STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Petitioner,	)	
vs.	)	Case No. 05-4358PL
SRDAN SARIC,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on February 8, 2006, by video teleconference between sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: S. Thomas Peavey Hoffer
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Assistants General Counsel
Department of Business and Professional Regulation
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For Respondent: Rose H. Robbins, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Srdan Saric, committed violations of Chapter 550, Florida Statutes (2005), and Florida Administrative Code Chapter 61D-6, as alleged in an Administrative Complaint filed with the Department of Business and Professional Regulation in DBPR Case Nos. 2005042972, 2005039423, and 2005042974, and amended January 30, 2006; and, if so, what disciplinary action should be taken against his State of Florida pari-mutuel wagering occupational license.

PRELIMINARY STATEMENT

On October 14, 2005, Petitioner filed a six-count Administrative Complaint against Srdan Saric, an individual licensed by Petitioner to train race horses in Florida. On November 8, 2005, Mr. Saric executed an Election of Rights form disputing the material allegations of the Administrative Complaint and requesting a formal administrative hearing before the Division of Administrative Hearings. The Election of Rights form and an Answer to the Administrative Complaint were filed by counsel for Mr. Saric with Petitioner on or about November 14, 2006.

On November 30, 2006, Petitioner filed the Administrative Complaint and Mr. Saric's Answer thereto and his request for hearing with the Division of Administrative Hearings with a

request that an administrative law judge be assigned to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2005). The matter was designated DOAH Case Number 05-4358PL and was assigned to the undersigned.

The final hearing was scheduled for February 8, 2006, by Notice of Hearing by Video Teleconference entered December 15, 2005.

On January 24, 2006, Petitioner filed Petitioner's Unopposed Motion for Leave to Amend Administrative Complaint seeking to correct scrivener's errors in paragraphs 28 and 32 of the Administrative Complaint. On January 30, 2006, an Order Granting Motion to Amend was entered. That same day, Mr. Saric filed an Answer to Amended Complaint and Affirmative Defenses.

On February 6, 2006, a Pre-Hearing Stipulation was filed by the parties. The Pre-Hearing Stipulation contains, in relevant part, stipulated facts. Those facts that have been deemed relevant to this matter have been included in this Recommended Order.

At the final hearing, Petitioner presented the testimony of Rene Riera, the "stage steward" at Pompano Park Racing harness racing facility; Cynthia Cole, D.V.M., director and associate professor at the University of Florida Racing Laboratory; and Jill Ray Blackman, a licensing administrator for Petitioner. Dr. Cole was accepted as an expert in the areas of veterinary

pharmacology, drug testing, and veterinary medicine. Petitioner also offered and had admitted Petitioner's Exhibits P-1 through P-4.

Respondent testified on his own behalf and presented the testimony of Richard Masters, a security supervisor at Pompano Park Racing; Anna Jopilovic, a groom at Pompano Park Racing; Michael Snyder, an owner and trainer of harness race horses; John Beatris, the security director at Pompano Park Racing; Luis Rivera, an investigator for Petitioner; Jeremy Glowacki, a former employee of Mr. Saric and others at Pompano Park Racing; and Jeanette Glowacki, the owner of Youngbro Clever and Swift Courier, the two horses at issue in this case, and the mother of Jeremy Glowacki. Respondent also offered the deposition testimony of Anne Santoriello, a groom at Pompano Park Racing; and Zoran Saric, a harness race horse trainer at Pompano Park Racing and Mr. Saric's brother. Respondent also offered and had admitted four exhibits, Respondent's Exhibits R-1 through R-4. The transcripts of the deposition testimony of Ms. Santoriello and Zoran Saric have been marked as Respondent's Exhibits R-5 and R-6, respectively.

A Notice of Filing of Transcript was issued March 13, 2006, informing the parties that the Transcript of the final hearing and the Transcripts of the deposition testimony of Anne Santoriello and Zoran Saric had been filed on February 23, 2006,

and March 9, 2006, respectively. The parties were informed, therefore, that they had until March 29, 2006, to file proposed recommended orders.

