

Agenda Item #2



FILED:

September 13, 2023

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

FINAL AGENCY AUTHORITY: Indiana Horse Racing Commission

PETITIONER: JAMAL WILLIAMS

RESPONDENT: Indiana Horse Racing Commission Staff

OALP CAUSE NUMBER: HRC-2206-001429

UNDERLYING ACTION OR ORDER NUMBER: Appeal of Administrative Complaint No. 222002 (as amended)

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

This matter came before the undersigned Administrative Law Judge Michael Buker for hearing on the appeal of Administrative Complaint No. 222002 (as amended) issued by the Indiana Horse Racing Commission Staff (“Commission Staff”) against Petitioner, Jamal Williams. On May 24, 2023, a hearing was conducted on this matter (the “Hearing”). Commission Staff was represented by its co-counsel Mr. David Rothenberg, Mr. Matthew M. Eggiman and Mr. Dale Lee Pennycuff. Respondent was represented by his counsel, Mr. Howard A. Taylor and Mr. Peter J. Sacopulos.

BACKGROUND AND PROCEDURAL SETTING

Petitioner was at all times relevant licensed as a groom and as a trainer and driver by the Indiana Horse Racing Commission (“IHRC”) to work at its race tracks in Indiana. On May 23, 2022, Respondent issued Administrative Complaint No. 222002 against Petitioner alleging violations of IHRC medication rules. Petitioner timely filed his appeal of the Amended Complaint and on July 20, 2022, the matter was assigned to the undersigned administrative law judge. On

April 20, 2023, Respondent moved to amend Administrative Complaint No. 222002 pursuant to which Petitioner is alleged to have improperly administered substances orally on multiple occasions to horses on days on which the horses were scheduled to race in violation of 71 IAC 8-1-1.5(b), and improperly administered a substance to a horse using a hypodermic needle and syringe on a day on which the horse was scheduled to race in violation of 71 IAC 8-1-1.5(b)(1) (the “Amended Complaint”)¹. All violations were alleged to have occurred at Harrah’s Hoosier Park in Anderson, Indiana. The Hearing was conducted with respect to the merits of Petitioner’s appeal under I.C. § 4-21.5-3 and 71 IAC 10-3, *et seq.*, pursuant to which Respondent had the burden of proof to establish the penalties imposed by the Racing Stewards should be sustained. Although not required, each party filed its Proposed Findings of Fact, Conclusions of Law and Recommended Order following the Hearing.

In rendering findings and conclusions, I am required to weigh the credibility of witnesses about the matters to which they testified including each witness’s interest, if any, in the outcome of the matter.² Having considered the administrative record, conducted a Hearing with evidence (including Supplemental Evidence as defined hereunder) and testimony presented by both parties, weighed the credibility of the witnesses and considered the arguments of counsel, I hereby issue this Findings of Fact, Conclusions of Law and Nonfinal Order. To the extent that any of the

¹ Respondent’s Motion for Leave to Amend Administrative Complaint in which (a) a charged violation under 71 IAC 8-7-1 was deleted, and (b) the Recommended Penalty was revised to a fine of \$5,000, a suspension of one year (reduced from a \$7,500 fine and four year suspension in the original Administrative Complaint), and forfeiture/redistribution of certain purse monies was not opposed by Petitioner and is hereby GRANTED.

² During his closing statement at the Hearing, Petitioner’s counsel, Mr. Taylor, made a number of remarks to the effect that all of Respondent’s witnesses were employed by the IHRC, and each “had an agenda” with respect to this matter. [Tr. pp. 176-7]. In light of the fact Mr. Taylor presented no evidence of conspiracy or bias or interest on the part of the witnesses beyond the fact of common employment, I find his remarks were not credible. Accordingly, they were not considered during my deliberations.

Findings of Fact are more appropriately considered Conclusions of Law, or conversely, they shall be so treated.

EXHIBITS ADMITTED DURING THE HEARING

Jointly Stipulated Exhibits:

1. A copy of the Joint Stipulations filed by the parties (identified as Exhibit AA);
2. Petitioner's groom license application form dated February 18, 2021 (identified as Joint Stipulation 13(a));
3. Petitioner's trainer and driver license application form dated August 26, 2021 (identified as Joint Stipulation 13(b));
4. Horse identification documents for four horses: "The Bucket", "Prescotts Hope", "A Sham of Amber", and "Meadowbrook Raider" (identified as Joint Stipulation 13(c));
5. A thumb drive containing four closed circuit video clips of the barn and stable areas at Hoosier Park in Anderson, Indiana on December 2 and 3, 2021 of the four horses identified in Paragraph 4 above (identified as Joint Stipulations 13(d) – 13(g));
6. Official program pages from Race 3 and Race 10 on December 2, 2021 at Hoosier Park in Anderson, Indiana (identified as Joint Stipulation 13(h));
7. Paddock sign-in sheets for Harrah's Hoosier Park Race 3 and Race 10 on December 2, 2021 and Race 6 on December 3, 2021 (identified as Joint Stipulation 13(j));
8. Race results from the United States Trotting Association Pathway website for Harrah's Hoosier Park on December 2 and 3, 2021 (identified as Joint Stipulation 13(k)); and
9. Transcript of a deposition of Indiana Horse Racing Commission Executive Director Deena Pitman from May 9, 2023 (identified as Joint Stipulation 13(l)).

Commission Staff's Exhibits:

1. Copies of Indiana administrative rule 71 IAC 8-1-1.5, *Medication* (identified as IHRC Exhibit A1); and
2. Petitioner's Notice of Services of Discovery Responses dated May 8, 2023 (identified as IHRC Exhibit O).

Petitioner's Exhibit:

1. Expert Report of Clara K. Fenger, DVM, PhD, DACVIM dated April 5, 2023 (identified as Petitioner's Exhibit P1).

WITNESSES WHO TESTIFIED AT THE HEARING

Respondent's Witnesses:

1. Mr. John McAllister – IHRC Investigator
2. Dr. Kerry Peterson, DVM – IHRC Equine Medical Director
3. Mr. John Zawistowski – IHRC Associate Judge
4. Mr. Kevin Gumm – IHRC Presiding Judge

Petitioner's Witnesses:

1. Dr. Clara Fenger, DVM
2. Mr. Jamal Williams, Petitioner

RELEVANT REGULATORY AUTHORITY

71 IAC 8-1-1.5 Medication

Sec. 1.5

(a) No horse participating in a race or entered in a race shall carry in its body any foreign substance as defined in 71 IAC 1 or IC 4-31-2, except as provided for in this rule.

Proposed Findings of Fact, Conclusions of Law and Nonfinal Order (Williams)

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

- (1) injection;
- (2) jugging;
- (3) oral administration;
- (4) tube;
- (5) rectal infusion or suppository;
- (6) inhalation; or
- (7) any other means;

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

(c) Substances or metabolites thereof which are contained in equine feed or feed supplements that do not contain pharmacodynamic or chemotherapeutic agents are not considered foreign substances if consumed in the course of normal dietary intake (eating and drinking).

(d) – (e)....

FINDINGS OF FACT

A. Substantial and reliable evidence exists to support a conclusion that Petitioner administered a substance, foreign or otherwise, to three horses within 24 hours prior to the scheduled post time for a race in which those horses were scheduled to run in violation of 71 IAC 8-1-1.5(b)(3).

