

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINES AND)
PROFESSIONAL REGULATION,)
DIVISION OF PARI-MUTUEL)
WAGERING,)
)
Petitioner,)
)
vs.) Case No. 09-1510PL
)
JOHN E. SHAW,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 25, 2009, by video teleconference between Lauderdale Lakes and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Joseph M. Helton, Jr., Esquire
David N. Perry, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Bradford J. Beilly, Esquire
John Strohsahl, Esquire
1144 Southeast Third Avenue
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STATEMENT OF THE ISSUE

Whether Petitioner proved by clear and convincing evidence that Respondent is guilty of the offenses alleged in the Order of Summary Suspension and in the Administrative Complaint.

PRELIMINARY STATEMENT

Respondent, John E. Shaw (Respondent), is licensed by Petitioner, Department of Business and Professional Regulation, Division of Pari-mutuel Wagering (the Division), as a trainer of thoroughbred horses. On February 4, 2009, the Division issued an Order of Summary Suspension, which suspended Respondent's licensure upon its entry. Petitioner attached to the Order of Summary Suspension a three-count Administrative Complaint against Respondent. The alleged violations set forth in the Order of Summary Suspension are identical to the alleged violations set forth in the Administrative Complaint. The factual allegations pertain to three separate thoroughbred horses and three different races. Each count alleged a violation of Section 550.2415(1)(a), Florida Statutes,¹ which prohibits the racing of thoroughbred horses with an impermissible drug.

Respondent filed an answer to the Administrative Complaint and two election of rights forms in which he requests a hearing pursuant to Section 550.24215(3)(c), Florida Statutes, as to the Summary Suspension and a hearing pursuant to Section 120.57(1),

Florida Statutes, as to the Administrative Complaint. Thereafter, these matters were referred to DOAH as a consolidated proceeding.

This Recommended Order will contain a recommended disposition of both the Order of Summary Suspension and the Administrative Complaint.

Respondent's answer admitted certain of the underlying facts. Those facts will be incorporated in the Findings of Fact section of this Order.

At the formal hearing, the Division presented the testimony of Diana Neira (an investigator employed by the Division) and Dr. Richard Sams (Director of the University of Florida Racing Laboratory). The Division offered 16 sequentially-numbered Exhibits, each of which was accepted into evidence.² Respondent testified on his own behalf, but he presented no other testimony and no exhibits.

A Transcript of the proceeding, consisting of one volume, was filed on April 1, 2009. The parties timely filed proposed orders, which have been duly-considered by the undersigned in the preparation of this Order.³

FINDINGS OF FACT

1. The Division is the agency of the State of Florida

charged with regulating pari-mutuel wagering pursuant to Chapter 550, Florida Statutes.

2. At all times relevant to this proceeding, Respondent held a pari-mutuel wagering trainer/thoroughbred license number 15043-1021 issued by the Division. Respondent has been a thoroughbred racehorse trainer for approximately 30 years. Excluding the allegations pertaining to this proceeding, Respondent has had only two prior disciplinary actions taken against his license by the Division. Each of the prior disciplinary actions involved the post-race detection of a drug in a horse trained by Respondent. Although the drug at issue in the prior disciplinary proceedings cannot be in a horse's system during a race, those drugs can legally be administered to race horses for therapeutic use. Neither violation resulted in a suspension of Respondent's license.

3. At all times relevant to this proceeding, Respondent trained horses that raced at Calder Race Course in Dade County, Florida.

4. It is undisputed that at all times relevant to this proceeding, Respondent was the trainer of record for the race horses "Red Nation," "Shea Stadium," and "Mi Corredora." As the trainer of record, Respondent was the absolute insurer for the condition of his horses.⁴

RED NATION

5. It is undisputed that Red Nation was entered in the seventh race at Calder on May 17, 2008, and finished the race in first place.

6. Following the seventh race at Calder on May 17, 2008, a urine sample and a blood sample were taken from Red Nation.⁵

7. Urine sample 407762 was collected on May 17, 2008, and processed in accordance with established procedures.

8. Urine sample 407762 was analyzed by the University of Florida Racing Laboratory (the Lab), which is retained by the Division to test urine and blood samples from animals racing at pari-mutuel facilities in Florida.⁶ The Lab found that the sample contained Despropionyl Fentanyl (the subject metabolite derivative), which is a metabolite derivative of Fentanyl (the subject drug). The subject metabolite derivative is the substance that remains in the urine after the horse's body has processed the subject drug. The sample concentration of the subject metabolite derivative was 2.8 nanograms per milliliter.