Petitioner filed a Proposed Recommended Order on March 29, 2006. Mr. Saric filed a Proposed Recommended Order after 5:00 p.m., March 29, 2006, but before 8:00 a.m., March 30, 2006. Mr. Saric's Proposed Recommended Order was, therefore, treated as having been filed at 8:00 a.m., March 30, 2006. On March 31, 2006, Petitioner filed Petitioner's Motion to Strike Respondent's Proposed Recommended Order as Untimely. Having found no prejudice to Petitioner, the motion was denied. The Proposed Recommended Orders of the parties have been fully considered in rendering this Recommended Order.

All references in this Recommended Order to Florida Statutes and Florida Administrative Code rules are to the 2005 version, unless otherwise noted.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Business and Professional Regulation, Division of Pari-mutuel Wagering (hereinafter referred to as the "Division"), is an agency of the State of Florida created by Section 20.165(2)(f), Florida Statutes, and charged with the responsibility for the regulation of the pari-

mutuel wagering industry pursuant to Section 550.0251, Florida Statutes.

2. Respondent, Srdan Saric, is, and was at the times material to this matter, the holder of a pari-mutuel license, number 2016930-1021, issued by the Division.

3. During the time period at issue in this case, Mr. Saric trained harness race horses and was a jockey at the harness race course of Pompano Park Racing (hereinafter referred to as "Pompano Park"), located in Pompano Beach, Florida.

4. Pompano Park is a harness horse racing facility authorized to conduct pari-mutuel wagering in Florida and is the location of all activity material to this matter.

5. On July 27, 2005, Respondent was the trainer of record and jockey for two standard bred harness race horses, known as "Youngbro Clever" and "Swift Courier." Both horses were owned by Jeanette Glowacki.

B. The Events of July 27, 2005.

6. Youngbro Clever and Swift Courier were both scheduled to race at Pompano Park the evening of July 27, 2005. Youngbro Clever was to run in the fourth race and Swift Courier was to run in the twelfth race.

7. The fourth race was scheduled to begin at approximately 8:15 to 8:30 p.m.

8. Both horses were being housed in Barn C of Pompano Park. That barn was shared by the two horses being trained by Mr. Saric and horses owned and trained by Michael Snyder.

9. Tack boxes, where equipment was stored, were located at Barn C adjacent to the wall just outside the horse stalls. Those located in the area where Mr. Saric's horses were housed were considered to be within areas of Barn C which he occupied or had the right to occupy. The tack boxes are part of the premises within the grounds of a racing permitholder where racing animals were lodged or kept and which Mr. Saric occupied or had the right to occupy.

10. At approximately 7:30 p.m., on July 27, 2005, Jeremy Glowacki, the son of the owner of Youngbro Clever and Swift Courier and an employee Mr. Saric had previously fired, informed Pompano Park security supervisor Richard Masters that he had witnessed Mr. Saric place syringes in a tack box located just outside Barn C, Stall 8.

11. Based upon Mr. Glowacki's report, Pompano Park security searched the tack box and found a 35 cc hypodermic syringe with needle attached and a 12 cc hypodermic syringe with needle attached.

12. As a result of the discovery of the syringes, Youngbro Clever and Swift Courier were immediately scratched from their scheduled races and were sent to the State Veterinarian for drug

testing. Mr. Saric was also suspended from Pompano Park and remained so at the time of the final hearing of this matter.

13. The State Veterinarian drew blood serum sample 173675 from Youngbro Clever and blood serum sample 173680 from Swift Courier. These samples were processed in accordance with established procedures.

14. Both blood serum samples were, along with the two syringes recovered from Mr. Saric's tack box, sent to the University of Florida Racing Laboratory (hereinafter referred to as the "Racing Laboratory"), for analysis.

C. Results of Racing Laboratory Testing.

15. The Racing Laboratory, following applicable procedures, performed an analysis on the syringes found in Mr. Saric's tack box and the blood serum samples taken from Youngbro Clever and Swift Courier.

16. No prohibited substance was detected by the Racing Laboratory analysis of the 35 cc syringe.

17. Flunixin was detected by the Racing Laboratory analysis of the 12 cc syringe.

18. Flunixin is a "non-steroidal anti-inflammatory drug" which can be used to suppress inflammation and provide pain relief to race horses. The Association of Racing Commissioners International, Inc. has classified Flunixin under the Uniform

Classification Guidelines for Foreign Substances as a "Class IV" drug. As such, it is considered an "impermissible substance."

19. Flunixin in excess of 200 ng/ml. was also found by the Racing Laboratory in blood serum sample number 173675 which had been collected from Youngbro Clever.

