

Agenda Item # 1



THE EMELIE BUILDING • 334 NORTH SENATE AVENUE • INDIANAPOLIS, INDIANA 46204
TELE: (317) 464-1100 • FAX: (317) 464-1111

March 14, 2016

Michael Smith
Executive Director
Indiana Horse Racing Commission
1302 N. Meridian Street, Suite 175
Indianapolis, IN 46202

RE: *Appeal by Scotty D. McNair
Stewards' Ruling 15600*

Dear Mr. Smith:

Enclosed please find the original and one copy of the *Recommended Order Granting Indiana Horse Racing Commission Staff's Motion for Summary Judgment* for filing in regard to the above-referenced matter. Please return a file-marked copy in the enclosed self-addressed envelope provided for your convenience.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Bernard L. Pylitt'.

Bernard L. Pylitt
Administrative Law Judge

BLP/bsb

Enclosures

cc: Scotty D. McNair (w/enclosure)
Lea Ellingwood (w/enclosure)

BEFORE AN ADMINISTRATIVE LAW JUDGE
APPOINTED BY THE INDIANA HORSE RACING COMMISSION

SCOTTY MCNAIR,

Petitioner,

v.

INDIANA HORSE RACING COMMISSION
STAFF,

Respondent.

In Re: APPEAL OF STEWARDS
RULING NO. 15600

**RECOMMENDED ORDER GRANTING INDIANA HORSE RACING
COMMISSION STAFF'S MOTION FOR SUMMARY JUDGMENT**

This matter comes before Administrative Law Judge Bernard Pylitt following Stewards' Ruling No. 15600 and Indiana Horse Racing Commission Staff's Motion for Summary Judgment. Scotty McNair's (hereinafter "McNair") failed to file any Response in opposition. Following review of the pleadings, Affidavits submitted in support of Commission Staff's Motion, and briefs filed by the IHRC Staff, ALJ Pylitt renders his Findings of Fact, Conclusions of Law, and Recommended Order GRANTING Commission Staff's Motion for Summary Judgment. Any Finding of Fact more appropriately deemed a Conclusion of Law, or conversely, shall be so treated.

PROCEDURAL BACKGROUND

McNair was licensed as a trainer by the Indiana Horse Racing Commission during the 2015 Quarterhorse Race Meet. McNair trained the quarter race horse Luvthatmustang which finished first in the eighth race at Indiana Grand Racing and Casino on May 15, 2015. Blood and urine samples were taken from Luvthatmustang following the race which were tested for

unauthorized substances. Blood samples were found to be suspicious for Terbutaline, a non-permissible substance.

Following a telephone hearing with the Stewards on September 2, 2015, they issued Steward's Ruling 15600 on September 22, 2015, after finding that McNair violated the Trainer responsibility rule, 71 IAC 5.5-3-2 (a) (2), and ORDERED the following:

1. Trainer McNair is suspended for 15 days beginning September 27, 2015 through October 11, 2015, for the presence of Terbutaline, a non-permissible drug in Luvthatmustang;
2. Trainer McNair is fined \$500;
3. Trainer McNair Luvthatmustang is disqualified from first place in the eighth race on May 15, 2015; and
4. The Owner is ORDERED to return the purse money (\$9,000) earned by Luvthatmustang in that race and the Horsemen's Bookkeeper is directed to redistribute the purse.

McNair filed a timely appeal from the Stewards Ruling on September 25, 2015, claiming that Terbutaline is not a performance enhancing drug. McNair further requested a stay of his suspension until his appeal is resolved. The IHRC Staff had no objection to the requested stay.

On October 8, 2015, Bernard Pylitt was appointed as the Administrative Law Judge to handle McNair's Appeal from Stewards Ruling No.15600 issued on September 22, 2015.

A Prehearing Order was entered by ALJ Pylitt on November 6, 2015 which required that any Motion for Summary Judgment be filed on or before February 3, 2016.