SHEA STADIUM

9. It is undisputed that Shea Stadium was entered in the sixth race at Calder on November 20, 2008, and finished the race in second place.

10. Following the sixth race at Calder on November 20, 2008, a urine sample and a blood sample were taken from Shea Stadium.

11. Urine sample 423241 was collected on November 20, 2008, and processed in accordance with established procedures.

12. Urine sample 423241 was analyzed by the Lab. The Lab found that the sample contained the subject metabolite derivative. The sample concentration of the subject metabolite derivative was 2.8 nanograms per milliliter.

MI CORREDORA

13. It is undisputed that Mi Corredora was entered in the third race at Calder on November 22, 2008, and finished the race in first place.

14. Following the third race at Calder on November 22, 2008, a urine sample and a blood sample were taken from Mi Corredora.

15. Urine sample 424032 was collected on November 20, 2008, and processed in accordance with established procedures.

16. Urine sample 424032 was analyzed by the Lab. The Lab found that the sample contained the subject metabolite derivative. The sample concentration of the subject metabolite derivative was 5.7 nanograms per milliliter.

SUMMARY SUSPENSION

17. On February 4, 2009, the Division issued an Order of Summary Suspension of Respondent's licensure pursuant to Section 550.2415(3(b), Florida Statutes. The Division contends in the Order of Summary Suspension and in the Administrative Complaint that urine sample 407762 was taken from Red Nation, that urine sample 423241 was taken from Shea Stadium, and that urine sample 424032 was taken from Mi Corredora

FENTANYL

18. The subject drug is a narcotic analgesic. The effect of the subject drug on a horse is dose dependent. A lower dose, 8 milligrams or less, stimulates a horse and makes the horse run faster. The subject drug was the drug of choice in the 70's and early 80's for "hopping" a horse to make it run faster. A dose above 8 milligrams causes the horse to lose coordination, which slows the running of the horse. After testing became more sophisticated, the subject drug lost its popularity.

19. The subject drug has been designated by the Association of Racing Commissioners International as a Class 1 drug. Class 1 drugs have the highest potential to impact the performance of a horse in a race and they have no therapeutic value in a racehorse. The subject drug is not approved for use in horses in the United States by the U.S. Food and Drug Administration.

20. A nanogram is one-thousandth of a microgram. A microgram is one-thousandth of a milligram. There was no evidence as to whether the levels of the subject metabolite derivative detected in the subject urine samples would have had an impact to the performances of these racehorses in the subject races.

21. The testimony of Dr. Sams established that all appropriate protocols were followed in testing the three urine samples at issue in this proceeding. The testing procedure used by the Lab is considered to be, as phrased by Dr. Sams, the gold standard for the identification of drugs in urine.

22. The presence of the subject metabolite derivative in each of the three urine samples at issue in this proceeding established that the subject drug had been administered to each horse from which one of the subject samples had been drawn.

23. The Lab thereafter submitted a report to the Division reflecting that the three urine samples at issue in this procedure had tested positive for the subject metabolite derivative. The report identified each sample only by the sample number. The Lab had no information to identify a sample by the name of the horse or trainer.

POST-RACE SAMPLING

24. Florida Administrative Code Rule 61D-6005 governs the

post-race sampling process and provides, in relevant part, as follows:

(1) The winner of every race and other such racing animal participants the stewards, judges, division, or track veterinarian of the meet designate, shall be sent immediately after the race to the detention enclosure for examination by the authorized representative of the division and for the taking of urine, blood or other such samples as shall be directed for the monitoring and detection of both permissible and impermissible substances. . . .

* * *

(3) The owner, trainer of record, groom, or other authorized person shall be (present in the testing enclosure) able to witness when urine, blood or other specimens are taken from that person's racing animal. The specimen shall be sealed in its container, assigned an official sample number which is affixed to the specimen container, and the correspondingly numbered information portion of the sample tag shall be detached and signed by the owner, trainer, groom, or the authorized person as a witness to the taking and sealing of the specimen. The racing animal and authorized person shall remain in the detention enclosure until the sample tag is signed. Said specimens shall be maintained in such a manner as to preserve the integrity of the specimen. Specimen containers shall be of the disposable type and shall not be reused.

