

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PARI-MUTUEL WAGERING**

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	3/20/2012
File #	2012-01697

**DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL WAGERING,**

Petitioner

v.

**DOAH Case No.: 10-4229PL
DBPR Case No.: 2009002867**

MANUEL J. CRIOLLO,

Respondent.

AMENDED FINAL ORDER

THIS CAUSE came before the State of Florida, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (“the Division”) for the purpose of considering Administrative Law Judge Edward T. Bauer’s (“ALJ Bauer”) Recommended Order, a copy of which is attached hereto as Exhibit A.

This proceeding began when the Division issued an Administrative Complaint alleging Manuel J. Criollo (“Mr. Criollo”) violated section 550.2415(1)(a) of the Florida Statutes in that a thoroughbred racehorse trained by him, “Cardiac Output,” tested positive for prohibited substances. ALJ Bauer convened a formal administrative hearing on November 22, 2010 and issued a Recommended Order on January 11, 2011. In his Recommended Order, ALJ Bauer recommended that the Division suspend Mr. Criollo’s pari-mutuel wagering thoroughbred trainer license for 30 days and impose a \$500 fine. The Division timely filed Exceptions to ALJ Bauer’s Recommended Order, a copy of

which is attached hereto as Exhibit B. Mr. Criollo did not file exceptions and did not file a response to the Division's exceptions.

On April 7, 2011, the Division rendered the initial Final Order in the instant case, a copy of which is attached as Exhibit C. That initial Final Order imposed a \$1,000 fine and suspended Mr. Criollo's pari-mutuel wagering thoroughbred trainer license for one year. Mr. Criollo appealed the initial Final Order to the First District Court of Appeal ("the Court"), and the Court issued an Opinion on October 31, 2011 reversing the initial Final Order and remanding "with directions to enter a new order which either accepts the penalty recommendation of the Administrative Law Judge or reimposes the increased penalty stating with particularity the reasons for increasing the penalty as required by section 120.57(1)(l), Florida Statutes (2010)." Criollo v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, 73 So. 3d 339 (Fla. 1st DCA 2011). A copy of the Court's opinion is attached as Exhibit D.

FINDINGS OF FACT

1. ALJ Bauer's Findings of Fact as set forth in Exhibit A are approved, adopted, and incorporated herein by reference. Those findings are supported by competent, substantial evidence.

CONCLUSIONS OF LAW

2. The Division adopts the Conclusions of Law set forth in Paragraph #'s 10, 11, 12, 13, 14, 15, 16, 17, 18, and 26.

3. However and as authorized by section 120.57(1)(l) of the Florida Statutes, the Division rejects the Conclusions of Law set forth in Paragraph #'s 19, 20, 21, 22, 23, 24, and 25. Those conclusions of law pertain to ALJ Bauer's recommended penalty. See

§120.57(1)(l), Fla. Stat. (2010)(providing “[t]he agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.”). As explained below, the Division’s substituted penalty “is as or more reasonable than that” recommended by ALJ Bauer. See §120.57(1)(l), Fla. Stat. (2010).

4. After reviewing the complete record, the undersigned has determined there are compelling reasons to reject ALJ Bauer’s recommended penalty of a 30-day licensure suspension and a \$500 fine. Even if ALJ Bauer correctly determined the Division can only penalize Mr. Criollo based on a single violation of section 550.2415(1)(a) of the Florida Statutes, ALJ Bauer’s recommended penalty is simply too lenient given the circumstances of the instant case.¹

5. ALJ Bauer’s penalty recommendation appears to have been influenced by the penalty guideline that applies when a Class II impermissible substance is discovered in a race day specimen. In the instant case, the impermissible Class II substance at issue is caffeine. But, the Division is not limited to imposing the guideline penalty set forth in Rule 61D-6.011(2) for a Class II drug. As explained in the following paragraphs, there are aggravating circumstances that justify a penalty in excess of that set forth in the applicable guideline.

¹ Section 550.2415(1)(a) of the Florida Statutes provides in relevant part that “[t]he 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.”

6. For instance, ALJ Bauer found in Paragraph #'s 4 and 6 of his Recommended Order that: (a) caffeine is a central nervous stimulant; (b) oxilofrine is a cardiac stimulant; and that (c) both were found to be present in Cardiac Output's system at the time of the fifth race on August 29, 2008 at Calder Race Course. See pages 4 and 5 of ALJ Bauer's Recommended Order.