On January 12, 2016, counsel for the IHRC Staff served Interrogatories, Requests for Production, and Requests for Admission upon McNair via email. The ALJ immediately emailed McNair reminding him that his failure to respond to these discovery requests in a timely fashion may result in his appeal being dismissed. Responses were due on or before Thursday, February

11, 2016. However, no responses were filed by McNair prior to the issuance of this Recommended Decision.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Indiana Rule of Trial Procedure 56 provides, in pertinent part:

(C) Motion and proceedings thereon. The motion and any supporting affidavits shall be filed in accordance with the provisions of Rule 5. An adverse party shall have thirty (30) days after service of the motion to serve a response **and any opposing affidavits. . . . A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.** The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . (emphasis added)

Ind. Code 4-21.5-3-23 is the Administrative Orders and Procedures Act provision that governs Summary Judgment motions. Section (b) provides that an Administrative Law Judge “shall consider a [summary judgment] motion . . . as would a court that is considering a motion for summary judgment filed under Trial Rule 56...” I.C. 4-21.5-3-23(b)

RELEVANT REGULATIONS

At all times relevant hereto, the following regulations were in full force and effect:

71 IAC 8.5-1-2 Foreign substances prohibited

Sec. 2. (a) No horse participating in a race shall carry in its body any foreign substance except as provided by these rules. A finding by the chemist or commission designee that a foreign substance is present in the test sample shall be prima facie evidence that such foreign substance was administered and carried in the body of the horse while participating in a race. Such a finding shall also be taken as prima facie evidence that the trainer and his or her agents responsible for the care or custody of the horse have been negligent in the handling or care of the horse.

(b) Upon a finding of a violation of this section, the owners or lessees of the horse from which the specimen was obtained shall forfeit any purse money and any trophy or award. However, forfeiture of any purse, trophy, or award for an overage of phenylbutazone, flunixin, ketoprofen, or furosemide in violation of

these rules shall be consistent with recommended penalties of the Association of Racing Commissioners, International.

71 IAC 5-3-2 Trainer responsibility

(a) The Trainer is responsible for:

(1) . . .

(2) The presence of any prohibited drug, medication or other substance . . . In absence of substantial evidence to the contrary, the trainer shall be responsible.

(b) The Trainer shall prevent the administration of any drug or medication or other prohibited substance that may cause a violation of these Rules.

COMMISSION STAFF'S MOTION FOR SUMMARY JUDGMENT

On February 3, 2016, Commission Staff filed its Motion for Summary Judgment with Affidavits which set forth undisputed material facts to support the entry of Summary Judgment in the Commission Staff's favor. The Motion designated material facts contained within (1) the Affidavit of IHRC Executive Director Deana Pittman (with attached exhibits); (2) the Affidavit of Petra Hartmann, Drug Testing Services Director, Industrial Laboratories; (3) the Affidavit of Stanley Bowker, Senior State Steward of the Indiana Horse Racing Commission; and the Affidavit of Richard Sams, Laboratory Director of LGC, which tested the split sample.

The following morning, February 4, 2016, the ALJ emailed McNair and reminded him that his response in opposition to the Motion for Summary Judgment, if any, was due within 29 days, or by no later than Monday, March 7, 2016.

As of the issuance of this Recommended Order, McNair failed to file any Response in opposition to Commission Staff's Motion for Summary Judgment and failed to designate any material issue of fact or include any opposing Affidavits.

Trial Rule 56 requires that the non-moving party (McNair) "shall designate each material issue of fact" which that party asserts precludes the entry of Summary Judgment and "the

evidence relevant thereto". It is not the job of the ALJ to draw inference and attempt to make the designation.

ALJ Pylitt concludes that there are no genuine issues as to any material fact that preclude the Commission Staff from receiving judgment as a matter of law.