20. Flunixin in excess of 200 ng/ml. was also found by the Racing Laboratory in blood serum sample number 173680, which had been collected from Swift Courier.

21. In addition to Flunixin, the Racing Laboratory test of blood serum sample number 173675 collected from Youngbro Clever and blood serum sample number 173680 collected from Swift Courier also revealed that those samples contained phenylbutazone, or its metabolites, in excess of 16 micrograms per milliliter of serum.

23. Like Flunixin, phenylbutazone is a "non-steroidal anti-inflammatory drug" which can be used to suppress inflammation and provide pain relief to race horses.

24. Pursuant to Florida Administrative Code Rule 61D-6.008, phenylbutazone, unlike Flunixin, may be administered to a race horse in an amount which, following the running of a race, will result in the horse's blood serum being found to contain less than 8 micrograms per milliliter of serum.

25. Dr. Cole testified convincingly and credibly that Flunixin and phenylbutazone had been administered to Youngbro

Clever and Swift Courier within 24 hours of their scheduled races on June 27, 2005.

26. Youngbro Clever and Swift Courier, having been administered Flunixin and phenylbutazone within 24 hours of their scheduled races, would have been able to compete at a higher level in their scheduled races than if these drugs had not been ministered to them.

27. According to Dr. Cole, whose unrebutted testimony in this regard is also credited, if Youngbro Clever and Swift Courier had been allowed to run their scheduled races, blood samples collected immediately after their respective races would have revealed the presence of phenylbutazone in each horse in excess of 8 micrograms per milliliter of serum.

D. Mr. Saric's Prior Disciplinary History.

28. Mr. Saric has previously been disciplined by the Division on two separate occasions. On both occasions, Mr. Saric was fined because Methocarbamol (a skeletal muscle relaxant and Class IV drug) was detected in urine samples collected from Youngbro Clever as part of the post race analyses.

29. The first violation for which Mr. Saric was disciplined took place on December 6, 2004. Mr. Saric was fined $250.00 for this violation of Section 550.2415(1)(a), Florida

Statutes (2004), and Florida Administrative Code Rule 61D-6.011(1).

30. The second violation for which Mr. Saric was disciplined took place on April 15, 2005. Mr. Saric was fined $500.00 for this violation of Section 550.2415(1)(a), Florida Statutes, and Florida Administrative Code Rule 61D-6.011(1).

E. Mr. Saric's Responsibility for Youngbro Clever and Swift Courier.

31. While Mr. Saric attempted, unsuccessfully, to prove that he did not place the syringes in his tack box or inject Flunixin and phenylbutazone into Youngbro Clever and Swift Courier, the evidence failed to support such a finding. The evidence also failed to prove that Jeremy Glowacki was responsible for these violations.

32. More importantly, the evidence failed to prove that Mr. Saric took the measures necessary to protect Youngbro Clever and Swift Courier in particular and the racing industry generally from harm, especially considering the fact that this case involves the third time that Youngbro Clever has tested positive for a prohibited substances in his blood.

CONCLUSIONS OF LAW

A. Jurisdiction

33. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the

parties thereto pursuant to Sections 120.569, 120.57(1), 550.0251(3), and 550.2415(2)(d) and (13), Florida Statutes.

B. The Charges of the Administrative Complaint.

35. Section 550.105(5)(b), Florida Statutes, authorizes the Division to deny, suspend, revoke, or declare ineligible any occupational license, including Mr. Saric's license, if the holder thereof violates the provisions of Chapter 550, Florida Statutes, or the Division's rules governing the conduct of persons associated with racetracks.

36. Section 550.0251, Florida Statutes, provides that the Division:

> May impose an administrative fine for a violation under this chapter of not more than $1,000 for each count or separate offense, except as otherwise provided in this chapter, and may suspend or revoke a permit, a pari-mutuel license, or an occupational license for a violation under this chapter. . . . .

37. In its Amended Administrative Complaint, the Division has alleged in Counts One and Two that the recovery on July 27, 2005, of an empty 35 CC syringe with a needle attached from Mr. Saric's tack box located in front of Bard C, Stall 8, are disciplinable offenses. Although not clearly pled, it is apparently the Division's position that the presence of the syringes constitutes a violation of Florida Administrative Code

Rule 61D-6.004(2)(a)2. and, therefore, a violation of Section 550.105(5)(b), Florida Statutes.