1. Petitioner has admitted to the predicate facts with respect to a violation of 71 IAC 8-1-1.5(b)(3). Specifically, Petitioner has admitted that he orally administered a substance using an oral dosing syringe to three standardbred horses on a date on which each horse

was scheduled to race.³ [Joint Stipulations, Nos. 5-10; IHRC Ex. O]. However, Petitioner contends the dose syringes contained a mixture of yogurt and aloe vera (the “Yogurt/Aloe Vera Mixture”),⁴ which Petitioner contends is food that may be provided to a horse on race day under 71 IAC 8-1-1.5(c). Respondent did not provide any evidence with respect to the contents of the dose syringes. Accordingly, I find the dose syringes contained the Yogurt/Aloe Vera Mixture.

2. Petitioner argues 71 IAC 8-1-1.5(c) is silent with respect to how feed or feed supplements may be administered which creates an ambiguity between subsection (b) of 71 IAC 8-1-1.5 which prohibits race day oral administrations, and subsection (c) of 71 IAC 8-1-1.5 which permits a horse to receive feed or feed supplements on race day. According to Petitioner, any ambiguity with respect to a rule or regulation must be held against the maker (i.e., the IHRC) and thus, oral administration of the Yogurt/Aloe Vera Mixture on race day does not violate 71 IAC 8-1-1.5(b)(3). In support of this position, Petitioner’s witnesses testified as follows:

- a. Dr. Fenger testified that “using a probiotic that you’re feeding every day [constitutes] normal dietary intake”. [Tr. p. 124]
- b. Petitioner testified that some horses may not like the taste of or to swallow the Yogurt/Aloe Vera Mixture, in which case it can be more efficient to administer the mixture by dose syringe to reduce the likelihood that a horse will “splash it all over” or “spit it up”. In addition, using a dose syringe also helps to ensure a horse will consume the entire amount of the mixture. [Tr. pp. 131-2; 145]. Dr. Fenger

³ Specifically, Petitioner admitted to orally administering a substance using an oral dosing syringe on December 2, 2021 to “The Bucket”, “Prescotts Hope” and “A Sham of Amber” (collectively, the “Affected Horses”).

⁴ Respondent did provide any evidence with respect to the contents of the dose syringes.

testified that dose syringes are often used to administer the Yogurt/Aloe Vera Mixture because horses do not always consume all of their feed from a feed tub.

[Tr. p. 116]

3. Respondent argues administration of any substance via oral administration is strictly prohibited on race day. Respondent further argues that feeding a horse on race day by oral administration is not consumption in the course of normal dietary intake under 71 IAC 8-1-1.5(c).
4. Petitioner is correct in that the race day administration regulations do not explicitly provide that oral administration of a food product on race day is prohibited. However, the regulations provide a clear distinction between oral administration of a substance and consumption in the course of normal dietary intake; i.e., eating and drinking.
 - a. Dr. Peterson testified that “forcibly putting [a substance] down a horse’s mouth” or “forcing a horse to take it” by using a dose or tube syringe, constitutes oral administration and is not permitted on race day under 71 IAC 8-1-1.5(b)(3). [Tr. pp. 43; 53]. Dr. Peterson further testified that the Yogurt/Aloe Vera Mixture could have been poured onto feed as a top dressing to a horse’s feed in its feed bucket. [Tr. pp. 43-4]
 - b. Mr. Gumm testified that “[a person] can’t give a horse anything on race day except [Lasix]”. [Tr. p. 93]. He further testified that, although the phrase “consumption in the course of normal dietary intake (eating and drinking)” is not defined in 71 IAC 8-1-1.5(c), its meaning is very clear to him, and “feeding in a natural way” means nothing is forced down a horse’s throat. [Tr. pp. 100; 102-4]

- c. Dr. Fenger’s testimony that consumption of probiotics and direct fed microbials, such as the Yogurt/Aloe Vera Mixture, on a daily basis constitutes normal dietary intake does not address the manner in which the mixture is provided; i.e., the Yogurt/Aloe Vera Mixture could have been provided to a horse as a top dressing on its feed as supported by the testimony of Dr. Peterson. [Tr. p. 53]
 - d. The terms “eating” and “drinking” are commonly used terms readily understood by most people to connote a voluntary willingness to consume a substance. Force-feeding a substance to a horse, whether in order to simply ensure the horse ingests the entire amount of the substance or otherwise, is not consistent with the plain meaning of those terms.
 - e. Although it is understandable why Petitioner may prefer to orally administer the Yogurt/Aloe Vera Mixture using a dose syringe as opposed to top dressing a horse’s feed, oral administration on race day simply is not permitted under the plain meaning of the language used in the regulations and the overall regulatory scheme contemplated in 71 IAC 8-1-1.5.
5. Based on the foregoing, I find that consumption by a horse “in the course of normal dietary intake (eating and drinking)” does not include the forcible or non-volitional administration of a substance using a dose syringe for purposes of 71 IAC 8-1-1.5(b) and (c). Accordingly, I find Petitioner violated 71 IAC 8-1-1.5(b)(3) when he orally administered the Yogurt/Aloe Vera Mixture to the Affected Horses on December 2, 2021.

B. Substantial and reliable evidence does not exist to support a conclusion that Petitioner injected a substance, foreign or otherwise, to a horse on race day using a hypodermic needle and syringe at Harrah’s Hoosier Park in violation of 71 IAC 8-1-1.5(b)(1).

9. Respondent contends the following:
- a. As part of his investigation, Mr. McAllister spoke with a Mr. Orantes, a groom who allegedly observed Petitioner administering injections to the necks of approximately ten horses on days on which the horses were scheduled to race. Mr. Orantes did not testify at the Hearing and reportedly recanted his allegations after speaking with Mr. McAllister. Petitioner did not object to the hearsay testimony by Mr. McAllister with respect to Mr. Orantes's allegations.
 - b. At the Hearing, Respondent played video recordings which showed Petitioner leading the horse "Meadowbrook Raider" into the wash bay at a barn on the grounds of Hoosier Park racetrack. The recordings were from cameras mounted at various locations in the barn including one camera mounted above certain stalls in the barn which included a distant and partially obstructed view of the wash bay area in the barn.
 - c. Shortly before Petitioner led the horse into the wash bay, Petitioner draped a blanket over the top of a sulky (i.e., racing cart) and moved the sulky in front of an aisleway in the barn. Mr. Zawistowski testified that he believed Petitioner covered the sulky with the blanket and moved it in order to conceal his activities while in the wash bay. [Tr. p. 78]
 - d. Petitioner was in the wash bay with the horse and another groom for less than one minute during which Respondent contends Petitioner injected the horse in its neck area with an unknown substance. Dr. Peterson and Mr. Zawistowski both testified it was unusual to only use a wash bay for less than one minute. [Tr. pp. 49-50; 63-5]

10. Mr. Zawistowski testified that it was possible Petitioner was injecting something in the neck area based on the body actions of the lower half of the horse seen in the video recording. [Tr. pp. 80-3; pp. 88-9]
11. It was difficult to ascertain what occurred in the wash bay because of the angle and distance of the wash bay from the camera. For example, Mr. Zawistowski testified that only the bottom half of the horses and both grooms were visible in the video recordings; the top halves of the people and horse could not be seen. [Tr. p. 79]
12. Petitioner contends he never injected a horse, and the recording reflects he was applying cedar oil to the horse's neck. [Tr. pp. 133-6]
13. Petitioner contends he was attempting to dry the blanket when he hung it over the sulky. Petitioner could not explain why he moved the sulky. [Tr. p. 153]
14. Mr. Zawistowski testified that no needles or syringes were found during the investigation of Petitioner. [Tr. p. 89]
15. Based on the foregoing, I find as follows:
 - a. The video evidence does not support Respondent's allegations because of the angle and distance of the wash bay from the camera, and the fact that only the lower halves of the people and horse were visible on the recordings.
 - b. Based on my review of the video evidence, a meaningful reaction by the horse was not observed.
 - c. No needles or syringes were located during the investigation.
 - d. The testimony of Mr. McAllister with respect to the matters related to him by Mr. Orantes, although hearsay, is sufficient to enter an order against Petitioner under I.C. § 4-21.5-3-26 because it was not objected to during the Hearing. However, in

light of the fact that Mr. Orantes apparently recanted his allegations and did not testify at the Hearing, I find that Mr. Orantes's allegations with respect to this matter are not credible.

