

BEFORE THE HORSE RACING BOARD

OF THE STATE OF CALIFORNIA

In the Matter of the Accusation Against:

FRANK PETRELLI
CHRB License # 292848

Respondent

Case No. SAC 10-0006

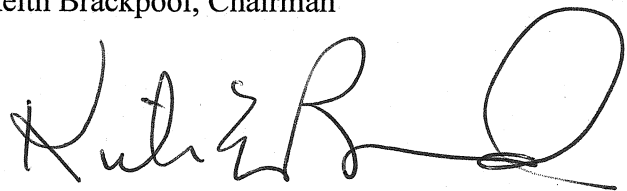
DECISION

The attached Proposed Decision is hereby adopted by the California Horse Racing Board as its Decision in the above-entitled matter.

The Decision shall become effective on February 20, 2010.

IT IS SO ORDERED ON January 15, 2010.

CALIFORNIA HORSE RACING BOARD
Keith Brackpool, Chairman

A handwritten signature in black ink, appearing to read "Kirk E. Breed", written in a cursive style.

Kirk E. Breed
Executive Director

was some issue with the original hearing officer so the matter was continued until November 17, 2009 and the parties were noticed to that effect. On November 13, 2009, counsel for the Respondent, sent a "Notice of Continuance and Order Thereon", which purported to continue the hearing and demanded that several pieces of evidence be provided by the CHRB to the Respondent. Then, on November 16, 2009, Respondent's attorney sent one letter to the DAG Daily and one to CHRB employee Sharyn Jolly, expressing her dissatisfaction with the process to date, acknowledging the hearing date, but refusing to participate.

The hearing was called to order at 9:45 a.m. on November 17, 2009, in accordance with the notice supplied to all parties. While Respondent might have wanted to request a continuance, and may have wanted to request additional evidence outlined in an earlier subpoena, neither Respondent, nor his attorney appeared to make these motions. Respondent clearly knew about the scheduled hearing, but chose not to appear. Whether these out of hearing motions were meritorious was impossible to discern given the fact that Respondent chose not to appear in support of them. Finding that all parties had received proper notice, and that Respondent had chosen not to avail himself of the due process afforded by a hearing, the hearing was conducted without Respondent. The Complainant submitted both oral and documentary evidence. The record was closed and deemed submitted on November 17, 2009.

LIST OF EXHIBITS

Complainant Exhibit A – CHRB Complaint 09SW0068, Investigative Report and Documents numbered 1-23.

Complainant Exhibit B – Settlement Agreement and Mutual Release between the CHRB and Frank Petrelli signed 26 August 2008.

FACTUAL FINDINGS

I

At all times, herein mentioned, Respondent was licensed by the California Horse Racing Board in the license category of trainer.

II

Respondent was the trainer of record for the horse "Keystone Comotion" when it raced in the fourth race on April 11, 2009 at the California Exposition and State Fair Harness (hereinafter "Cal Expo") race meet. "Keystone Comotion" finished first in the aforementioned race.

III

A post-race urine sample (labeled sample number CE11537) was taken from "Keystone Comotion" following the running of the race in accordance with CHRB rule 1858 (Test Sample Required) and was sent to the Kenneth L. Maddy Equine Analytical

Chemistry Lab at the University of California, Davis. This lab is the official testing laboratory for the CHRB.

IV

At all times herein mentioned, the chain of custody of sample number CE11537 from “Keystone Comotion” was uninterrupted.

V

After analyzing the sample, Maddy Laboratory reported a finding of the prohibited drugs yohimbine and hydroxy-yohimbine, a metabolite of yohimbine. (Yohimbine is a Class 2 drug substance (Class A penalty) as classified by CHRB rule 1843.2 (Classification of Drug Substances) and is approved for use in horses to reverse the effects of tranquilizers).

VI

Respondent requested that sample CE11537 also be analyzed by the University of Pennsylvania Equine Toxicology & Research Laboratory pursuant to CHRB rule 1859.25 (Split Sample Testing). That lab also reported the presence of yohimbine and hydroxy-yohimbine in the post race urine (and plasma) sample taken from “Keystone Comotion.”

VII

CHRB Executive Director, Kirk Breed, in his official capacity filed an accusation against Respondent on July 7, 2009 regarding the post-race medication positive herein described.

VIII

Respondent has a previous medication violation in his licensing history. Specifically, on August 26, 2009, through a stipulated agreement, Respondent agreed to pay a \$3,000 fine and serve a thirty day suspension of his trainer’s license after one of the horses under his care tested positive for the Class 2 drug substance, hydroxydetomidine, a metabolite of detomidine.

APPLICABLE LAWS AND REGULATIONS

California Horse Racing Board rule 1887. Trainer to Insure Condition of Horse.