38. The Division has alleged in Counts Three and Four that both Youngbro Clever and Swift Courier had blood serum samples collected by the State Veterinarian on July 27, 2005, and that both of those blood serum samples, when tested by the Racing Laboratory, were found to contain Flunixin. Again, although not clearly pled, it is apparently the Division's position that the presence of Flunixin constituted violations of Section 550.2415, Florida Statutes, and Florida Administrative Code Rule 61D-6.011(1).

39. Finally, in Counts Five and Six, the Division has alleged that both Youngbro Clever and Swift Courier had blood serum samples collected by the State Veterinarian on July 27, 2005, and that both of those blood serum samples, when tested by the Racing Laboratory, were found to contain phenylbutazone or its metabolites in an impermissible amount. Apparently it is the Division's position that the level of phenylbutazone found the two horses is contrary to Florida Administrative Code Rule 61D-6.008(2)(c) and, therefore, violates Section 550.2415, Florida Statutes.

C. Absolute Insurer Rule.

40. Florida Administrative Code Rule 61D-6.002(1), known as the "Absolute Insurer Rule," provides, in part, that "[t]he

trainer of record shall be responsible for and be the absolute insurer of the condition of horses . . . he/she enters into the race."

41. The Absolute Insurer Rule is based upon the belief that it is necessary to impose strict liability upon those engaged in the pari-mutuel wagering industry as a condition of licensure in order to protect the integrity of the industry. In its decision in Division of Pari-Mutuel Wagering, Department of Business Regulation v. Caple, 362 So. 2d 1350, 1354-1355 (Fla. 1978), upholding the validity of the Absolute Insurer Rule, the Supreme Court of Florida stated the following:

> On review of these more recent authorities, we are now persuaded that Florida should align itself with the well reasoned majority view. To protect the integrity of this unique industry, it is really immaterial whether "guilt" should be ascribed either directly or indirectly to the trainer. The rules were designed, and reasonably so to condition the grant of a trainer's license on the trainer's acceptance of an absolute duty to ensure compliance with reasonable regulation governing the areas over which the trainer has responsibility. Whether a violation occurs as a result of the personal acts of the trainer, of persons under his supervision, or even of unknown third parties, the condition of licensure has been violated by the failure to provide adequate control, and the consequence of the default is possible suspension of the trainer's license or a fine. We have no doubt that a rule which both conditions a license and establishes with specificity reasonable precautionary duties within the competence

> of the licensee to perform is both reasonable and constitutional.

See also Department of Business and Professional Regulation v. Levkoff, DOAH Case No. 01-0262PL (Final Order July 15, 2004); Department of Business and Professional Regulation v. Smith, DOAH Case No. 02-4028PL (Final Order July 15, 2004); Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Petrillo, DOAH Case Nos. 02-3890PL and 02-3891PL (Final Order January 24, 2003); and Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Abbey, DOAH Case No. 02-1058PL (Final Order November 7, 2002).

42. In addition to being found valid in the Caple decision, the Absolute Insurer Rule has been upheld in Hennessey, Warren and Gangemi v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 818 So. 2d 697 (Fla. 1st DCA 2002). That decision upheld a Final Order entered by the Division of Administrative Hearings in DOAH Case Nos. 99-5254RX, 00-2821RX, and 00-3809RX finding that Florida Administrative Code Rule 61D-6.002(1) was not an invalid exercise of delegated legislative authority.

43. This theory of a trainer's strict responsibility and liability is found in all of the rule provisions at issue in this case:

a. Florida Administrative Code Rule 61D-6.004(2) prohibits a licensee from allowing the existence of hypodermic needles, injectable vials, syringes, etc., in his or her personal property or effects, regardless of how they got there. The rule requires no showing that the trainer actually placed the syringes on his or her property;

b. Florida Administrative Code Rule 61D-6.011(1) prohibits the "presence" of Class I-V foreign substances, again, without regard as to how the substance was administered or by whom. Again, the rule does not require proof that the trainer actually injected or caused to be injected the drug; and

c. Finally, Florida Administrative Code Rule 61D-6.008(2)(c), establishes penalties, where phenylbutazone or its metabolites equal to or in excess of 8 micrograms per milliliter of blood serum is found, to be imposed on "the trainer of record as the absolute insurer of the horse." Again, the rule does not require proof that the trainer actually injected or caused to be injected the drug.