16. Based on the foregoing, I find that Respondent did not sustain its burden of proof with respect to the allegations that Petitioner injected a horse in violation of 71 IAC 8-1-1.5(b)(1).

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over this matter pursuant to his appointment by the Indiana Office of Administrative Proceedings and the provisions of I.C. § 4-21.5, *et seq.* and 71 IAC 10-3-7.
2. The IHRC has promulgated rules, consistent with its legislative directive, that provide for the assessment of sanctions, including license suspension, revocation and/or fines to those who violate its rules.
3. At all times relevant, Petitioner was duly licensed by the IHRC as a groom and as a trainer and driver and subject to all rules and statutes that regulate pari-mutuel horse racing in Indiana.
4. The Amended Complaint was issued in accordance with Indiana statutes and IHRC rules and were supported by substantial, reliable and credible evidence presented to the undersigned administrative law judge.
5. Commission Staff had the burden of persuasion and the burden of going forward with proof on the Amended Complaint by a preponderance of the evidence pursuant to I.C. § 4-21.5-3-14.

6. By a preponderance of the evidence, Commission Staff met its burden of proof with respect to each of the following under 71 IAC 8-1-1.5(b)(3):
 - a. Petitioner orally administered a substance, foreign or otherwise, to the Affected Horses within 24 hours of the horses' scheduled race times;
 - b. The Yogurt/Aloe Vera Mixture is "feed or feed supplements" for purposes of 71 IAC 8-1-1.5(c); and
 - c. Feed or feed supplements may not be orally administered to a horse using a dosage syringe under 71 IAC 8-1-1.5(b)(3).

7. By a preponderance of evidence, Commission Staff did not meet its burden of proof as follows:
 - d. Respondent did not establish by a preponderance of the evidence that Petitioner injected a horse with a substance, foreign or otherwise, on a day the horse was scheduled to race under 71 IAC 8-1-1.5(b)(1).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff met its burden of proof by a preponderance of the evidence that Petitioner violated 71 IAC 8-1-1.5(b)(3), orally administering a substance, foreign or otherwise, to the Affected Horses on three occasions on a date each horse was scheduled to race.

2. Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff did not meet its burden of proof by a preponderance of the evidence that Petitioner violated 71 IAC 8-1-1.5(b)(1), injecting the horse "Meadowbrook

Raider” with a substance, foreign or otherwise, within 24 hours of the date on which the horse was scheduled to race.

APPROPRIATENESS OF SANCTIONS

1. Pursuant to 71 IAC 10-3-12(f), Commission Staff may recommend penalties and an administrative law judge may accept, reject or modify the recommended penalty.
2. As set forth above, the Amended Complaint recommended Petitioner be suspended for one year, fined in the amount of \$5,000 and required to forfeit purses with respect to four races.⁵ Other than the purse forfeitures, the recommended sanctions set forth in the Amended Complaint did not provide detail with respect to the respective sanctions for violations of race day oral administration rules versus recommended sanctions for violation of race day injection rules.
3. Accordingly, on June 2, 2023 Respondent was ordered to supplement the record and provide additional evidence with respect to how the sanctions proposed in the Amended Complaint were determined with respect to each charge⁶ (collectively with Petitioner’s response thereto, the “Supplemental Evidence”).
4. In its Supplemental Evidence, Respondent provided two cases involving race day oral administration violations in Indiana in which violators were suspended for 45 days, fined in the amount of \$1,000 and required to forfeit related purses. Respondent also provided examples of race day oral administration violations in California with suspensions ranging

⁵ Specifically, three races for violation of race day oral administration rules (i.e., races in which the horses “The Bucket”, “Precotts Hope” and “A Sham of Amber” raced) and one race for violation of race day injection rules (i.e., a race in which “Meadowbrook Raider” raced).

⁶ Petitioner provided his response on June 14, 2023.

from 30 days to one year and fines of up to \$10,000. [Respondent's Supplemental Evidence, pp. 5-6]

5. In its determination of recommended sanctions, Respondent considered the seriousness of the violations, penalties imposed by the IHRC and other states in the past, Petitioner's clean record (albeit for a relatively short time period as a standardbred licensee)⁷ and the fact that only one race day injection violation was alleged to have occurred in recommending the sanctions set forth in the Amended Complaint.
6. In its Supplemental Evidence, Respondent determined the recommended sanctions against Petitioner for violations of the race day oral administration rules should be a 90 day suspension, a fine of \$1,000 and purse forfeiture/redistribution. [Respondent's Supplemental Evidence, p. 6].⁸
7. Petitioner provided a case in Indiana where a groom admitted to violating the race day oral administration rules under 71 IAC 8-1-1.5(b), and the trainer was charged with similar violations under the trainer responsibility rules. The groom was suspended for 45 days, and the trainer was suspended for seven days and fined in the amount of \$1,500 (in addition to purse forfeiture/redistribution). In mitigation the Racing Judges determined the groom acted without the knowledge of the trainer. In a second case in Indiana, a trainer violated the race day oral administration rules and was suspended for 45 days and fined in the amount of \$1,000 (in addition to purse forfeiture/redistribution). In mitigation, the Racing Judges cited Petitioner's admission of guilt, acknowledgement of wrongdoing, willingness

⁷ Respondent represents that according to the United States Trotting Association database (as reflected on its website), 2021 was Mr. Williams first year as a standardbred licensee.

⁸ Although not explicitly so stated, the recommended sanctions in excess of the foregoing are presumably attributable to race day injection violations.

to cooperate and his “impeccable record through nearly 50 years of racing.” [Petitioner’s Supplemental Evidence, p. 5]

8. As set forth above, Petitioner has been found to have violated only the race day administration rules under 71 IAC 8-1-1.5(b)(3) and not the race day injection rules under 71 IAC 8-1-1.5(b)(1). Accordingly, a reduction of the recommended sanctions set forth in the Amended Complaint appears to be appropriate.
9. Based on the foregoing and as follows, I find the appropriate period of suspension to be less than one year, as reflected in the Amended Complaint, but more than 90 days, as reflected in Respondent’s Supplemental Evidence:
 - a. Petitioner’s relatively short standardbred licensure record (i.e., he has held his standardbred license only since 2021) compared to much longer records of the individuals involved in cases provided by both Petitioner and Respondent;
 - b. Petitioner has not acknowledged he violated the race day oral administration rules.
 - c. During the Hearing, Mr. Gumm testified that violations of race day administration rules were “serious” because they involved attempts to circumvent the rules.⁹ [Tr. p. 95]

NONFINAL ORDER

1. As set forth above, Commission Staff may recommend penalties and an administrative law judge may accept, reject or modify the recommended penalty. 71 IAC 10-3-12(f).
2. A 180 day suspension, fine of One Thousand Dollars (\$1,000) and forfeiture/redistribution of certain purse monies recommended against Petitioner are each reasonable in light of the

⁹ Mr. Gumm testified that race day injections were a “serious, serious violation” of IHRC rules. [Tr. p. 96]

substantial, credible and reliable evidence presented during the Hearing and in the Supplemental Evidence.