UNDISPUTED MATERIAL FACTS

Scotty McNair was licensed as a Thoroughbred trainer by the Commission in 2015. (Affidavit of Deana Pittman ¶¶6 "Pittman Aff.") McNair was the trainer of Luvthatmustang, a thoroughbred racehorse that competed in the eighth race at Indiana Grand on May 15, 2015. Luvthatmustang placed first in the eighth race, and was awarded a purse of \$9,000. (Pittman Aff. ¶5)

After the race, and pursuant to 71 IAC 8.5-2-3(b)(2), post-race blood (serum) and urine specimens were taken from Luvthatmustang. (Pittman Aff. ¶8 and 9) On May 20, 2015, Luvthatmustang's specimens, labeled Sample No. 124955, were sent to the Commission's primary approved laboratory, Industrial Laboratories, for analysis pursuant to the Commission's regulations. (Pittman Aff. ¶11) Industrial Laboratories received the sample on May 21, 2015. (Affidavit of Petra Hartmann Aff. ¶4 "Hartmann Aff.") On June 5, 2015, Industrial Laboratories reported to the Commission Staff that Sample No. 124955 tested positive for Terbutaline at a level of 107 picograms per milliliter ("pg/mL") in the blood and a level of 16 nanograms per ml in the urine. (Hartmann Aff. ¶12)

McNair, upon being notified of the positive test results and advised of his rights to have the split sample sent to an independent laboratory approved by the Commission, McNair exercised his right to have the split sample tested by LGC Sport Science, Inc. ("LGC"). (Affidavit of Stanley Bowker ¶¶9 and 10 "Bowker Aff.") On August 7, 2015, LGC confirmed

the presence of Terbutaline at levels of 141 pg/ml of serum and 17.3 ng/ml of urine. (Sams Aff &7)

At the end of the hearing before the Stewards on September 2, 2015, McNair admitted that “obviously it happened, but it was not intentional. It was an absolute accident” (Stewards hearing transcript page 15).

Terbutaline is a substance foreign to the natural horse and are classified by the ARCI Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule, Version 9.00, revised April 2015^[1], as a Class 3 drug with a category “B” penalty classification (“Class 3-B foreign substance”). (Pittman Aff. ¶¶13 and 15) 71 IAC 8.5-1-7, which was in full force and effect at all times relevant, directs the Commission to consider and impose penalties consistent with the ARCI Uniform Guidelines. The primary factors in determining the severity of a licensed trainer or owner’s penalty are the number and recency of any past violations. (Bowker Aff. ¶13) After further investigation, the Commission learned that McNair had not been sanctioned for any other incidents taking place within 365 days of the May 15, 2015 race at Indiana Grand involving the presence of a foreign substances in a race horse for which he was responsible. (Bowker Aff. ¶14) Taking all of these facts into consideration, the ARCI Uniform Guidelines recommends a penalty of a \$500.00 fine for each medication infraction, as well as disqualification of the horse, and redistribution of any purse won by the horse. (Bowker Aff. ¶16)

^[1] The April 2015 Uniform Guidelines were in effect at the time of the race at issue. The Guidelines have been revised 15 times since January 2014, but Version 9.0 is applicable to the matter before the ALJ.

MCNAIR FAILED TO DESIGNATE ANY MATERIAL ISSUE OF FACT IN DISPUTE

McNair failed to “designate to the court each material issue of fact,” as required by Rule 56(C). Further, McNair failed to provide any opposing Affidavits or designation in opposition required to be filed pursuant to Rule 56.

Indiana courts have consistently determined that the requirement that a Response to a Motion for Summary Judgment and opposing Affidavits be filed is a “bright-line” rule. In *Desai v. Croy*, 805 N.E. 2d 844, 849 (Ind. Ct. App. 2004), the Court reviewed a line of cases that established this “bright-line” rule for trial courts and the parties who litigate Summary Judgment motions. The *Desai* court further held:

[W]here a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicated why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), the trial court lacks discretion to permit that party to thereafter file a response.

Id. at 850

Parties may choose the placement of evidence designated in opposition to Summary Judgment. *Nat’l Bd. Of Examiners for Osteopathic Physicians and Surgeons, Inc. v. Am. Osteopathics Ass’n*, 645 N.E. 2d 608, 615 (Ind. Ct. App. 1994). The only requirement is that the designation must clearly identify materials in support of its opposition.

