STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Petitioner,	)	
vs.	)	Case No. 10-4229PL
MANUEL J. CRIOLLO,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge Edward T. Bauer for final hearing by video teleconference on November 22, 2010, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: David N. Perry, Esquire
Department of Business and
Professional Regulation
Division of Pari-Mutuel Wagering
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Manuel J. Criollo, pro se
c/o Singing Oaks Farm
6363 Northwest 170th Avenue
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STATEMENT OF THE ISSUES

The issues are whether Respondent violated section 550.2415(1)(a), Florida Statutes, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On April 21, 2009, Petitioner Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("the Division"), issued an Administrative Complaint against Respondent. The Administrative Complaint alleged that Respondent violated section 550.2415(1)(a), in that a thoroughbred racehorse trained by Respondent, "Cardiac Output," tested positive for prohibited substances. Through counsel, Respondent timely requested a formal hearing to contest these allegations, and on June 29, 2010, the matter was referred to the Division of Administrative Hearings.

On July 27, 2010, citing "irreconcilable differences," counsel for Respondent filed a "Motion to Withdraw as Counsel of Record for Respondent, Manuel J. Criollo." Administrative Law Judge John G. Van Laningham entered an Order Allowing Withdrawal of Counsel on August 9, 2010. Subsequently, on September 2, 2010, the instant matter was transferred to the undersigned.

During the final hearing, the Division presented the testimony of Diana Neira and Dr. Richard Sams. The Division also introduced five exhibits, identified as A, C, D, E, and F.

Respondent testified on his own behalf and introduced one exhibit, identified as Respondent's Exhibit A. At the conclusion of the final hearing, the undersigned advised the parties that proposed recommended orders would be due 10 days from the filing of the hearing transcript.

The Transcript of the final hearing was filed on December 10, 2010. On December 27, 2010, Petitioner filed a request for an extension of time to submit a proposed recommended order. The undersigned granted the request, and directed that proposed recommended orders be filed no later than January 7, 2011. Both parties subsequently filed proposed recommended orders, which the undersigned has considered.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 version of the Florida Statutes.

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 thoroughbred trainer license, number 260970-1021, issued by the Division in 2001.

3. On August 29, 2008, and at all times material hereto, Respondent was the trainer of record for "Cardiac Output," a thoroughbred racehorse.

4. On August 29, 2008, Cardiac Output was entered, and finished second, in the fifth race at Calder Race Course.

5. Approximately thirty minutes after the conclusion of the race, and in accordance with established procedures, a Division employee collected urine and blood samples from Cardiac Output. The blood and urine samples were assigned numbers 421716B and 421716U, respectively.

6. Cardiac Output's race day specimens were 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. The Lab, following applicable procedures, found that the blood and urine specimens contained caffeine, which acts as a central nervous system stimulant and is categorized as a Class Two drug pursuant to the Uniform Classification Guidelines for Foreign Substances.[1] In addition, the Lab detected oxilofrine, a cardiac stimulant, in the urine sample. Although oxilofrine is a non-classified drug, it has the potential to cause injury to racehorses, particularly when administered in combination with caffeine.

7. Subsequently, pursuant to section 550.2415(5)(a), the Division split Cardiac Output's race day specimens into primary samples and secondary ("split") samples. The split samples were then forwarded to the Louisiana State University (LSU) School of Veterinary Medicine for confirmatory testing. On July 15, 2009,

LSU submitted a report confirming the presence of caffeine and oxilofrine.

8. During the final hearing, Respondent testified that he did not knowingly administer any prohibited substances to Cardiac Output. The undersigned finds Respondent's testimony to be credible.

9. Nevertheless, the "absolute insurer rule," which is described in detail below, requires the undersigned to find as a matter of ultimate fact that Respondent violated section 550.2415(1)(a).

CONCLUSIONS OF LAW

A. Jurisdiction

10. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 550.2415(3)(d), Florida Statutes.

B. Burden of Proof

11. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Division must prove the charges against Respondent by clear and convincing evidence. Dep't of Banking and Fin., Div. of Sec. & Investor Protect. v. Osborne Stern & Co., 670 So. 2d 932,

933-34 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987); Nair v. Dep't of Bus. & Prof'l Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

12. 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 testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

C. The Charge Against Mr. Criollo

13. As noted previously, the Division alleges that Respondent violated section 550.2415(1)(a), which reads, in relevant 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.

14. In turn, section 550.2415(1)(c), provides that 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."

15. Florida Administrative Code Rule 61D-6.002(1), also known as the "absolute insurer rule," imposes strict liability on trainers as a condition of licensure:

> (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. Trainers . . . are presumed to know the rules of the division.

(Emphasis added).

16. Although the imposition of strict liability upon licensees such as Respondent can produce harsh results, the absolute insurer rule has withstood various challenges over the years. See Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation v. Caple, 362 So. 2d 1350, 1354-55 (Fla. 1978) ("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"); Hennessey v. Dep't of Bus. & Prof'l Regulation, 818 So. 2d 697, 701 (Fla. 1st DCA 2002) ("A plain reading of the authorizing statutes in this case demonstrates that the legislature granted the department the specific authority to hold a trainer responsible for the condition of the horses which he trains and races if these horses are raced with any drug in their system. . . . We, therefore, determine that the absolute insurer rule is still valid"); see also Hudson v. Tex. Racing Comm'n, 455 F.3d 597, 601 (5th Cir. 2006) ("We agree with the majority of jurisdictions that the absolute insurer rule does not violate due process. While the absolute insurer rule may be harsh, it is constitutional"); Cooney v. Am. Horse Shows Ass'n, 495 F. Supp. 424, 431 n.4 (S.D.N.Y. 1980) ("The majority of racing commissions now have even stricter regulations which provide that the trainer is the absolute insurer of the horse's condition, and therefore hold him strictly liable for the acts of others . . . . These regulations do not depend upon the operation of an irrebuttable presumption of trainer responsibility for drugging, which in the past was held to violate due process . . . rather, courts now uphold these rules on the basis of the state's power to impose strict liability as a reasonable exercise of its regulatory authority over horse