(4) Only those persons stated in subsection (3) of this rule shall be admitted at any time to the detention enclosure except the division staff immediately in charge of such work, the stewards or judges, or such other persons as shall be authorized by the director or the division veterinarian.

* * *

(6) All specimens taken by or under direction of the division veterinarian or other authorized representative of the division shall be delivered to the laboratory under contract with the division for official analysis. Each specimen shall be marked by number and date and also bear any information essential for its proper analysis; however, the identity of the racing animal from which the specimen was taken or the identity of its owner, trainer, jockey, stable, or kennel shall not be revealed to the laboratory staff until official analysis of the specimen is complete. . . .

25. Ms. Neira is an investigator who has been employed by the Division for over 20 years. In discharging her official responsibilities, Ms. Neira has observed the post-race sampling process at Calder. Ms. Neira was not present when any of the subject samples were taken and she is not the custodian of the records maintained at by the Division at Calder. Those records are taken by persons employed by the Division. Those records are maintained in a secure location that is under the supervision of a Division employee. Ms. Neira has access to those records and she utilizes those records in the discharge of her official duties.

26. After receiving the report from the Lab pertaining to the subject urine samples, Ms. Neira followed standard investigative protocol. Ms. Neira went to the Division's South Florida Regional Office at the North Broward Regional Service

Center in Fort Lauderdale, Florida (South Region) offices where the urine specimen cards (Specimen Cards) are kept in a locked file cabinet. The Specimen Cards collected at Calder are maintained separately from Specimen Cards taken from other licensed pari-mutuel facilities. The Specimen Cards for Calder are filed by the date the sample was taken. Ms. Neira located each of the Specimen Cards at issue in this proceeding using the specimen numbers. She thereafter matched each specimen number identified as being positive by the Lab report to that specimen number's Specimen Card. While Ms. Neira is not the records custodian for the records maintained at the South Region Office, she has access to and utilizes those records in the discharge of her official duties.

27. Each Specimen Card at issue in this proceeding (the Division's Exhibits 3, 6 and 9, respectively) indicates the date the sample was taken, the name of the animal, its color and age, its race, its order of finish in the race, its owner, its trainer, the name of the person taking the urine sample, the names of the witnesses (including the owner's witness), and the horse's tattoo number (taken from the horse's upper inside lip). Each Specimen Card is a state record maintained in the regular course of business. The subject Specimen Cards established that urine sample 407762 was taken from Red Nation following the seventh race at Calder on May 17, 2008; that urine sample 423241

was taken from Shea Stadium following the sixth race at Calder on November 20, 2008; and that urine sample 424032 was taken from Mi Corredora following the third race at Calder on November 22, 2008.

28. A form styled "State Detention Area Security Log" (Security Log) is kept at Calder in the regular course of business. Those Security Logs reflect the dates and times people and horses enter and exit the secure State Detention Area (the Detention Area). The Security Logs are completed by Division employees and are maintained in a secure location at Calder that is under the supervision of Division employees. Ms. Neira has access to those Security Logs in the discharge of her official duties.

29. A document styled "Daily Record of Sample Collection for Race Horses" (Sample Record) is also kept at Calder in the ordinary course of business. Sample Records are completed by Division employees and are maintained in a secure location at Calder that is under the supervision of Division employees. Ms. Neira has access to the Sample Records in the discharge of her official duties.

30. Following each race, the horses that must be tested are tagged by a veterinarian's assistant (vet assistant) who tags the animal with an identifying tag and escorts the animal and the trainer's representative⁷ to the Detention Area. After a

cool-down period, the vet assistant takes the urine sample from the horse and the state veterinarian takes the blood sample from the animal. The state veterinarian and the vet assistant are employees of the Division. The urine sample and the blood sample are taken in the presence of witnesses, one of whom is the trainer's representative. At that point the Specimen Card discussed above is filled out. The trainer's representative signs the specimen card. The horse and the trainer's representative are then released from the Detention Area.