7. Furthermore, ALJ Bauer found in Paragraph # 6 of his Recommended Order that "[a]lthough oxilofrine is a non-classified drug, it has the potential to cause injury to racehorses, particularly when administered in combination with caffeine." See page 4 of the Recommended Order.

8. Therefore, the danger to Cardiac Output resulting from the presence of both drugs in his system amounts to an aggravating circumstance under Rule 61D-2.021. See Fla. Admin. Code R. 61D-2.021(2)(providing in pertinent part that "[c]ircumstances which may be considered for the purposes of mitigation or aggravation of any penalty shall include, but are not limited to, the following: (2) The danger to the public and/or racing animals.").

9. In his Response to the Division's Administrative Complaint, Mr. Criollo admitted to six previous Class III and Class IV drug violations. Compare page 4 of the Division's Administrative Complaint with page 2 of Mr. Criollo's Response to the Administrative Complaint.

10. Mr. Criollo's previous violations and the similarity of those previous violations to the violation or violations at issue in the instant case represent another aggravating circumstance. See Fla. Admin. Code R. 61D-2.021(3) (providing in pertinent part that "[c]ircumstances which may be considered for the purposes of

mitigation or aggravation of any penalty shall include, but are not limited to, the following: (3) The number of repetitions of offenses.”).²

11. The fact that Respondent has not been deterred from administering prohibited drugs to his racing animals amounts to yet another aggravating circumstance. See Fla. Admin. Code R. 61D-2.021(6) (providing in pertinent part that “[c]ircumstances which may be considered for the purposes of mitigation or aggravation of any penalty shall include, but are not limited to, the following: (6) The deterrent effect of the penalty imposed.”). See also page 4 of the Division’s Administrative Complaint.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The initial Final Order rendered on April 7, 2011 is vacated and replaced by the instant Amended Final Order.


2. Mr. Criollo shall pay an administrative fine of \$1,000 made payable to the Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, FL 32399, within thirty (30) days of the date of the filing of this Final Order with the Department’s Agency Clerk.

² In Footnote #2 of his Recommended Order, ALJ Bauer noted that “[a]lthough 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.” See page 14 of ALJ Bauer’s Recommended Order. However, the Division respectfully notes that no evidence of Mr. Criollo’s disciplinary history was necessary because he answered the Administrative Complaint by admitting the allegation about his disciplinary history. Compare page 4 of the Division’s Administrative Complaint with page 2 of Mr. Criollo’s Response to the Administrative Complaint. **Nevertheless, even if the Division were to treat the violation at issue in the instant case as a first offense, the danger posed to the racing animals through the combination of prohibited substances justifies aggravation of the penalty recommended by ALJ Bauer.**

3. Mr. Criollo's license is suspended for a period of one (1) year from the date of the filing of this Final Order with the Department's Agency Clerk.

4. This order shall become effective on the date of the filing with the Department's Agency Clerk.

DONE AND ORDERED this 16th day of March, 2012.


LEON M. BIEGALSKI, Director
Department of Business and
Professional Regulation
Division of Pari-Mutuel Wagering
1940 North Monroe Street
Tallahassee, FL 32399-1011

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Unless expressly waived, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Fla. R. App. P., and section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to: (1) Manuel J. Criollo; 6363 N.W. 17-th Avenue; Morristown, Florida 32688; and (2) Bradford J. Beilly, Esquire; BRADFORD J. BEILLY, P.A.; 1144 S.E. 3 Avenue; Fort Lauderdale, Florida 33316 on this the 20th day of March, 2012.

AGENCY CLERK'S OFFICE

A handwritten signature in black ink that reads "Brandon M. Nichols". The signature is written in a cursive style and is positioned above a horizontal line.

Brandon Nichols, Deputy Agency Clerk

Copies furnished to:

Yvette Pressley, Deputy General Counsel
David N. Perry, Assistant General Counsel
The Honorable Edward T. Bauer, Administrative Law Judge; Division of Administrative Hearings; 1230 Apalachee Parkway; Tallahassee, Florida 32399-3060