upon examination of Stone Toasted, following the Tenth Race on August 11, 2015, that any marks or bruises were discovered which would indicate that an electrical device had been used on the horse.
- g. William Troilo, an Associate Commission Steward and retired jockey, testified that if a horse were shocked by a machine it could endanger the other jockeys (Hearing Transcript Page 136 lines 18-20) and that as a Steward he has a duty to protect the integrity of racing (Hearing Transcript page 134, lines 17 -18) and a duty to protect the jockeys (Hearing Transcript Page 136, lines 21 – 24).
- h. Evidence was presented that other electrical devices, similar to the one discovered on the roof of the Casino, have been discovered at Indiana Grand without any evidence linking them to having been in possession of any particular individual.(Hearing Transcript Page 141, lines 2 – 11)
- i. Approximately eight (8) months later Steward Troilo, during a demonstration staged by Wolf Technical Services, Inc., was able to successfully throw an “exemplar” device (an electronic device previously found on the grounds of either Indiana Grand or Hoosier Park) from the patio adjacent to the jockey’s locker room to the roof of the Indiana Grand Casino two out of four attempts, which does not lead to conclusive proof that Guerrero threw an electrical device on the roof of the Casino on the evening of August 11, 2015. It only proves that it could be done by a human of similar size.
- j. Tompkins and the Stewards decided, despite having information from a person described as “credible and reliable”, not to confront Guerrero prior to the start of the race, put the other jockeys in danger and jeopardized the integrity of that horse race.
- k. The testimony of Tompkins and Troilo that despite the “credible And reliable” information received from the confidential informant, the decision by the Stewards and Security Officer not to confront Guerrero prior to the race is consistent with the way they have handled similar situations in the past (i.e. Sarna and Servis).

- I. It is illogical that Commission employees with a duty to protect jockeys and the integrity of horse racing would let a jockey race if the information received that he may have a machine in his possession during a race was truly considered to be “credible and reliable”.
7. Contrary to Paragraph 14 (Page 31) of the Recommended Order the IHRC Staff did not prove “by a preponderance of the evidence” that Guerrero was in possession of an electrical device on the grounds of Indiana Grand on August 11, 2016.
8. Contrary to Paragraph 19 (Page 32), the facts in this case are not identical to those in the earlier case of Dean Sarvis (Ruling 98606 and PR 98012, Final Order 5/26/1999) by the evidence that Sarvis was observed placing his hand into and out of a trash can in the jockey’s restroom (no one else was in the restroom) and immediately thereafter during a search of the trash can by a Security Officer, in the presence of Sarvis, the electrical device was found.
9. The only similarity between the present case and previous similar cases involving the possession of an electrical device by a jockey (Serna and Sarvis) is the negligent inaction of the Commission’s Stewards and Security Staff to confront the jockeys prior to the race, based upon “credible and reliable” information that they were in possession of an electrical device, to ensure the safety of the other jockeys and preserve the integrity of horse racing.
10. There is insufficient evidence to support the conclusion that on August 11, 2015, during Race #10, Guerrero had an electrical device in his possession nor that he used that device on Stone Toasted.
11. The proposed penalty is excessive and unsubstantiated by a preponderance of the evidence.

WHEREFORE, the Respondent, Juan DeLeon Guerrero, by counsel, respectfully prays the Commission reject the Recommended Order proposed by the Administrative Law Judge and that the only penalty imposed upon him be suspension for forty-three (43) weeks beginning August 12, 2015 and no fine.

Further, that the Commission direct the Stewards and Director of Security to alter the current negligent protocol discovered in this case and direct them to confront jockeys prior to a race where there is "credible and reliable" information that the jockey is in possession of an electrical or mechanical device in violation of Indiana Code 4-31-12-20 and 71 IAC 7.5-6-5 to faithfully enable the Commission to fulfill its statutory duty, "to ensure that pari-mutual wagering on horse races in Indiana will be conducted with the highest standards and the greatest level of integrity" (Indiana Code 4-31-1-2).

Respectfully submitted,



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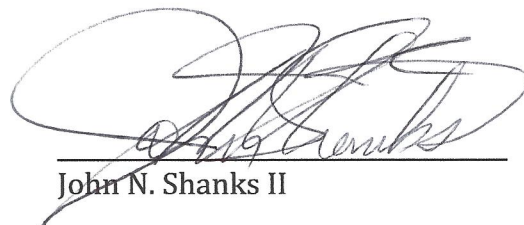
CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing has been served upon the following by U.S. Mail, first class postage prepaid or by electronic means this 27th day of May, 2016:

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