racing"); Berry v. Mich. Racing Comm'r, 321 N.W.2d 880, 882 (Mich. Ct. App. 1982) ("Plaintiff contends that whenever a prohibited substance is found in a horse's system the insurer rule creates an irrebuttable presumption that the trainer of the horse administered the substance or negligently cared for the horse. We disagree. The rule, as its name implies, makes the trainer of a horse that is entered into a race the insurer of that horse's condition. It creates no presumption of trainer fault when the presence of a prohibited substance is found. The rule simply does not concern itself with assigning fault, but instead requires the trainer, as a contingency of being licensed by the state, to bear the responsibility for the horse's condition.").

17. Pursuant to the authority discussed above, Respondent, as Cardiac Output's trainer, is strictly responsible for the caffeine and oxilofrine detected in the race day specimens. Accordingly, the Division has proven by clear and convincing evidence that Respondent violated section 550.2415(1)(a).

D. Penalty

18. Section 550.2415(2) and (3) authorize the Division to take disciplinary 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 . . . 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.

19. Florida Administrative Code Rule 61D-6.011(2)(b) provides relevant penalty guidelines where a Class II impermissible substance (such as caffeine) is discovered in a race day specimen. For a first violation[2] involving a Class II substance, the guidelines call for a penalty of "$100 to $1000 fine, suspension of license up to 30 days." As oxilofine is an unclassified drug, Florida Administrative Code Rule 61D-6.011(2)(b) does not provide a recommended penalty range.

20. In its Proposed Recommended Order, the Division takes the position that the Administrative Complaint contains two counts, and as such, seeks the imposition of separate penalties for the caffeine and the oxilofrine. Specifically, Petitioner recommends:

Count 1

> Class two drug [caffeine], first offense: 30 day suspension of Respondent's pari-mutuel

wagering license, $1,000 fine, and redistribution of the purse.

Count 2

Unclassified illegal drug [oxilofrine]: One year suspension of Respondent's pari-mutuel wagering license, $1,000 fine.

Recommendation of the Division: One year and 30 day suspension of Respondent's pari-mutuel wagering license, $2,000 fine, and redistribution of the purse.

21. The problem with the Division's request is that the Administrative Complaint did not charge separate violations for each of the drugs discovered in the samples. Not only was the complaint not separated into multiple counts, but paragraph 16 of the complaint reads, in pertinent part:

> Based on the foregoing, Respondent is responsible for a violation of Section 550.2415(1)(a), Florida Statutes, which provides, "[t]he racing of an animal with any drug, medication, stimulant, depressant, hypnotic, local anesthetic, or drug-masking agent is prohibited . . . . "

(Emphasis added).

22. As the preceding language demonstrates, the Administrative Complaint charged only one violation of section 550.2415(1)(a), which Petitioner could prove by alternative means (i.e., by demonstrating the presence of either caffeine or oxilofrine). Accordingly, only one penalty can be imposed in this cause.

23. In his Proposed Recommended Order, Respondent argues that in the event a finding of guilt is made, his license should be suspended for a period of two weeks, from April 25 through May 8, 2011.

24. If caffeine was the only prohibited substance involved in this matter, the undersigned would be inclined to recommend a 14-day suspension of Respondent's license and a $250 fine. However, due to the additional presence of oxilofrine, the undersigned concludes that the appropriate penalty is a 30-day suspension of Respondent's license and a $500 fine.

25. The undersigned has considered the Division's recommendation, but finds it to be excessive given the absence of penalty guidelines for oxilofrine, as well as the fact that no evidence of any disciplinary history was introduced.

26. Finally, the undersigned declines to recommend the redistribution of the purse, as insufficient evidence regarding the purse was presented during the final hearing. Although the Division's Exhibit C indicates that the total purse was $8,000, no evidence was presented concerning how it was distributed among the top three finishers, nor did the Division prove that Respondent received any portion of the purse. See Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Purdy, Case No. 03-713 (Fla. DOAH May 29, 2003) ("Petitioner argues that it would be appropriate to require that any purse received in any

of the races in question be returned. The undersigned has, after careful consideration, rejected that argument because there was no evidence as to any of the purses involved in any of the races at issue in this proceeding, including the amounts of such purses or whether Respondent received any portion of such purses.") (Emphasis added).

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, enter a final order finding that Respondent violated section 550.2415(1)(a), as described in this Recommended Order; suspending Respondent's license for a period of 30 days from the date of the final order; and imposing a fine of $500.

DONE AND ENTERED this 11th day of January, 2011, in Tallahassee, Leon County, Florida.

EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of January, 2011.

ENDNOTES

[1] Two caffeine metabolites, theophylline and theobromine, were also detected.

[2] Although the Administrative Complaint alleged that Respondent has previously violated section 550.2415(1)(a), no evidence of any disciplinary history was introduced during the final hearing. Accordingly, the undersigned will treat the instant violation as a first offense.

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 must be filed with the agency that will issue the final order in this case.