31. The Security Log for May 17, 2008 (the Division's Exhibit 2), reflects that Andrew J. Mitchell entered the Detention Area with Red Nation following the seventh race at 3:10 p.m. and that he left the Detention Area with Red Nation at 3:50 p.m. The subject Sample Record (the Division's Exhibit 4) reflects that Red Nation's urine sample and blood sample were taken on that date at 3:50 p.m. Red Nation was identified by name and by tattoo number. The Sample Record reflects that the specimen number assigned these samples was 407762. On May 17, 2008, Mr. Mitchell acted as Respondent's representative. Mr. Mitchell signed the Specimen Card admitted into evidence as the Division's Exhibit 3 as the trainer's representative.

32. Urine sample 407762 was taken from Red Nation on May 17, 2008, following the seventh race at Calder.

33. The Security Log for November 20, 2008 (the Division's Exhibit 7) reflects that Victor H. Flores entered the Detention Area with Shea Stadium following the sixth race at 3:00 p.m. and that he left the Detention Area with Shea Stadium at 3:40 p.m. The Sample Record (the Division's Exhibit 9) reflects that Shea Stadium's urine sample and blood sample were taken on that date at 3:50 p.m. Shea Stadium was identified by name and by tattoo number. The Sample Record reflects that the specimen number assigned these samples was 423241. On November 20, 2008, Mr. Flores acted as Respondent's representative. Mr. Flores signed the Specimen Card admitted into evidence as the Division's Exhibit 8.

34. Urine sample 423241 was taken from Shea Stadium on November 20, 2008, following the sixth race at Calder.

35. The Security Log for November 22, 2008 (the Division's Exhibit 12) reflects that Victor H. Flores entered the Detention Area with Mi Corredora following the third race at 1:30 p.m. and that he left the Detention Area with Mi Corredora at 2:00 p.m. The Sample Record (the Division's Exhibit 14) reflects that Mi Corredora's urine sample and blood sample were taken on that date at 2:00 p.m. Mi Corredora was identified by name and by tattoo number. The Sample Record reflects that the specimen number assigned these samples was 424032. On November 22, 2008, Mr. Flores acted as Respondent's representative. Mr. Flores

signed the Specimen Card admitted into evidence as the Division's Exhibit 13.

36. Urine sample 424032 was taken from Mi Corredora on November 22, 2008, following the third race at Calder.

37. Each of the urine samples at issue in this proceeding was subjected to a split testing procedure as required by Section 550.2415(1)(a), Florida Statutes.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

39. In this disciplinary proceeding, the Division has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So.2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So.2d 398 (Fla. 1994). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

Clear 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 evidence 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 the firm belief of

(sic) conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

40. Section 550.001 provides that Chapter 550, Florida Statutes, constitutes the Florida Pari-Mutuel Wagering Act. Section 550.2415(1)(a), Florida Statutes, provides in relevant part, as follows:

(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. . . .

41. Section 550.2415(1)(c), Florida Statutes, provides that test results shall constitute prima facie evidence as follows:

(c) The finding of a 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.

42. Subsections 550.2415(2) and (3), Florida Statutes, provide for the Division to take action as follows:

(2) Administrative action may be taken by the division against an occupational licensee responsible pursuant to rule of the division for the condition of an animal that has been impermissibly medicated or drugged in violation of this section.

(3) (a) Upon the finding of a violation of this section, the division may revoke or suspend the license or permit of the violator or deny a license or permit to the violator; impose a fine against the violator in an amount not exceeding \$5,000; require the full or partial return of the purse, sweepstakes, and trophy of the race at issue; or impose against the violator any combination of such penalties. The finding of a violation of this section in no way prohibits a prosecution for criminal acts committed.

(b) The division, notwithstanding the provisions of chapter 120, may summarily suspend the license of an occupational licensee responsible under this section or division rule for the condition of a race animal if the division laboratory reports the presence of an impermissible substance in the animal or its blood, urine, saliva, or any other bodily fluid, either before a race in which the animal is entered or after a race the animal has run.

(c) If an occupational licensee is summarily suspended under this section, the division shall offer the licensee a prompt post-suspension hearing within 72 hours, at which the division shall produce the laboratory report and documentation which, on its face, establishes the responsibility of the occupational licensee. Upon production of the documentation, the occupational licensee has the burden of proving his or her lack of responsibility.