- (a) The trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. If the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of this division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. In addition, the owner of the horse, foreman in charge of the horse, groom, and any other person shown to have had care or attendance of the horse, may be fined, his/her license suspended, revoked, or be ruled off.

- (b) Notwithstanding the above, if the Board or its agents fail to notify a trainer of a potential positive test within 21 calendar days from the date the sample was taken, the trainer shall not be deemed responsible under this rule unless it is shown by the preponderance of the evidence that the trainer administered the drug or other prohibited substance defined in Rule 1843.1 of this division, caused the administration or had knowledge of the administration.

California Horse Racing Board rule 1843. Medication, Drugs and Other Substances.

It shall be the intent of these rules to protect the integrity of horse racing, to guard the health of the horse, and to safeguard the interests of the public and the racing participants through the prohibition or control of all drugs, medications and drug substances foreign to the horse. In this context:

- (a) No horse participating in a race shall carry in its body any drug substance or its metabolites or analogues, foreign to the horse except as hereinafter expressly provided.
- (b) No drug substance shall be administered to a horse which is entered to compete in a race to be run in this State except for approved and authorized drug substances as provided in these rules.
- (c) No person other than a licensed veterinarian or animal health technician shall have in his/her possession any drug substance which can be administered to a horse, except such drug substance prescribed by a licensed veterinarian for a specific existing condition of a horse and which is properly labeled.
- (d) A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance or a finding of a drug substance in excess of the limits established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered.

California Horse Racing Board rule 1888. Defense to Trainer Insurer Rule.

A trainer or other person charged with a violation of Rule 1887 of this division may defend, mitigate or appeal the charge if:

- (a) He was not, before the commencement of any proceeding against him, informed of the charges being brought against him;
- (b) He was not permitted counsel, representation or an advisor of his choosing in any hearing before the stewards concerning the charges;
- (c) He shows, by a preponderance of evidence, that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons; and
- (d) He was not permitted to introduce evidence in his own behalf before any finding or ruling was made against him. Nothing herein shall require that the stewards permit cross-examination of any witness appearing before them, or issue subpoenas for the attendance of witnesses.

DISCUSSION OF ISSUES

At the outset of this discussion, it is important to note that it is somewhat troubling that neither Respondent nor a representative was present at the hearing, and therefore not able to present evidence that might rebut the Complainant's accusations. Unfortunately, in order to avail oneself of the due process protections in place to protect licensees, one has to appear at the noticed hearing. Simply choosing not to participate, or more plainly, to show up, cannot absolve Respondent of his responsibility for the alleged violation or delay the proceedings in order to ultimately delay the imposition of a penalty that may or not result. It is important to note that Complainant is also governed by and protected by the concept of due process and the rules and laws that accompany it. I am satisfied that both Respondent and his representative were given proper notice regarding the hearing, and chose, for whatever reason, not to attend. Had Respondent wanted a continuance or objected to the manner in which discovery had proceeded, the prudent course of action would have been to make the appropriate motions at hearing. Short of that, inaction leaves this Hearing Officer with few options if Complainant is able to prove its case.

As the factual findings indicate, Respondent trained a horse that tested positive for a drug substance, the presence of which is prohibited by CHRB Rules and Regulations. Not only did the CHRB's laboratory detect this substance (a fact that in and of itself would have been enough to sustain a violation) but the split sample analysis requested by the Respondent tested positive for the prohibited drug yohimbine as well. The oral and documentary evidence created a proper chain of evidence from the horse "Keystone Comotion" itself to the moment at each of the laboratories when the presence of yohimbine and its metabolite hydroxy-yohimbine were discovered. This, coupled with the fact that Respondent was the trainer of the horse at the time it raced creates "prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered" (CHRB Rule 1843(d)). Interestingly, the CHRB rules and regulations create a version of strict liability or absolute liability not often seen in modern law. This is presumably because the trainer is in the best position to prevent tampering with the horses in his or her care, because the harm to the public can be great and widespread if tampering occurs, and to create an incentive for trainers to take appropriate precautions in order to promote the health and welfare of the horses in his or her care. In the case at hand, Respondent, under the absolute insurer rule outlined in CHRB rule 1887, is responsible for the presence of yohimbine and its metabolites found in his horse. However, CHRB rule 1888 (Defense to Trainer Insurer Rule) provides several avenues by which a licensee can defend, mitigate or appeal the presumption created by the aforementioned rule.