3. Having considered all of the facts and evidence presented by the parties, including facts in mitigation, I recommend that a Final Order be entered by the Indiana Horse Racing Commission (1) in favor of the Indiana Horse Racing Commission Staff and against Petitioner with respect to Paragraph 19 of the Amended Complaint (i.e., race day oral administration violations), and (2) in favor of Petitioner and against the Indiana Horse Racing Commission Staff with respect to Paragraph 20 of the Amended Complaint (i.e., race day injection violation), and sanctions be adopted recommending that Petitioner:

(a) Be suspended for a period of 180 days,

(b) Be fined in the amount of One Thousand Dollars (\$1,000), and

(c) Be ordered to forfeit for redistribution certain purse monies as set forth in Paragraphs (a), (b) and (c) on Page 7 of the Amended Complaint; i.e., with respect to the horses “The Bucket”, “Prescotts Hope” and “A Sham of Amber”.¹⁰

In accordance with I.C. § 4-15-10.5-12(b), the undersigned’s order disposing of this matter is not final. Specifically, this Non-Final Order is subject to review by the Indiana Horse Racing Commission. Pursuant to I.C. § 4-21.5-3-29(d), Petitioner and Respondent each have fifteen (15) calendar days following receipt of this Non-Final Order to file written exceptions with the Indiana Horse Racing Commission.

¹⁰ Forfeiture and redistribution of the purse set forth in Paragraph (d) on Page 8 of the Amended Complaint (i.e., with respect to the horse “Meadowbrook Raider”) is not recommended.

ORDERED: September 13, 2023

/S/ Michael Buker _____

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

Distributed to Parties:

Jamal Williams, Petitioner – served by Co-Counsel Peter J. Sacopulos by ALP EService email at pete_sacopulos@sacopulos.com and Co-Counsel Howard Taylor by ALP EService email at Htaylorseq@comcast.net.

Indiana Horse Racing Commission Staff (Agency), Respondent – served by Co-Counsel Dale L. Pennycuff by ALP E-Service email at dpennycuff@hrc.in.gov and Co-Counsel Matthew E. Eggiman, by ALP EService email at meggiman1@hrc.in.gov

INDIANA OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS

**BEFORE AN ADMINISTRATIVE LAW JUDGE
FOR THE INDIANA HORSE RACING COMMISSION
2023 TERM**

ADMINISTRATIVE CAUSE NUMBER: HRC-2206-001429

**JAMAL WILLIAMS,
Petitioner**

v.

**INDIANA HORSE RACING
COMMISSION STAFF,
Respondent.**

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) **In Re: Appeal of Administrative**
) **(Civil Penalty) 222002**
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Respondent, Jamal Williams by counsel, Howard A. Taylor and Peter J. Sacopulos, pursuant to I.C. 4-21.5-3-29 and in compliance with Administrative Law Judge Michael Buker’s Proposed Findings of Fact, Conclusions of Law and Nonfinal Order, respectfully submits his Objections and Exceptions to the Administrative Law Judge’s Proposed Findings of Fact, Conclusions of Law and Nonfinal Order of September 13, 2023. In support of Jamal Williams Objections and Exceptions set forth herein, Jamal Williams states:

PETITIONER’S EXCEPTIONS

Petitioner, Jamal Williams, takes exception to the comments in footnote number 2 on page 2 of the Proposed Findings of Fact, Conclusions of Law and Nonfinal Order of September 13, 2023, that Petitioner presented no evidence of conspiracy, bias, or interest on the part of: “...the witnesses beyond the fact of common employment...” To the contrary, Petitioner cross examined each of the witnesses presented by Respondent in light of their opinions offered.

Petitioner further objects and takes exception to Findings of Fact number 4 that the regulations and specifically 71 IAC 8-1-1.5(c) provide a clear distinction between oral administration of a substance and consumption in the course of normal dietary intake, i.e., eating and drinking. 71 IAC 8-1-1.5(c) states that: “substances or metabolites thereof which are contained in equine feed or feed supplements...are **not** considered foreign substances consumed in the course of normal dietary intake (eating and drinking).” See 71 IAC 8-1-1.5(c). The ALJ, in his Proposed Findings of Fact, Conclusions of Law and Nonfinal Order of September 13, 2023, correctly states that: “.... regulations do not explicitly provide that oral administration of a food product on race day is prohibited....” Petitioner objects to this exception to the Findings of Fact that said regulation provides a clear distinction between oral administration of a substance and consumption in the course of normal dietary intake. No such distinction is made in the regulation and flies in the face of the balance of the language of the that the regulation.

Petitioner further objects to and takes exception with the Findings of Fact number 4 that “forcibly” putting a substance in a horse’s mouth constitutes oral administration and is not permitted. Respondent introduced evidence in the form of multiple surveillance videos. All show the horse accepting and swallowing the entirety of the dose syringe.

In furtherance of this objection and exception, it is significant that Respondent’s witness, Kevin Gumm, Presiding Judge at Hoosier Park, testifying for the Commission, agreed that consumption in the course of normal dietary intake is **not** defined. In contrast, Dr. Clara Fenger, Petitioner’s qualified expert, testified that the yogurt and aloe vera mixture is food and constitutes normal dietary intake and, as such, is not a violation of 71 IAC 8-1-1.5 (b)(3).

Petitioner also objects and takes exception with the ALJ’s Proposed Findings of Fact, set forth in rhetorical paragraph 4, that eating and drinking are commonly used terms understood by most people to connote a voluntary willingness to consumer a substance. The ALJ, in making this finding, is relating eating and drinking defined as consumption by humans and transferring that to the horse. Horses are not humans and do not understand that this food is good for them and will help settle their stomachs, as a human would.

Petitioner further objects to and takes exception with the Proposed Finding of Fact number 5 that incorrectly finds and concludes that consumption by a horse does not include the forcible or nonvolitional administration of a substance using a dose syringe and the ALJ’s finding that Petitioner, therefore, violated 71 IAC 8-1-1.5 (b)(3). Said proposed Findings of Fact/Conclusion is inconsistent with and contrary to 71 IAC 8-1-1.5(b)(3).

Petitioner also objects to and takes exception with the ultimate finding that the Commission Staff met its burden of proof that Petitioner violated 71 IAC8-1-1.5(b)(3). Respondent failed to do so as is required, just as Respondent failed to do so relative to Respondent’s allegation of needle injections.

Finally, Petitioner objects to and takes exception with the appropriateness of sanctions as not substantiated by the facts. As documented in rhetorical paragraph 6, on page 14, Respondent submitted supplemental evidence, recommending sanctions against Petitioner for race day oral administration of 90 days with \$1,000.00 fine and purse forfeiture. Petitioner offered and introduced multiple cases involving the Indiana Horse Racing Commission involving fines and suspensions that are substantially less and never more than 45 days with some penalties as minimal as 7 days of suspension. The proposed recommended penalty is not based on the evidence, or the testimony admitted and offered at the hearing of May 24, 2023. In fact, it is arbitrary and without justification. The recommendation is twice that was recommended by the Respondent. In short, the penalty is arbitrary, capricious, unsubstantiated by evidence and/or testimony and/or by president. The Proposed Recommendation is draconian.