(d) Any proceeding for administrative action against a licensee or permittee, other than a proceeding under paragraph (c), shall be conducted in compliance with chapter 120.

43. Florida Administrative Code Rule 61D-6.011((a) contains disciplinary guidelines to be imposed against the trainer following the detection of a Class I impermissible substance in one of the trainer's racing animals. For the first violation, the recommended penalty is an administrative fine in the amount of \$500.00 to \$1,000.00 and the suspension or revocation of the trainer's licensure. For any subsequent

violation, the recommended penalty is an administrative fine in the amount of \$1,000.00 to \$5,000.00 and the suspension or revocation of the trainer's licensure. These penalties are in addition to the provisions of Section 550.2415(3)(a), Florida Statutes, which authorizes the Division to require the full or partial return of the purse at issue.

44. The Division proved by clear and convincing evidence that Respondent committed the offenses alleged in the Order of Summary Suspension and in the Administrative Complaint. In forming the recommendation that follows, the undersigned has considered that Respondent has been a trainer for approximately 30 years with two minor blemishes on his record and no major blemish. The undersigned has also considered Respondent's disciplinary guidelines and the recommended disposition set forth in Petitioner's Revised Proposed Recommended Order.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that Petitioner enter a final order that adopts the Findings of Fact and Conclusions of Law set forth herein. It is, further, RECOMMENDED that the Final Order uphold the Order of Summary Suspension. It is, further, RECOMMENDED that the Final Order find Respondent guilty of the three counts alleged in the Administrative Complaint; impose against him an administrative fine in the amount of \$1,000.00 per count (for a total of \$3,000.00); suspend his licensure for a period of one

year from the date of the emergency suspension; and require him to return any purse won by the horses at issue for the races at issue.

DONE AND ENTERED this 14th day of May, 2009, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of May, 2009.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2008).

^{2/} Respondent objected to Petitioner's Exhibits 2, 3, 4, 7, 8, 9, 12, 13, and 14 on the grounds that each Exhibit is inadmissible hearsay. Those objections were overruled following arguments of counsel. Those arguments, and the undersigned's rulings, are contained in the Transcript. Each record is a document maintained by a state employee in a secure manner. Ms. Neira has access to these records in the discharge of her official duties and she established the requisite foundation for the admissibility of these records. For the reasons argued by Petitioner at the formal hearing and in its Proposed Recommended Order, these records are admissible as business records and as public records pursuant to the provisions of Subsections 90.803(6) and (8), Florida Statutes.

^{3/} Pursuant to Section 550.2415(5), Florida Statutes, split samples of the subject urine samples were forwarded for analysis to a racing laboratory in Louisiana. Because of the expedited nature of this proceeding, the analysis of those samples had not been completed as of the date of the formal hearing. On May 1, 2009, counsel for Petitioner filed "Petitioner's Notice of Split Sample Results" which represented that analysis of the three split samples by the Louisiana laboratory confirmed the presence of the subject metabolite derivative in each sample. Those confirming tests have not been admitted into evidence and have not been considered by the undersigned in the preparation of the Order Sustaining Summary Suspension or in the preparation of this Recommended Order. The parties verbally advised the undersigned of the results of that testing and agreed that all issues were ripe for determination. The parties were afforded an opportunity to submit arguments as to penalty. Respondent's counsel advised that Respondent elected not to submit additional argument. Thereafter, Petitioner submitted "Petitioner's Revised Proposed Recommended Order" on May 1, 2009.

^{4/} Florida Administrative Code Rule 61D-6.002(1) provides, in relevant part:

(1) The trainer of record shall be responsible for and be the absolute insurer of the condition of the horses . . . he/she enters to race. . . .

^{5/} The manner in which the urine samples were taken from all three horses will be discussed below. The blood samples are not at issue in this proceeding.

^{6/} The testing procedures for the urine samples at issue in this proceeding will be discussed below.

^{7/} This person could be the representative of the trainer or the owner. The representatives at issue in these proceedings were representatives of the trainer.

COPIES FURNISHED:

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NOTICE OF RIGHT TO 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 this case.