D. The Burden and Standard of Proof.

44. The Division seeks to impose penalties against Mr. Saric through its Amended Administrative Complaint that include a suspension or revocation of his license and/or the imposition of administrative fines. Therefore, the Division must prove by clear and convincing evidence that Mr. Saric

violated the relevant provisions of Section 550, Florida Statutes, and the Division's rules. Department of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Pou v. Department of Insurance & Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and § 120.57(1)(j), Fla. Stat. (2005).

45. Citing Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Florida Supreme Court described what constitutes "clear and convincing" evidence in In re Henson, 913 So. 2d 579, 590 (Fla. 2005):

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

E. Counts One and Two; Violation of Florida Administrative Code Rule 61D-6.004(2)(a).

46. Rule 61D-6.004(2)(a), Florida Administrative Code, provides, in part, the following:

> (2)(a) No licensee within the grounds of a racing permitholder where racing animals are lodged or kept shall have in or upon the premises which that person occupies or has the right to occupy, or in that licensee's personal property or effects, the following:

. . . .

2. Any hypodermic needle, injectable vial, syringe capable of accepting a hypodermic needle or which may accept a volume greater than 6 ounces, tube device for naso-gastric or gastric intubation;

. . . .

4. Except as provided in subsection (2)(b), any other device which could be used for the injection, infusion, or other administration of a legend drug, proprietary drug or medicinal compound (natural or synthetic) into a horse or racing greyhound.

47. The evidence in this case proved that two syringes, with needles, as described in the Amended Administrative Complaint, were found in Mr. Saric's tack box. That tack box was a part of Mr. Saric's premises or an area he had the right to occupy and it was located within the grounds of a racing permitholder where racing animals were being lodged and kept.

48. Read in conjunction with the Absolute Insurer Rule, the Division has proved clearly and convincingly that Mr. Saric violated Florida Administrative Code Rule 61D-6.004(2)(a), and, therefore, Section 550.105(5)(b), Florida Statutes, as alleged in Counts One and Two of the Amended Administrative Complaint.

F. Counts Three and Four; Violation of Florida Administrative Code Rule 61D-6.011(2).

49. Florida Administrative Code Rule 61D-6.011(2), provides, in part:

> (2) The presence of a Class I-V foreign substance, as defined by the Uniform Classification Guidelines for Foreign Substances, revised January 7, 2000, as promulgated by the Association of Racing Commissioners International, Inc., in the bodily fluids of an animal collected either immediately prior to or immediately after the racing of that animal constitutes a violation of Chapter 550, Florida Statutes. The Uniform Classification Guidelines for Foreign Substances, revised January 7, 2000, as promulgated by the Association of Racing Commissioners International, Inc., is hereby incorporated and adopted by reference. . . .

Although not relied upon by the Division in this case, the presence of any drug, including those defined as Class I-V foreign substances, in the blood serum of a race horse is also defined in Section 550.2415, Florida Statutes, quoted, infra, as a violation.

50. The evidence proved that blood serum samples were collected from Youngbro Clever and Swift Courier on June 27, 2005, and that, when tested by the Racing Laboratory, were found to contain Flunixin. Flunixin is a "Class IV" drug as defined by the Uniform Classification Guidelines for Foreign Substances, revised January 7, 2000, as promulgated by the Association of Racing Commissioners International, Inc.

51. Read in conjunction with the Absolute Insurer Rule, the Division has proved clearly and convincingly that Mr. Saric violated Rule 61D-6.011(2), Florida Administrative Code, as alleged in Counts Three and Four of the Amended Administrative

Complaint. Mr. Saric, therefore, also was proved to have violated Section 550.2415, Florida Statutes.

G. Counts Five and Six; Violation of Florida Administrative Code Rule 61D-6.008(2)(c).

52. Counts Five and Six allege that the blood serum samples taken from the two horses under Mr. Saric's control on July 27, 2005, tested positive for a prohibited amount of phenylbutazone. The Division, in the Amended Administrative Complaint, apparently has taken the position that this constitutes a violation of Florida Administrative Code Rule 61D-6.008(2)(c), which provides:

> (c) When the post race serum sample contains an amount of phenylbutazone or its metabolites equal to or in excess of 8 micrograms per milliliter of serum, the trainer as the absolute insure of the horse, shall be subject to the following penalties:
>
> . . . .