Agenda Item #3



FILED:

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

FINAL AGENCY AUTHORITY: Indiana Horse Racing Commission

September 30, 2023

PETITIONER: ANDY R. SHETLER

RESPONDENT: INDIANA HORSE RACING COMMISSION STAFF

OALP CAUSE NUMBER: HRC-2210-002090 and HRC-2208-001611

**UNDERLYING ACTION OR ORDER NUMBER: Administrative Complaint, No. 222003 (as amended);
Judges' Ruling HP-2022-2765**

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND NONFINAL ORDER

This matter came before Administrative Law Judge Michael Buker for hearing on a consolidated record with respect to the appeal of (1) Judges' Ruling HP-2022-2765 (the "Judges' Ruling") and (2) Administrative Complaint No. 223003 (as amended) issued by the Indiana Horse Racing Commission Staff ("Commission Staff") against Petitioner. Petitioner is a trainer of standardbred horses who at all times relevant was licensed by the Indiana Horse Racing Commission ("IHRC"). On August 5, 2022, pursuant to the Judges' Ruling, Petitioner was summarily suspended under 71 IAC 10-2-3(a) for 91 days by the Judges for allegedly injecting race horses with hypodermic needles on multiple occasions at Harrah's Hoosier Park ("Hoosier Park") racetrack in violation of 71 IAC 8-7-1, 71 IAC 5-3-2(a) and (b) and 71 IAC 5-3-3(a)(5). Petitioner timely filed his appeal thereto and requested a stay of the suspension pending and evidentiary Hearing. On August 22, 2022, the matter was assigned to the undersigned Administrative Law Judge.

On September 27, 2022, Respondent filed Administrative Complaint No. 223003 against Petitioner alleging multiple violation of IHRC rules. Petitioner timely filed his appeal thereto. On October 11, 2022, the matter was assigned to the undersigned Administrative Law Judge.

On April 18, 2023, an amended administrative complaint was filed pursuant to which the original recommended sanctions were reduced (the “Amended Complaint”) The Amended Complaint includes alleged violations by Petitioner of IHRC rules set forth generally as Paragraphs 11, 12, 19, 20, 21 and 22 thereof. In general, the Amended Complaint alleges the following:

- Paragraph 11 – Petitioner was alleged to possess contraband consisting of two glass injectable vials within the grounds of Hoosier Park racetrack in violation of 71 IAC 8-7-1;
- Paragraph 12 – Petitioner was alleged to possess contraband consisting of two glass injectable vials containing the substance erythropoietin (“EPO”) within the grounds of Hoosier Park racetrack in violation of 71 IAC 8-6-2;
- Paragraph 19 – Petitioner injected horses using hypodermic needles and syringes on the grounds of Hoosier Park racetrack in violation of 71 IAC 8-7-1;
- Paragraph 20 – Petitioner injected horses on multiple occasions with substances, foreign or otherwise, using hypodermic needles and syringes on the grounds of Hoosier Park racetrack in violation of 71 IAC 5-3-2(a) and (b) and 71 IAC 5-3-3(a)(5);
- Paragraph 21 – Petitioner was summarily suspended by the Judges on August 5, 2022, for violations of 71 IAC 8-7-1, 71 IAC 5-3-2(a) and (b), and 71 IAC 5-3-3(a)(5) when he injected horses using hypodermic needles and syringes on the grounds of Hoosier Park racetrack; and

- Paragraph 22 – Petitioner injected horses with substances, foreign or otherwise, on multiple occasions using hypodermic needles and syringes on the grounds of Hoosier Park racetrack in violation of 71 IAC 5-3-3(a)(17), (18) and (27).

In addition to the foregoing, Respondent alleges Petitioner violated or attempted to violate IHRC rules or engaged in conduct that is against the best interest of horse racing or which compromises the integrity of operations at an IHRC facility in violation of 71 IAC 5-1-14.¹ Pursuant to the Amended Complaint, Commission Staff recommended sanctions against Petitioner of (1) a \$10,000 fine and (2) a five year suspension. On August 23, 2023, an evidentiary hearing was conducted on a consolidated record with respect to the merits of Petitioner’s appeals under I.C. § 4-21.5-3 and 71 IAC 10-3, *et seq.* (the “Hearing”),² pursuant to which Respondent had the burden of proof to establish the penalties set forth in the Amended Complaint and the Judges’ Ruling should be sustained.

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

¹ Amended Complaint, Paragraph 23

² Petitioner was represented by his co-counsel, Mr. Peter J. Sacopulos and Mr. Gregory S. Carter. Commission Staff was represented by its co-counsel Mr. David Rothenberg, Mr. Matthew M. Eggiman and Mr. Dale Lee Pennycuff.

EXHIBITS ADMITTED DURING THE HEARING

Respondent's Exhibits:

Respondent's Exhibits A-F, I-V, and X-Z were admitted as set forth in the Hearing Transcript ("Tr."), Index of Exhibits, pp. 3-4.

Petitioner's Exhibits:

Petitioner's Exhibits A1, L-N, and O were admitted as set forth in the Tr., Index of Exhibits, p. 4.

WITNESSES WHO TESTIFIED AT THE HEARING

Respondent's Witnesses:

1. Mr. Robert Murdock –Hoosier Park racetrack security employee
2. Dr. Amanda Wilson, DVM – IHRC licensed veterinarian
3. Mr. Jeff Brahaum – IHRC Investigator
4. Mr. Harold Davis, Jr. – IRHC Investigator
5. Ms. Petra Hartmann – Industrial Laboratories, Director of Drug Testing Services
6. Mr. John Zawistowski – IHRC Associate Judge
7. Dr. Kerry Peterson, DVM – IHRC Equine Medical Director
8. Dr. Daniel Eichhorn, DVM – IHRC Director of Veterinary Services at Hoosier Park racetrack
9. Mr. Eric Smith – IHRC Senior State Steward

Petitioner's Witness:

1. Mr. Andy Shetler (Petitioner)

Proposed Findings of Fact, Conclusions of Law and Nonfinal Order (Shetler)

2. Mr. Dane May – IHRC licensed trainer
3. Dr. Clara Fenger, DVM, PhD, Dipl. ACVIM

RELEVANT STATUTORY AND REGULATORY AUTHORITY

71 IAC 8-7-1, *Contraband*

Sec. 1. No person other than a licensed veterinarian shall have in his or her possession within the association grounds any injectable substance or any hypodermic syringe or hypodermic needle or similar instrument which may be used for injection....

71 IAC 5-3-2, *Trainer Responsibility*

Sec. 2. (a) The trainer is responsible for:

- (1) the condition of horses he or she trains entered in an official workout or race;
 - (2) the presence of any prohibited drug, medication, or other substance, including permitted medication in excess of the maximum allowable level, in horses he or she trains; and regardless of the acts of third parties. A positive test for a prohibited drug, medication, or substance, including permitted medication in excess of the maximum allowable level, as reported by a commission-approved laboratory, is prima facie evidence of a violation of this rule. In the absence of substantial evidence to the contrary, the trainer shall be responsible.
 - (3) Ensuring that all persons employed by them are knowledgeable of and observe all commission rules and regulations.
- (b) A trainer shall prevent the administration of any drug or medication or other prohibited substance that may cause a violation of these rules.
- (c) A trainer whose horse has been claimed remains responsible for the race in which the horse is claimed.

71 IAC 5-3-3, *Other responsibilities*

Sec. 3 (a) A trainer is responsible for the following:

- (1) – (4)....
- (5) The proper identity, custody, care, health, condition, and safety of horses in his or her charge, including that outlined in 71 IAC 8.
- (6) – (16)....
- (17) Horses entered as to eligibility.
- (18) Ensuring the fitness of a horse to perform creditably.

