STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Petitioner,	)	
vs.	)	Case Nos. 11-1578PL 11-1579PL
RICHARD ALVES AND CASEY ALVES,	)	
Respondents.	)	

RECOMMENDED ORDER

On July 22, 2011, a duly-noticed hearing was held by video teleconferencing with sites in Daytona Beach and Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David N. Perry, Esquire
Assistant General Counsel
Department of Business and
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Tallahassee, Florida 32399-2202

For Respondent: Mitchell Wrenn, Esquire
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STATEMENT OF THE ISSUE

Whether Respondents have violated the provisions of section 550.2415(1)(a), Florida Statutes (2010), and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On January 18, 2010, Petitioner, the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Petitioner or the Department), filed Administrative Complaints against Respondents Richard Alves (DOAH Case No. 11-1578PL) and Casey Alves (DOAH Case No. 11-1579PL), alleging that with respect to the dogs named in the Administrative Complaints, Respondents had violated section 550.2415(1)(a). Both Respondents filed an Election of Rights form disputing the allegations in the Administrative Complaints and requesting a hearing pursuant to section 120.57(1), Florida Statutes (2010). On March 29, 2011, the cases were transferred to the Division of Administrative Hearings for assignment of an administrative law judge.

On April 12, 2011, the cases were consolidated for the purposes of conducting a hearing, scheduled for May 9, 2011. At Petitioner's request, the hearing was rescheduled without objection for July 22, 2011, and proceeded as scheduled.

At hearing, Petitioner presented the testimony of James Decker, Margaret Wilding, and Bryan Wall, and Petitioner's Exhibits A through BB were admitted into evidence. Respondents submitted no exhibits but presented the testimony of Chris Miller, Lance LaFreniere, Casey Alves, and Richard Alves.

The transcript was filed on August 5, 2011, and both parties timely filed Proposed Recommended Orders which have been

carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Division of Pari-Mutual Wagering is the state agency charged with the regulation of pari-mutuel wagering pursuant to section 20.165 and chapter 550, Florida Statutes.

2. At all times material to the allegations in the Administrative Complaints, Respondent Richard Alves held a pari-mutuel wagering greyhound trainer license, number 1053205-1021, issued by Petitioner.

3. At all times material to the allegations in the Administrative Complaints, Respondent Casey Alves was also licensed as a greyhound trainer by Petitioner, having been issued license number 2015868-1021.

4. At all times material hereto, Daytona Beach Kennel Club (DBKC) has been a licensed Florida pari-mutuel facility authorized to conduct pari-mutuel wagering. The Respondents trained greyhounds that were entered to race at DBKC.

5. Cocaine is a local anesthetic and a Class One drug under the Uniform Classification Guidelines for Foreign Substances, as promulgated by the Association of Racing Commissioners, Inc. It is a prohibited medication pursuant to section 550.2415(10(a).

6. At all times material hereto, Respondent Richard Alves was the trainer of record for greyhounds named "Flying Car," "Goldie's Trey," and "Iruska Direct."

7. At all times material hereto, Respondent Casey Alves was the trainer of record for greyhounds named "Kelsos Jalopy," "Wild Mia," "Mani Appeal," and "Fuzzy's Big Shot."

Flying Car

8. On April 27, 2010, Flying Car was entered in the third race at DBKC.

9. Flying Car finished sixth in the third race that day.

10. Flying Car was subject to pre-race testing, and prior to the start of the race, urine sample 610687 was collected from Flying Car. The urine sample was processed in accordance with established procedures and forwarded to the lab for analysis.

11. Richard Alves was not present in the testing enclosure when the urine sample was taken, because according to John Decker, DBPR Investigations Supervisor, trainers are not permitted to be on the track when greyhounds are there for the race. Trainers are required to drop the animals off at the track approximately one and a half hours prior to the racing schedule and leave them there until after the dog's race is over. Depending on when the dog races, the trainer has no contact with the racing animal from two to approximately five hours.