53. Florida Administrative Code Rule 61D-6.008(2)(c) does not specifically define the use of phenylbutazone or its metabolites in the defined amount as a prohibited activity for which a trainer may be subjected to discipline. In actuality, Florida Administrative Code Rule 61D-6.008(1) simply provides an exception to Section 550.2415, Florida Statutes, by allowing the use of phenylbutazone and Florida Administrative Code Rule 61D-6.008(2) simply defines an appropriate penalty where

phenylbutazone is found to equal to or in excess of 8 micrograms per milliliter of serum.

54. The actual provision prohibiting the presence of foreign substances, including phenylbutazone, in a racing horse's blood serum is Section 550.2415, Florida Statutes (2005), which provides, in part:

> (1)(a) The racing of an animal with any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent is prohibited. It is a violation of this section for a person to administer or cause to be administered any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or drug-masking agent to an animal which will result in a positive test for such substance based on samples taken from the animal immediately prior to or immediately after the racing of that animal. . . .
>
> . . . .
>
> (c) The finding of prohibited substance in a race-day specimen constitutes prima facie evidence that the substance was administered and was carried in the body of the animal while participating in the race.

No prejudice as been caused to Mr. Saric by the failure of the Division to clearly cite this statutory provision in the Amended Administrative Complaint as the provision of law violated by the acts described in Counts Five and Six.

55. Section 550.2415(1)(c), Florida Statutes, creates a rebuttable presumption that an impermissible drug was administered and that the drug would have been carried in the

body of the animal during the race on the day the specimen was collected. See Levkoff, supra. Mr. Saric offered no evidence that calls into question either the collection or testing of the blood serum samples in this case. No did he offer any evidence to raise any doubt as to the accuracy of the tests results. The rebuttable presumption was not, therefore, overcome.

56. Read in conjunction with the Absolute Insurer Rule, the Division has proved clearly and convincingly that Mr. Saric violated Section 550.2415, Florida Statutes, due to the presence in blood serum samples taken from Youngbro Clever and Swift Courier on July 27, 2005, of phenylbutazone in a amount equal to or in excess of the amount established in Florida Administrative Code Rule 61D-6.008(2).

H. Mr. Saric's Affirmative Defense.

57. Mr. Saric did not dispute the essential facts alleged in the Amended Administrative Complaint. Indeed, Mr. Saric agreed to the accuracy of most of the factual allegations of the Amended Administrative Complaint.

58. Instead of challenging the material facts of the Amended Administrative Complaint, Mr. Saric has asserted and attempted to prove that he was not responsible for the two syringes found in his tack box and that he did not administer or in any way cause to be administered the Flunixin or

phenylbutazone found in the blood serum samples taken from Youngbro Clever or Swift Courier on July 27, 2005.

59. At best, the evidence presented by Mr. Saric raised some doubt as to who actually placed the syringes in his tack box and who administered Flunixin and phenylbutazone to the two horses. His attempt to prove that he did not place the syringes in the tack box or administer the drugs failed, as did his effort to prove that Jeremy Glowacki was responsible for both placing the syringes and administering the drugs.

60. Of greater significance, Mr. Saric was unable to present any evidence that he had met his responsibility to ensure that drug paraphernalia was not found within the grounds of a racing permitholder where racing animals were lodged or to ensure that horses for which he was the trainer of record had not been administered prohibited substances or substances in an inappropriate amount.

61. Having concluded that the factual bases for Mr. Saric's affirmative defenses have not been proved, the legal argument presented by counsel for Mr. Saric as to the impact such defenses may have on the application of the Absolute Insurer Rule in this case need not be discussed in this Recommended Order.

I. Penalty Guidelines.

62. Section 550.105(5)(b), Florida Statutes, authorizes the Division to suspend, revoke, or declare ineligible any occupational license upon proof of a violation of Chapter 550, Florida Statutes, or the Division's rules. Section 550.0251, Florida Statutes, authorizes the Division to "impose an administrative fine for a violation under this chapter of not more than $1,000 for each count or separate offense, except as otherwise provided in this chapter, and may suspend or revoke a permit, a pari-mutuel license, or an occupational license for a violation under this chapter. . . . ." Section 550.0251, Florida Statutes, thus limits the maximum fine which may be imposed on Mr. Saric to $1,000.00 per count, or a total of $6,000.00.