(19) – (26)....

(27) Guard and protect all horses in his or her care.

(28) – (31)....

71 IAC 8-6-2, *Prohibited Practices*

Sec. 2 (a) The possession and/or use of a drug, substance, or medication, specified below, on the premises of a facility under the jurisdiction of the commission is prohibited. These drugs or substances include those which a recognized analytical method has not been developed to detect and confirm the administration of such substance, or the use of which may endanger the health and welfare of the horse or endanger the safety of the rider, or the use of which may adversely affect the integrity of racing:

(1) Erythropoietin

(2) – (12)....

(b) – (j)....

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

(1) injection;

(2) – (7) ...

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

(c) – (e)

FINDINGS OF FACT

A. **Substantial and reliable evidence exists to support a conclusion that Petitioner possessed contraband in the form of two injectable vials on the grounds of Hoosier Park racetrack in violation of 71 IAC 8-7-1.**

1. At all times relevant, Petitioner was licensed by the IHRC and subject to its rules and regulations. [IHRC Ex. B]

2. As a licensee, Petitioner agrees the IHRC or its agents may search, inspect and seize any prohibited medication, controlled substances, paraphernalia or devices in violation of IHRC rules. [IHRC Ex. A3]
3. On June 17, 2022, IHRC investigators conducted a search of Shetler's barn area, vehicle and person. [Tr. pp. 78-80, 105-8]
4. During the search, Petitioner and his stepdaughter, Ashley Smith, engaged in suspicious, non-verbal communication. [Tr. pp. 106-7]
5. After observing the non-verbal communication, Mr. Brahaum and Mr. Davis searched Petitioner's truck located on the backside of Hoosier Park. [Tr. pp. 78-81, 107-8; IHRC Exhibits C1-C3]
6. During the search, Petitioner put his hand into a cooler that contained water. [Tr. pp. 80, 107-8]
7. Petitioner's hand was cold and wet and Petitioner was instructed to open his hand to reveal its contents. [Tr. pp. 80, 107-8]
8. Petitioner had in his hand two unlabeled injectable vials, each of which contained a small, residual amount of a clear liquid. [Tr. pp. 80, 108-9]
9. Petitioner claimed the vials contained vitamins for himself to assist him with weight loss. [Tr. pp. 80, 109]
10. Petitioner understood he was not supposed to possess the vials on the grounds of Hoosier Park racetrack.
 - a. Petitioner testified it was "my mistake for having them [in his possession]." [Tr. p. 317]

b. Petitioner testified “I knew they shouldn’t have been there, and I grabbed them.”

[Tr. pp. 319-20]

11. The vials were photographed by Mr. Brahaum, placed in an evidence bag, and sent to Industrial Laboratories for analysis. [Tr. pp. 81, 109-15; IHRC Ex. E]

12. Based on the foregoing, I find Petitioner possessed two injectable vials on the grounds of Hoosier Park racetrack in violation of 71 IAC 8-7-1.

B. Substantial and reliable evidence does not exist to support a conclusion that the vials possessed by Petitioner contained EPO in violation of 71 IAC 8-6-2(a)(1).

13. The vials did not contain vitamins.

a. Petitioner told investigators and testified at the Hearing the substances in the vials were “fat burner” vitamins to assist him with weight loss. [Tr. pp. 80, 109, 317]

b. Industrial Laboratories tested the contents in the vials and determined the contents were not vitamins. [Tr. p. 163]

14. The residual contents in the vials were “oily” and consisted of a “clear, colorless, slightly viscous, trace amount of liquid.”

a. The chemist at Industrial Laboratories who received the vials described the contents as “oily” and “clear, colorless, slightly viscous, trace amount of liquid” in the Laboratory Documentation Packet.³ [IHRC Ex. F, p. 12]

15. Upon testing, the residual contents of the vials suggested a strong presence for EPO.

a. An immunoassay test using an ELISA test kit was performed on the substances contained in the vials. [Tr. p. 155; IHRC Ex. F, p. 5]

³ The Laboratory Documentation Packet included shipping/receiving/log-in documents, racetrack and laboratory chain of custody documents, test records, laboratory test reports and a Certificate of Analysis.

- b. The test is designed so that the tested substance will change color (i.e., to blue) if EPO is detected in the submitted sample; the stronger the color formed, the greater amount of EPO is present. [Tr. p. 155]
 - c. After performing the test on the contents in the vials, the color that was formed was “very” blue. [Tr. p. 160]
 - d. The test also produced a numerical expression of the optical density data (i.e., the color change) associated with the contents of the vials that was compared to control samples. [Tr. pp. 160, 380]
 - i. The numerical expression for the contents of the first vial was 3.481 out of a maximum of approximately 3.6). [Tr. p. 161; Ex. F, p. 17]
 - ii. The numerical expression for the contents of the first vial was 3.509. [Tr. p. 161; Ex. F, p. 17]
 - e. The foregoing numerical expressions indicated “the potential presence of [EPO] at a level that was higher than the highest calibrator supplied with the test kit.” [Tr. pp. 160-1]
 - f. The ELISA test kit is “used on a routine basis in human medicine.” It is a “very well-established immunoassay kit that has been scientifically verified and is commonly in use with the United States and internationally.” [Tr. p. 156]
 - g. Industrial Laboratories uses it on a “routine basis on contraband as well as on out-of-competition blood samples that we get from racehorses.” [Tr. p. 157]
16. Confirmatory testing to establish conclusively whether the vials contained EPO was not conducted because there was not enough contents in the vials to do so. [Tr. p. 149]

- a. Without confirmatory testing, the ELISA test results were neither “negative”, meaning there was no indication of the presence of EPO, nor “positive”, meaning the substance was unequivocally EPO. [Tr. p. 153]
 - b. Ms. Hartmann testified she “definitely cannot call this a negative.” [Tr. p. 164]
17. Despite the strong indication of EPO based on the test results, the test results may not be reliable because the testing was not performed in accordance with the instructions and protocol of the test kit manufacturer.
 - a. The test kit manufacturer’s instructions provide that an oily sample may yield inaccurate results.
 - i. The package insert provides: “Lipemic [i.e., oily], grossly hemolyzed or contaminated specimens may yield inaccurate results and should not be tested with this procedure.” [Tr. p. 356; Petitioner’s Ex. O]
 - ii. Dr. Fenger testified the sample was “not suitable for using on a [sic] ELISA test kit that’s designed for an aqueous sample” because the sample was described as oily. [Tr. pp. 381-2]
 - iii. Dr. Fenger testified the ELISA test kit used to test for EPO was not appropriate because the contents were described as oily and the test required the sample to be “an aqueous nonoily base in order to work – because oil and water don’t mix.” [Tr. p. 352]
 - iv. Dr. Fenger testified the very strong color response from the ELISA test meant (1) the sample substance contained EPO, (2) either interference or cross-reactivity occurred with respect to the sample and the test. [Tr. p. 381]

- v. Dr. Fenger testified it was “highly unlikely [the substance in the vials] was EPO just based on the oil base that it was in.” [Tr. p. 352]
- b. Petitioner further argued the ELISA test results may not be valid because the concentration of the tested sample exceeded the range of sample concentration specified by the test kit manufacturers.
 - i. The ELISA test kit is designed to be used to test for EPO in a “serum or plasma sample”. [Tr. p. 357]
 - ii. The ELISA test kit package insert provides: “Report values for each unknown that reads within the range of the assay.” The range of the assay is 2.5 to 200 milliunits per milliliter. “For unknown values above the range, dilute the samples” which, according to Dr. Fenger, was not done by Industrial Laboratories. [Tr. pp. 357-8; Petitioner’s Ex. O]
 - iii. According to Dr. Fenger, “pure” EPO would “overwhelm the system to the point that you can’t determine anything and, therefore, you need to dilute the sample” which, according to Dr. Fenger, was not done by Industrial Laboratories. [Tr. pp. 357-8]
 - iv. However, Ms. Hartmann testified that the chemist who performed the tests removed a small sample of the fluid in the vials and “diluted it in several dilution steps” in order to conduct the testing. [Tr. p. 137].
 - 1. This process is consistent with the process described by Ms. Hartmann for how samples for testing are obtained when there is little or “small samples to work with”; i.e., a buffer solution would

be used to rinse the container, and the rinse would then be tested.