12. Richard Alves did not sign the sample collection form for Flying Car, because he was not present when the collection was taken.

13. The University of Florida Racing Laboratory tested urine sample number 610687 and found that it contained Benzoylecgonine, a metabolite of cocaine.

Goldie's Trey

14. Respondent Richard Alves was the trainer of record for racing greyhound Goldie's Trey on August 5, 2010.

15. On August 5, 2010, Goldie's Trey was entered in the tenth race at DBKC. Goldie's Trey finished sixth in the tenth race.

16. Goldie's Trey was subject to pre-race testing, and prior to the start of the race, urine sample 603139 was collected from Goldie's Trey. The urine sample was processed in accordance with established procedures and forwarded to the lab for analysis.

17. Richard Alves was not present in the testing enclosure when the urine sample was taken, because trainers of greyhounds are not permitted to be on the track at that time.

18. Richard Alves did not sign the sample collection form for Goldie's Trey, because he was not present when the collection was taken.

19. The University of Florida Racing Laboratory tested urine sample 60319 and found that it contained cocaine, plus Benzoylecgonine and Ecgonine Methyl Ester, metabolites of Cocaine.

Iruska Direct

20. Respondent Richard Alves was the trainer of record for the greyhound, Iruska Direct.

21. On November 26, 2010, Iruska Direct was entered in the 15th race at DBKC. Iruska Direct finished sixth in the 15th race.

22. Iruska Direct was subject to pre-race testing, and prior to the start of the race, urine sample 662039 was collected from Iruska Direct and processed in accordance with established procedures and forwarded to the lab for analysis.

23. Richard Alves was not present in the testing enclosure when the urine sample was taken, because trainers for greyhounds are not permitted to be on the track when the animals are there for the race.

24. Richard Alves did not sign the sample collection form for Iruska Direct, because he was not present when the collection was taken.

25. The University of Florida Racing Laboratory tested urine sample number 662039 and found that it contained Benzoylecgonine, a metabolite of cocaine.

Kelsos Jalopy

26. Respondent Casey Alves was the trainer of record for the racing greyhound Kelsos Jalopy.

27. On November 10, 2010, Kelsos Jalopy was entered in the seventh race at DBCK. The dog finished second in the seventh race.

28. Kelsos Jalopy was subject to pre-race testing, and prior to the start of the race, urine sample 661859 was collected from Kelsos Jalopy and processed in accordance with the established procedures and forwarded to the lab for analysis.

29. Casey Alves was not present in the testing enclosure when the urine sample was taken, because trainers for greyhounds are not permitted to be on the track when the animals are there for the race.

30. Casey Alves did not sign the sample collection form for Kelsos Jalopy, because he was not present when the collection was taken.

31. The University of Florida Racing Laboratory tested urine sample number 661859 and found that it contained Benzoylecgonine, a metabolite of cocaine.

Mani Appeal

32. Respondent Casey Alves was the trainer of record for the racing greyhound Mani Appeal on November 6, 2010.

33. On November 6, 2010, Mani Appeal was entered in the second race at DBKC. Mani Appeal finished fourth.

34. Mani Appeal was subject to pre-race testing, and prior to the start of the race, urine sample 661795 was collected from

Mani Appeal and processed in accordance with established procedures and forwarded to the lab for analysis.

35. Casey Alves was not present in the testing enclosure when the urine sample was taken, because greyhounds' trainers are not permitted to be on the track at that time.

36. Casey Alves did not sign the sample collection form for Mani Appeal, because he was not present when the collection was taken.

37. The University of Florida Racing Laboratory tested urine sample number 661795 and found that it contained cocaine, and Benzoylecgonine and Ecgonine Methyl Ester, metabolites for cocaine.

Wild Mia

38. Respondent Casey Alves was the trainer of record for the racing greyhound Wild Mia on November 5, 2010. On that day, Wild Mia was entered in the sixth race at DBKC. Wild Mia finished second in the sixth race.