63. While no more specific penalty guidance is provided for a violation of Florida Administrative Code Rule 61D-6.004(2)(a) (Counts One and Two), Florida Administrative Code Rule 61D-6.011(2)(d) (Counts Three and Four), provides relevant penalty guidelines where a Class IV impermissible substance such as Flunixin is found in a race horse's serum. Specific penalty guidance is also provided for a violation of Section 550.2415, Florida Statutes, by a violation of Florida Administrative Code Rule 61D-6.008(2)(c) (Counts Five and Six).

64. In addition to the penalty guidelines of Florida Administrative Code Rules 61D-008(2)(c) and 61D-6.011(2)(d), Florida Administrative Code Rule 61D-2.021 provides a non-exclusive listing of "[c]ircumstances which may be considered for the purposes of mitigation or aggravation of any penalty." Those mitigating and aggravating circumstances include:

> (1) The impact of the offense on the integrity of the pari-mutuel industry.
> (2) The danger to the public and/or racing animals.
> (3) The number of repetitions of offenses.
> (4) The number of complaints filed against the licensee or permitholder, which have resulted in prior discipline.
> (5) The length of time the permitholder has practiced.
> (6) The deterrent effect of the penalty imposed.
> (7) Any efforts at rehabilitation.
> (8) Any other mitigating or aggravating circumstances.

65. In its Proposed Recommended Order, the Division has requested, without reference to the specific penalty guidelines of Florida Administrative Code Rules 61D-6.008(2)(c) and 61D-6.011(2), that Mr. Saric's pari-mutuel wagering occupational license be revoked and that he be required to pay an administrative fine of $9,500.00.

66. The Division has argued in its Proposed Recommended Order that its requested penalties are justified because of the existence of three aggravating circumstances: (a) the impact of the offense on the integrity of the pari-mutuel industry;

(b) "both horses tested positive for the very same drug that was contained in one of the syringes that was discovered in Respondent's tack box"; and (c) "in the past 12-months, Respondent has accumulated two Class IV drug positives that resulted in discipline from the Stewards of Pompano Park Racing."

67. The penalty requested by the Division is excessive and ignores the law governing this matter. Section 550.021, Florida Statutes, specifically limits the amount of any fine to $1,000.00 per count. Therefore, a fine of $6,000.00 is the maximum fine which the Division may be imposed. A fine of $6,000.00 is also consistent with the Division rule guidelines as discussed, infra.

68. The request that Mr. Saric's license be revoked is also excessive. First, the Division's requested discipline is much harsher then the Division rule guidelines as discussed, infra. Second, the Division's reliance on the three suggested aggravating circumstances is somewhat misplaced. The first aggravating circumstance has already been taken into account in imposing the Absolute Insurer Rule on Mr. Saric. The second and third circumstances have also been taken into account to a large extent in the guidelines provided by the Division for multiple violations. The guidelines gradually increase the penalties after the first, second, and third offense during a 12-month

period. Finally, the Division's requested penalty fails to take into account the nature of the evidence presented in this case. Although Mr. Saric did not prove his affirmative defenses, he did present enough evidence to cause the trier of fact to question the veracity of Jeremy Glowacki's testimony.

J. The Appropriate Penalty: Counts One and Two.

69. Counts One and Two are based upon the discovery of two different syringes with needles in Mr. Saric's tack box in violation of Florida Administrative Code Rule 61D-6.004. One of those syringes, the 12 cc syringe, was found to contain Flunixin, a prohibited Class IV drug which was also found in the blood serum samples from Youngbro Clever and Swift Courier. Mr. Saric had been fined twice during the past several months for the discovery of a prohibited Class IV drug in Youngbro Clever.

70. No specific penalty guidelines are provided for a violation of Florida Administrative Code Rule 61D-6.004. Under the circumstances of this case, and consistent with the guidelines for the violations involved in Counts Three through Six, it is concluded that the imposition of a fine of $1,000.00 for each of Counts One and Two is appropriate.