[Tr. p. 134-5]

- c. Test kit results are only valid if the test is performed in accordance with the intended use and instructions of the product.
 - i. Dr. Fenger testified that if instructions and intended use of a test kit manufacture are not followed, validation of the results is not guaranteed and must be independently conducted. [Tr. p. 374]
 - ii. Industrial Laboratories has not validated testing for EPO in an oily base. [Tr. p. 175]
 - d. The ELISA test kit is “used on a routine basis in human medicine.” It is a “very well-established immunoassay kit that has been scientifically verified and is commonly in use with the United States and internationally.” [Tr. p. 156]
 - e. Industrial Laboratories uses the ELISA test kit on a “routine basis on contraband as well as on out-of-competition blood samples that we get from racehorses.” [Tr. p. 157]
18. Based on the ELISA testing data, there is strong evidence to support a conclusion the vials contained EPO. However, the clear language of the test kit package insert provides that an oily sample may yield inaccurate results and the test kit should not be used in such circumstances. Respondent did not provide evidence with respect to why the ELISA test kit was appropriate to use in light of the oily nature of the sample. Accordingly, I find that

substantial and reliable evidence does not exist to support a conclusion that the two vials confiscated from Petitioner contained EPO in violation of 71 IAC 8-6-2(a)(1).⁴

C. Substantial and reliable evidence does not exist to support a conclusion that Petitioner injected horses on the backside of Hoosier Park in violation of 71 IAC 5-3-2(a) and (b), and 71 IAC 5-3-3(a)(5), (17), (18) and (27).

19. On or about June 22, 2022, Mr. Murdock provided Mr. Brahaum closed circuit video footage of six incidents in which Petitioner was alleged to engage in unusual behavior. [Tr. pp. 48, 86; IHRC Exhibits J-O]
20. The videos depict six separate incidents in which Petitioner is seen leading different horses into the wash rack in Barn 12 at Hoosier Park. [Tr. pp. 35, 215-33; IHRC Exhibits J-O]
21. Wash racks at racetracks are used for many purposes, including, without limitation, bathing horses, washing equipment, to perform veterinary procedures, and to orally administer substances to a horse. [Tr. pp. 182-3, 215-6, 365-6; IHRC Exhibits Q, R]

⁴ The Certificate of Analysis from Industrial Laboratories provides the residual substance in the vials was “Suspect for [EPO] using immunoassay testing.” It further provides in smaller print at the bottom of the one page document:

“Test results are based on screening tests and should not be used for legal purposes without additional testing (confirmatory analysis available at client request)

....

Test results determined by Industrial Laboratories do not constitute a guarantee that subsequent testing of different samples will yield the same result.

**Industrial Laboratories cannot guarantee that all potential drugs are detected with existing methods” (the “Disclaimer Language”). [IHRC Ex. F]

The Certificate of Analysis was admitted under I.C. § 4-21.5-3-26(a) over Petitioner’s objection.

During the Hearing, the parties were afforded an opportunity to file briefs with respect to whether the Certificate of Analysis should be admitted despite the Disclaimer Language pursuant to I.C. § 4-21.5-3-27(f). According to Ms. Hartmann, regardless of whether, hypothetically, the laboratory was “100% [certain] or zero percent [certain]” a sample contained EPO, the Disclaimer Language would print on the Certificate of Analysis form simply because confirmatory testing had not been performed on the sample, in which case, the Disclaimer Language appears to be an attempt by Industrial Laboratories to shield itself from legal liability. [Tr. p. 177]. Accordingly, I find the Certificate of Analysis was properly admitted under I.C. § 4-21.5-3-26(a) and as generally described in State v. Stotts and State v. Martin cited in Respondent’s brief. [Respondent’s Brief, pp. 8-9]. As reflected in this Nonfinal Order, minimal, if any, weight was given to the Certificate of Analysis in reaching the conclusions set forth herein.

22. On the videos, Petitioner was observed tying each of the six horses with a single crosstie with the horse's head facing toward the left rear corner of the wash rack. [Tr. pp. 219, 311; IHRC Exhibits J-O, Q, R]
23. On the videos, Petitioner then moves to the neck area of each horse. [Tr. pp. 219, 222, 225, 228, 230-2, 290-1; IHRC Exhibits J-O, Q, R]
24. In one of the videos, Petitioner pushes the mane of the horse to the other side of its neck. [Tr. p. 225; IHRC Exhibits L, Q]
25. The neck of the horse is a common site for intravenous and intramuscular injections and is where Lasix is frequently administered by an approved veterinarian. [Tr. pp. 58, 203-4; IHRC Exhibits Q, R, p. 2]
26. It was difficult to determine from the videos whether any of the horses reacted or moved when Petitioner was near its neck.
27. Different horses have different reactions when substances are administered to them either orally or by injection. [Tr. pp. 220, 287]
28. Respondent contends Petitioner administered something to each horse by intravenous or intramuscular injection.
 - a. Petitioner generally was in the wash rack for only one minute with each horse. [IHRC Exhibits J-O, Q]
 - b. Dr. Peterson and Dr. Eichhorn communicated to Mr. Brahaum they each believed Petitioner was administering some sort of substance to the horse. [IHRC Ex. R, p. 2; Ex. Q]
29. Petitioner contends he administered electrolytes to each of the horses using an oral dosing syringe. [Tr. p. 310]

30. No needles or syringes were seen or identified in any of the videos.
31. No evidence was presented to the effect that Petitioner possessed needles or syringes at Hoosier Park racetrack.
 - a. Mr. May testified he had never seen Petitioner in possession of needles on the backside of Hoosier Park. [Tr. p. 328]
32. Other than Petitioner, no other witness had personal knowledge of what occurred in the wash rack.
33. The surveillance videos are inconclusive with respect to the allegations against Petitioner. Specifically, it was difficult to determine what occurred in the wash rack because (a) the cameras were located a significant distance from the wash rack; (b) the camera angles were severe, i.e., it was necessary to adjust the viewing angle to extreme angles to view the wash rack; (c) the lighting was poor inside the barn; and (d) significant glare was present in the videos.
34. Based on the foregoing, I find substantial and reliable evidence does not exist to support the conclusion that Petitioner injected any of the horses on the videos in violation of IHRC rules.

CONCLUSIONS OF LAW

35. The undersigned has jurisdiction over this matter pursuant to his appointment by the Indiana Office of Administrative Proceedings and the provisions of I.C. § 4-21.5, *et seq.* and 71 IAC 10-3-7.