While defenses to absolute liability are not typical (and by definition, probably make the scheme something other than absolute liability), those delineated in the CHRB rule 1888 can be sorted into two categories: (1) procedural and (2) substantive. The procedural defenses include those based on lack of notice, lack of representation, and the ability to present evidence on one's own behalf. As already discussed, Respondent was permitted all of these due process protections come defenses, but chose not to avail himself therewith. The substantive defense outlined in rule 1888 states that the licensee

must show “by a preponderance of evidence, that he made every reasonable effort to protect the horses in his care from tampering by unauthorized persons.” Obviously, the licensee did not put on a case in the instant matter but some pertinent evidence did exist in the Complainant’s presentation. To wit, Respondent completed a declaration in connection with this case and it was included with the Complainant’s exhibits. In it, he explains that he has no idea how this post-race positive occurred. Respondent does speculate with respect to how it might have happened (i.e. feed supplement, employee contamination, feed or straw contamination, third party tampering, etc.) but offers little in terms of evidence. In fact, the direct testimony of Dr. Scott Stanley, chief chemist at the University of California, Davis laboratory that tested the urine sample, refutes most of these theories. When questioned about yohimbine, Dr. Stanley stated: “[Yohimbine is] commercially available, but from a couple pharmaceutical sources, as an injectable. . . It can also be purchased from compounding pharmacies as an injectable. . . But the only – the only form that I know is an injectable, not an oral, not a paste, not any other form. . . It is a naturally occurring plant alkaloid, but only from plants in Africa.” Given the evidence, it would be difficult to accept Mr. Petrelli’s speculation that this positive somehow occurred from contamination or from a feed supplement. While third party interference is always a possibility, without a shred of evidence, this is no more than speculation and will be considered as such. Finally, in his declaration, Respondent states that he “does not give [his] horses any medications or drugs,” that he “compl[ies] with all rules,” and “[he] tr[ies] everything [he] can to keep people out of [his] barn but it’s hard. Lack of security in the bran area.” These statements, while quite possibly true, do not satisfy the requirement that the Respondent demonstrate by a preponderance of evidence that he or she has made every reasonable effort to protect his or her horses from third party tampering. Therefore, given the foregoing, Respondent cannot avail himself of any of the defenses to the trainer insurer rule outlined in CHRB rule 1888. And more pointedly, given the evidence, Respondent is in clear violation of CHRB rule 1843.

Once the determination that a medication violation has occurred, one must then examine the penalty required by the rules. As stated in the findings of fact, yohimbine (and its metabolite) is considered a class 2 medication that requires a class A penalty under CHRB rule 1843.3 (Penalties for Medication Violations) and its supporting documents. The minimum penalty for a first offense is designated as a one year license suspension and a \$10,000 fine. Both the suspension and fine are required absent mitigating or aggravating circumstances. In fact, Complainant has requested a one year license suspension and fine of \$10,000.00 for Respondent’s violation. Therefore, mitigating and aggravating circumstances should be considered before arriving at an appropriate penalty. CHRB rule 1843.3(b) lists eleven factors that should be considered. Frankly, not all of the factors are applicable to the case at hand, nor was there evidence regarding each of the them, so only the germane factors will be considered here. First, Respondent does have a history of a previous medication violation. Respondent’s fine and suspension for another class 2 medication positive can only be viewed as an aggravating circumstance. Second, as an “anti-tranquilizer”, a masking agent and a pain reliever, this drug had the potential to influence the horse’s racing performance. Third, there is only tangential or no evidence regarding the legal availability of the drug and whether the drug was intentionally administered to the horse. Fourth, there is no evidence of the steps taken to safeguard the horse or of any steps taken by the owner to

avoid future positives. Fifth, there is no evidence of environmental contamination. Sixth, on the mitigating side, the purse of the race (\$2,300) is relatively low and there was no evidence of suspicious wagering patterns on the race. Lastly, the horse did not appear to be receiving regular yohimbine treatments nor was Respondent acting at the direction of a veterinarian. On balance, aggravating factors slightly outweigh mitigating ones, but not to the extent that a deviation from the recommended minimum penalty for this violation should be considered.

ORDER

Given all of the foregoing, it is concluded that Respondent, pursuant to CHRB rule 1887 (Trainer to Insure Condition of Horse) violated CHRB rule 1843 (Medication, Drugs and Other Substances) when the presence of yohimbine and its metabolite was discovered in the post-race urine sample of "Keystone Comotion" following the running of the fourth race at the California Exposition and State Fair on April 11, 2009.

It is ordered that:

- (1) All CHRB licenses held by Respondent shall be suspended for a period of one (1) year, beginning on a date to be determined by the CHRB. During the term of suspension, Respondent shall perform no act for which a trainer's license is required by law.
- (2) Respondent shall pay a fine of \$10,000.00 (ten thousand dollars), due on a date to be determined by the CHRB.

DATED: December 14, 2009.


C. SCOTT CHANEY
Hearing Officer