39. Prior to the start of the race, urine sample 661786 was collected from Wild Mia as part of pre-race testing, and processed in accordance with established procedures and forwarded to the lab for analysis.

40. Casey Alves was not present in the testing enclosure when the urine sample was taken, because greyhounds' trainers are not permitted to be on the track at that time.

41. Casey Alves did not sign the sample collection form for Wild Mia, because he was not present when the collection was taken.

42. The University of Florida Racing Laboratory tested urine sample number 661786 and found that it contained cocaine, and Benzoylecgonine and Ecgonine Methyl Ester, metabolites for cocaine.

Fuzzy's Big Shot

43. Respondent Casey Alves was the trainer of record for the racing greyhound Fuzzy's Big Shot on November 17, 2010. On that day, Fuzzy's Big Shot was entered in the fifth race at DBKC and finished first.

44. Fuzzy's Big Shot was subject to pre-race testing. Prior to the start of the race, urine sample 661943 was collected from Fuzzy's Big Shot in accordance with established procedures and forwarded to the lab for analysis.

45. As was the case with the other racing greyhounds, Casey Alves was not present in the testing enclosure when the urine sample was taken, because greyhound trainers are not permitted to be on the track at that time.

46. Casey Alves did not sign the sample collection form for Fuzzy's Big Shot, because he was not present when the collection was taken.

47. The University of Florida Racing Laboratory tested urine sample 661943 and found that it contained Benzoylecgonine, a metabolite of cocaine.

48. Respondents steadfastly deny giving cocaine to any of the animals discussed above. Both Casey and Richard Alves' kennels were searched in November of 2010. No drugs or illegal substances were found in the kennels.

49. John Dekker, Investigations Supervisor for the Department for the Department, testified that the procedures were different for pre-race and post-race testing.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1).

51. The Department is seeking revocation of Respondents' occupational licenses as trainers of racing greyhounds. Because this is a penal proceeding, Petitioner is required to prove the allegations against Respondents by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

52. As stated by the Florida Supreme Court:

> 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

53. Respondents were charged with violating section 550.2415, which states in pertinent 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. Test results and the identities of the animals being tested and of their trainers and owners of record are confidential and exempt from s. 119.07(1) and from s. 24(a), Art. I of the State Constitution for 10 days after testing of all samples collected on a particular day has been completed and any positive test results derived from such samples have been reported to the director of the division or administrative action has been commenced.
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> * * *
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> (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.

54. Petitioner relies on the "absolute insurer rule," Florida Administrative Code Rule 61D-6.002(a) for attributing the administration of a prohibited substance to Respondents as trainers of record for the animals. Conversely, Respondents

argue that the Department has not complied with the Department's rules for taking pre-race specimens, in that while rule 61D-6.005 requires the animal's trainer of record, owner or designee to be present, in practice trainers are not permitted in the testing enclosure when the specimens are taken.

55. Rule 61D-6.002(1) provides:

> (1) The trainer of record shall be responsible for and be the absolute insurer of the condition of the horses or racing greyhounds, he/she enters to race. Trainers, kennel owners and operators are presumed to know the rules of the division. . . .

56. Known as the absolute insurer rule, rule 61D-6.002(1) makes a trainer strictly liable for the administration of impermissible drugs to a racing animal. This firmly entrenched rule of the Division of Pari-Mutuel Wagering has survived several challenges to its validity over the years. See, e.g., Hennessey v. Dep't of Bus. & Prof'l Reg., 818 So. 2d 697 (Fla. 1st DCA 2002); Solimena v. Dep't of Bus. Reg., 402 So. 2d 1240 (Fla. 3d DCA 1981); Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg. v. Caple, 362 So. 2d 1350 (Fla. 1978). In the most recent challenge to the absolute insurer rule, the First District relied in part on the findings of the administrative law judge regarding the regulatory scheme for pari-mutuel facilities. The Court quoted the following findings from the underlying final order:

> 28. The trainer is singularly the best individual to hold accountable for the condition of a horse. The trainer is either going to be with the horse at all times or one of his or her employees or contractors is

> going to be with the horse at all times, whether the horse is racing on an individual day or is merely stabled at the track. A trainer of racing horses is responsible for the animals' athletic conditioning. A trainer is also responsible for providing for the regular care of the horses he trains, including feeding and seeing to the medical needs of the horses. All persons who handle an animal prior to the running of a race are either employees of the track or Department or are employed by or in a professional relationship with the trainer. At no time prior to a race is a trainer or his employer prohibited from seeing to the security of the horse in the paddock. While there are other persons who come in contact with the horse prior to a race, the trainer due to his responsibility for the care and supervision of the animal stands in the best overall position to prevent improper medication of the horse.
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> 29. There is no practical alternative to holding the trainer of record responsible for the condition of the animals he enters to race. . . . The integrity of the pari-mutuel industry would suffer from the Department's inability to enforce statutes relating to the drugging of racing animals.

Hennessey, 818 So. 2d at 699-700 (emphasis added).

57. Respondents argue that the Department is relying on the absolute insurer rule while not following the testing procedures outlined in rule 61D-6.005 in that trainers are not permitted to be present while pre-race samples, as opposed to post-race samples are taken. However, by its terms, rule 61D-6.005 only applies to post-race sampling. The rule provides in pertinent part:

> (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 center for examination. . . .
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> * * *
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> (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 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 representative 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. . . .

58. While the rule expressly references post-race testing, there is no corresponding reference to pre-race testing. Neither party has cited, and the undersigned has not located, a rule addressing the procedure to be used for pre-race testing. In practice, the more credible evidence indicates that the trainer or other authorized person cannot be present in the testing enclosure, as they are not permitted to be in the area while the greyhounds race.

59. Holding the trainer of record accountable is troubling where, contrary to the record established in Hennessey, the trainer or his employee is not with the greyhound at all times prior to the race, and is in fact prohibited from being present.

This situation lends itself to liability without authority. However, rule 61D-6.002(1) is a validly adopted rule of the Department, and Respondents have not challenged its validity as opposed to its application. Under these circumstances, it must be applied to Respondents. Accordingly, the Department has proven that the Respondents, Casey and Richard Alves, have violated section 550.2415(1)(a) with respect to the animals named in the Administrative Complaints.

60. Section 550.2415(3)(a) enumerates the penalties for violating the section: suspension, revocation or denial of a license or permit; a fine not exceeding $5,000; full or partial return of the purse, sweepstakes, and trophy of the race at issue; or any combination of the penalties listed above. Petitioner has adopted disciplinary guidelines for administering these penalties. Florida Administrative Code Rule 61D-6.001(2) specifies that with respect to Class I impermissible substances, the penalty range is a $500 to $1,000 fine, and suspension or revocation of the license. For subsequent violations, the penalty range is the same, except that the possible fine amount increases to a range of $1,000 to $5,000.

61. While there is no question that Respondents have violated section 550.2415, in recommending penalty the undersigned has taken into account that the trainer of record is not present when the dogs are tested pre-race and does not have supervision and control for a significant period of time prior to

the race. The testimony presented regarding Respondents' care of their animals was credible, and the testimony that no drugs or illegal paraphernalia was discovered in their kennels was unrebutted. Likewise, no prior violations of section 550.2415 have been established. Under these circumstances, revocation of Respondents' licenses is not appropriate.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering enter a final order finding that Respondent Casey Alves violated section 550.2415(1)(a); impose an administrative fine of $2,000; and suspend his occupational license for a period of one year, retroactive to January 31, 2011. It is further recommended that the Department enter a final order finding that Richard Alves violated section 550.2415(1)(a); impose an administrative fine of $1,500 and suspend his occupational license for one year, retroactive to January 31, 2011.

DONE AND ENTERED this 19th day of September, 2011, in Tallahassee, Leon County, Florida.

LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of September, 2011.

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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.