36. The IHRC has promulgated rules, consistent with its legislative directive, that provide for the assessment of sanctions, including license suspension, revocation and/or fines to those who violate its rules.
37. At all times relevant, Petitioner was duly licensed by the IHRC as a trainer and subject to all rules and statutes that regulate pari-mutuel horse racing in Indiana.
38. The Amended Complaint was issued in accordance with Indiana statutes and IHRC rules.
39. Commission Staff had the burden of persuasion and the burden of going forward with proof on the Amended Complaint by a preponderance of the evidence pursuant to I.C. § 4-21.5-3-14.
40. By a preponderance of the evidence, Commission Staff met its burden of proof with respect to each of the following:
 - a. Commission Staff established by a preponderance of the evidence that Petitioner violated 71 IAC 8-7-1 when he possessed contraband in the form of two injectable vials pursuant to the search of his vehicle on the grounds of Hoosier Park racetrack.
 - b. Possession of contraband is one of the charges for which Petitioner was summarily suspended pursuant to the Judges' Ruling. Because as set forth above, Petitioner has been found to have violated 71 IAC 8-7-1, his summary suspension should be sustained.
41. By a preponderance of the evidence, Commission Staff did not meet its burden of proof with respect to each of the following:
 - a. Commission Staff did not establish by a preponderance of the evidence that Petitioner possessed the prohibited substance EPO on the grounds of Hoosier Park racetrack in violation of 71 IAC 8-6-2(a)(1); and

b. Commission Staff did not establish by a preponderance of the evidence that Petitioner injected horses on the backside of Hoosier Park racetrack in violation of 71 IAC 5-3-2(a) and (b) and 71 IAC 5-3-3(a)(5), (17), (18) and (27).

42. As set forth below, a violation of 71 IAC 8-7-1 is a serious violation that is contrary to the best interests of horse racing in Indiana.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

43. Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff met its burden of proof by a preponderance of the evidence that Petitioner violated 71 IAC 8-7-1 when he possessed two injectable vials pursuant to the search of his vehicle on the grounds of Hoosier Park racetrack.

44. Possession of contraband is one of the charges for which Petitioner was summarily suspended pursuant to the Judges' Ruling. Because as set forth above, Petitioner has been found to have violated 71 IAC 8-7-1, his summary suspension should be sustained.

45. Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff did not meet its burden of proof by a preponderance of the evidence that Petitioner violated 71 IAC 8-6-2(a)(1) by possessing the prohibited substance EPO on the grounds of Hoosier Park racetrack.

46. Based on all of the evidence presented, including the Hearing and by submission of the parties, Commission Staff did not meet its burden of proof that Petitioner violated 71 IAC 5-3-2(a) and (b) and 71 IAC 5-3-3(a)(5), (17), (18) and (27) by injecting horses on the backside of Hoosier Park racetrack.

APPROPRIATENESS OF SANCTIONS

47. As set forth above, the Amended Complaint recommended Petitioner be suspended for five years and fined in the amount of \$10,000. The Amended Complaint did not provide detail regarding how the respective sanctions were determined for each of the violations set forth in the Amended Complaint.
48. At the Hearing, three unrelated rulings by the racing Judges were admitted with respect to other violations in Indiana.
- a. Ruling No. HP-2022-2793, in which a trainer violated the trainer responsibility rules with respect to race day administration violations perpetrated by a groom employed by her. The trainer was fined \$1,500 and suspended for seven days. In mitigation, the Judges noted the trainer's clean record, and the fact the groom confessed he administered the medications without the trainer's knowledge. [Petitioner's Ex. L]
 - b. Ruling No. HP-2022-2751, in which a trainer orally administered substances on race day and was fined \$1,000 and suspended for 45 days. In mitigation, the Judges noted the trainer's admission of guilt, acknowledgement of wrongdoing, willingness to cooperate and his "impeccable record through nearly 50 years of racing." [Petitioner's Ex. M]
 - c. Ruling No. HP-2022-2795, in which a groom orally administered substances to horses on race day and was suspended 45 days. In mitigation, the Judges noted the groom's admission of guilt and his clean record. [Petitioner's Ex. N]

49. As set forth above, Petitioner has been found to have violated only one of the three charges he is alleged to have committed.⁵ Accordingly, a reduction of the recommended sanctions set forth in the Amended Complaint is appropriate.
50. Under the Association of Racing Commissioners International Model Rules, possession of EPO is a “Class 1” substance for which a “Class A” penalty is recommended. [Tr. pp. 296, 300]
51. Possession of contraband is a serious violation of IHRC rules.
- a. Mr. Smith testified that possession of contraband by a person other than a veterinarian on the backside of a Commission-licensed racetrack negatively affects the integrity of horse racing and is a “serious” violation of IHRC rules. [Tr. pp. 297-8]
 - b. Dr. Peterson testified that possession of contraband is potentially harmful to the welfare of a horse and negatively impacts the integrity of racing. [Tr. pp. 206-7]
52. Petitioner has not acknowledged he possessed contraband in violation of 71 IAC 8-7-1.
53. Under I.C. § 4-21.5-3-27(d), an “administrative law judge’s experience, technical competence, and specialized knowledge may be used in evaluating evidence.”
54. Based on the foregoing, I find the appropriate period of suspension to be less than five years, as reflected in the Amended Complaint, but more than 45 days, as set forth in Petitioner’s Exhibits L-N.

⁵ In essence, the Amended Complaint can be grouped into three distinct categories of allegations: (1) possession of contraband in the form of the injectable vials (i.e., Paragraph 11 of the Amended Complaint), (2) possession of EPO (i.e., Paragraph 12); and (3) injections of horses in the wash rack of Barn 12 at Hoosier Park (i.e., Paragraphs 19, 20 and 22).

55. As set forth above, Petitioner was found to have possessed contraband in violation of IHRC rules and found to not have committed the two remaining violations of which he was accused.
56. Absent specific guidance to the contrary, the appropriate sanctions to be recommended against Petitioner should be approximately one-third of the amount and duration of the sanctions recommended in the Amended Complaint.
57. Based on the foregoing, and taking into account (a) the relative seriousness of a Class A penalty for possession of EPO (for which Petitioner was found to have not violated) and (b) Petitioner's clean record, I find the appropriate sanctions for violation of possession of contraband by Petitioner are as follows:⁶
- a. an eighteen month suspension, and
 - b. a fine of \$3,000.

NONFINAL ORDER

58. As set forth above, Commission Staff may recommend penalties and an administrative law judge may accept, reject or modify the recommended penalty. 71 IAC 10-3-12(f).
59. The five year suspension and fine of Ten Thousand Dollars (\$10,000) recommended in the Amended Complaint against Petitioner are excessive in light of the substantial, credible and reliable evidence presented during the Hearing.

⁶ The recommended sanctions in this Nonfinal Order reflect an approximately two-thirds reduction of the sanctions recommended in the Amended Complaint.

60. Having considered all of the facts and evidence presented by the parties, including facts in mitigation, I recommend a Final Order be entered by the Indiana Horse Racing Commission:

- a. Affirming the Amended Complaint with respect to the charges under Paragraph 11 thereof in all material respects, i.e., in favor of Commission Staff and against Petitioner;
- b. Dismissing the Amended Complaint with respect to all charges other than those set forth in Paragraph 11 in all material respects, i.e., in favor of Petitioner and against Commission Staff; and
- c. Affirming Judges' Ruling No. HP-2022-2765 in all material respects; i.e., in favor of Commission Staff and against Petitioner.

61. With respect to charges under Paragraph 11 of the Amended Complaint, I recommend sanctions be adopted recommending that Petitioner:

- d. Be suspended for a period of eighteen months, and
- e. Be fined in the amount of Five Thousand Dollars (\$3,000).

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

ORDERED: September 30, 2023

/s/ Michael Buker

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

Distributed to Parties:

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