70. Additionally, Mr. Saric's license should be suspended for a period of 60 days.

K. The Appropriate Penalty; Counts Three and Four.

71. As to Counts Three and Four, Florida Administrative Code Rule 61D-6.011(2) provides the following penalty guidelines:

> (2) Pursuant to Rule 61D-6.002, Florida Administrative Code, the trainer of record is the absolute insurer of the condition of an animal he or she enters to race. Consequently, when evidence of the presence of an impermissible substance, or substances, is presented either to the Division or to a panel of stewards or judges, the Division or the stewards or judges, absent aggravating or mitigating circumstances, must impose on the trainer of record one or more of the following penalties, in accordance with the class of impermissible substance. . . .

The Rule goes on to provide the following relevant guidelines: (a) for a "first violation" the penalty guideline includes a "Reprimand, $100 to $250 fine"; (b) for a "second violation in a 12-month period, the penalty guideline includes a "$250 to $500 fine"; and (c) for a "third or subsequent violation in a 12-month period" a penalty guideline of "$500 to $1,000 fine, suspension of license up to 30 days."

72. This case involves the third and fourth time for which Mr. Saric has been disciplined for a horse testing positive for a prohibited Class IV drug in its blood serum. One of the horses, Youngbro Clever, is the same horse which tested positive on the previous two occasions.

73. It is, therefore, appropriate to impose the maximum fine of $1,000.00 for the positive blood serum sample for Flunixin from Youngbro Clever. It is also appropriate to impose an additional fine of $1,000.00 for the positive blood serum sample for Flunixin from Swift Courier.

74. Additionally, the maximum suspension guideline of 30 days should be imposed for both Count Three and Count Four, or a total of 60 days.

L. The Appropriate Penalty; Counts Five and Six.

75. As to Counts Five and Six, the following guidance is provided for a violation of Section 550.2415, Florida Statutes (2005), under the circumstances described Florida Administrative Code Rule 61D-6.008(2)(c):

> (c) When the post race serum sample contains an amount of phenylbutazone or its metabolites equal to or in excess of 8 micrograms per milliliter of serum, the trainer as the absolute insurer of the horse, shall be subject to the following penalties:
>
> | | |
> |---|---|
> | 1. First violation in a 12-month period | $500 fine and suspension of any division license 0 to 15 days. |
> | 2. Second violation in a 12-month period | $1,000 and suspension of any division license up to 30 days. |

3. Third or subsequent violation in a 12-month period	$1,000 fine and suspension of any division license up to 60 days.

76. Neither Youngbro Clever nor Swift Courier actually raced on June 27, 2005, and, consequently, the blood serum samples collected from them were pre-race, rather than post-race samples. Therefore, the penalty guidelines of Florida Administrative Code Rule 61D-6.008(2)(c) do not specifically apply in this case. The Division, however, provided credible, unrefuted evidence in the form of expert opinion that phenylbutazone at the levels found in Youngbro Clever and Swift Courier on July 27, 2005, would have, had the horses raced, been detected at concentrations exceeding 8 micrograms per milliliter of serum in post-race serum samples. It is, therefore, appropriate to rely upon the guidelines in recommending the appropriate discipline in this case.

77. Count Five involves the detection of phenylbutazone in the blood serum sample collected from Youngbro Clever (sample number 173675). This is Mr. Saric's fifth violation of Section 550.2415, Florida Statutes, within a 12-month period. He should, therefore, be subjected to the maximum $1,000.00 fine for Count Five and a 60-day suspension.

78. Count Six involves the detection of phenylbutazone in the blood serum sample collected from Youngbro Clever (sample

number 173675). This is Mr. Saric's sixth violation of Section 550.2415, Florida Statutes, within a 12-month period. He should, therefore, be subjected to the maximum $1,000.00 fine for Count Six and a 60 day suspension.

M. Overall Penalty.

79. Based upon the foregoing, Mr. Saric should be required to pay a total of $6,000.00 in fines, the maximum of $1,000.00 per count.

80. The guidelines also suggest the imposition of a suspension of his license of 240 days. Given that Mr. Saric has committed so many violations from December 2005 through July 2006, the suspension should be increased to two years.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the final order be entered by the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, finding that Srdan Saric violated Sections 550.105(5)(b) and 550.2415(1)(c), Florida Statutes, and Florida Administrative Code Rules 61D-6.004(2) and 61D-6.011(1), as described in this Recommended Order; suspending his license for a total period of two years from the date of the final order; and requiring that he pay a fine of $6,000.00.

DONE AND ENTERED this 14th day of April, 2006, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2006.

COPIES FURNISHED:

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NOTICE OF RIGHT OT SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in these cases.