It was, and remains, the express obligation of a licensee to be aware of the rules regulating pari-mutuel racing in Indiana. 71 IAC 5.5-1-27(a) provides: “A licensee shall be knowledgeable of these rules and, by acceptance of the license, agrees to abide by these rules.” McNair accepted a license from the IHRC, and he accordingly accepted the responsibility of being aware of and abiding by all Indiana rules.

McNair failed to designate any material issues of fact in dispute which would preclude the entry of Summary Judgment as a matter of law. The ALJ recognizes that the lack of an adequate response to a Motion for Summary Judgment does not automatically entitle the moving party to a judgment as a matter of law. *Countrywide Home Loans, Inc. v. Holland*, 993 N.E. 2d 184, 189 (Ind. Ct. App. 2013). Once the Staff filed its Motion for Summary Judgment, designating evidence and Affidavits to establish that there were no issues of material fact, the burden shifted to McNair to present evidence in a timely fashion with his Response as required by IND. R. TRIAL P. 56(C).

When the non-moving party fails to properly respond or designate evidence before the response deadline as required by Trial Rule 56, and the moving party has shown that it is entitled to Summary Judgment, Summary Judgment must be entered against the non-moving party as a matter of law. *Morton v. Moss*, 694 N.E.2d 1148, 1152 (Ind. Ct. App. 1998).

In Seufert v. RWB Med. Income Props. I Ltd. P'ship, 649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995), the Court held that "If the non-moving party does not respond to a properly supported motion by setting forth specific facts showing a genuine issue for trial, then T.R. 56(E) mandates that summary judgment, if appropriate, be entered against him."

**BASIS FOR RECOMMENDED ORDER GRANTING SUMMARY JUDGMENT
IN FAVOR OF COMMISSION STAFF**

The Indiana Pari-Mutuel Horse Racing Act (the "Horse Racing Act"), is codified at Ind. Code § 4-31 *et seq.* The Horse Racing Act provides that the purpose of the article is to "permit pari-mutuel wagering on horse races in Indiana **and to ensure that pari-mutuel wagering on horse races in Indiana will be conducted with the highest of standards and the greatest level of integrity.**" Ind. Code § 4-31-1-2 (emphasis added).

The Indiana legislature provided specific direction to the Commission with respect to the illegal medication and/or drugging of racehorses. Chapter 12 of the Horse Racing Act makes clear that (unless specifically authorized by the Commission) there is an absolute prohibition against allowing a horse that has “drugs [and] medications or substances foreign to the natural horse” in its system to compete in a race without suffering an appropriate sanction. Ind. Code §§ 4-31-12-1, 4-31-12-2(a). That sanction includes the mandatory forfeiture of any purse that was earned as a result of the horse’s performance. Ind. Code § 4-31-12-13(b)(1). This absolute prohibition and the related legislative forfeiture directive have been incorporated into the applicable Commission regulations at 71 IAC 8.5-1-2.

The Commission Staff has shown that it is entitled to Summary Judgment as a matter of law since there are no genuine issues of material fact in dispute that: (1) a horse racing in Indiana is prohibited from having illegal foreign substances in its system at the time of a race; (2) Luvthatmustang had illegal foreign substances in his system at the time of the race;(3) McNair was responsible for the presence of these substances; and (4) the sanction imposed by the Stewards against McNair was reasonable and appropriate.

Once the Commission Staff met its obligation pursuant to Indiana Trial Rule 56 and I.C. 4-21.5-4-23, the obligation shifted to McNair. Given the fact that McNair failed to designate any genuine issue of material fact in dispute, the Commission Staff’s Motion must be granted as a matter of law.

FINDINGS OF FACT

1. The IHRC acted within its statutory authority when it promulgated 71 IAC 10-2-3, pursuant to IC 4-31-13-2(a) and IC 4-31-12-15(a).

2. A horse racing in Indiana is prohibited from having illegal foreign substances in its system at the time of a race.

3. Luvthatmustang had illegal foreign substances in his system at the time of the eighth race at Indiana Grand on May 15, 2015.

4. His trainer, Scotty McNair, was licensed as a trainer by the Indiana Horse Racing Commission during 2015.

5. McNair was the trainer of Luvthatmustang, a quarterhorse race horse that participated in the eighth race on May 15, 2015.

6. Luvthatmustang placed first in that race and was awarded a purse of \$9,000.

7. McNair was responsible for the presence of foreign substances found in Luvthatmustang on May 15, 2015 pursuant to 71 IAC 5-3-2.

8. Following the race, post-race blood and urine samples were taken from Luvthatmustang (No. 124955) and sent to Industrial Laboratories for analysis.

9. The samples were transferred to Industrial Laboratories who reported on June 5, 2015 that the sample tested positive for Terbutaline.

10. McNair was offered the opportunity to have a split sample test and exercised that right.

11. On August 7, 2015, LGC Science, Inc. confirmed the presence of Terbutaline.

12. Terbutaline is a substance foreign to the natural horse that is classified by the ARCI Uniform Guidelines as a Class 3 drug with a category "B" penalty. ("Class 3-B foreign substance").

13. Terbutaline is a substance foreign to the natural horse that is classified by the ARCI Uniform Guidelines as a Class 3-B foreign substance.

14. 71 IAC 8.5-1-7, which was in full force and effect at all times relevant, directs the Commission to consider and impose penalties consistent with ARCI Uniform Guidelines.

15. The ARCI Uniform Guidelines recommend a \$500.00 fine for a Class 3-B violation.

16. The monetary sanction imposed by the Stewards against McNair was reasonable and appropriate since the ARCI Uniform Guidelines suggested a penalty of a \$500.00 fine for each medication infraction, disqualification of the horse, and redistribution of any purse won by the horse.

17. Luvthatmustang placed first in the eighth race and was awarded a purse of \$9,000.

18. Luvthatmustang is disqualified from first place, unplaced, and the purse money it earned is forfeited, returned, and redistributed pursuant to the provisions of 71 IAC 8.5-1-2 (b) and the Stewards September 22, 2015 Ruling.

CONCLUSIONS OF LAW

1. A horse participating in a pari-mutuel race in Indiana is prohibited from carrying in its body any foreign substance that is not specifically authorized by Commission rules. I.C. 4-31-12-2; 71 IAC 8.5-1-1(a); 71 IAC 8.5-1-2.

2. A horse participating in a pari-mutuel race in Indiana is prohibited from carrying in its body Terbutaline. 71 IAC 8.5-1-4.2(21).

3. The Commission rules direct the Staff to consider the ARCI Uniform Guidelines in both classifying a foreign substance and when imposing penalties and sanctions. 71 IAC 8.5-1-7.

4. A finding at a Commission-approved laboratory that a test sample taken from a horse contains a foreign substance creates a presumption that "the procedures of collection,

preservation, transfer to the laboratory, and analysis of the sample are correct and accurate.” 71 IAC 8.5-2-1(2).

5. The finding that a foreign substance is present creates a presumption that the foreign substance was in the horse’s body at the time the race was run. 71 IAC 8.5-1-2(a).

6. Positive laboratory tests are prima facie evidence that the foreign substance has been administered to the horse in violation of the Commission’s rules. 71 IAC 8.5-2-1.

7. A positive test creates a prima facie case that the trainer (or his or her agents) responsible for the care and custody of the horse were negligent in handling the care of the horse. 71 IAC 8.5-1-2(a).

8. There is a duty on the trainer to “prevent the administration of any drug or medication or other substance that may cause a violation of these rules.” 71 IAC 5.5-3-2(b).

9. The trainer is responsible for the condition of the horse regardless of any acts of third persons. 71 IAC 5.5.-3-2(a)(2).

10. All IHRC licensees are responsible for knowing the rules that govern pari-mutuel racing in Indiana. 71 IAC 5.5-1-27(a).

11. Indiana law mandates the forfeiture of a purse when any prohibited substance is detected in a horse participating in a race. I.C. 4-31-12-13; 71 IAC 8.5-1-2(b).

12. The ARCI Uniform Guidelines recommend a \$500.00 fine for each violation involving a Class 3-B substance, such as terbutaline.

13. There is no genuine issue in dispute of any material fact with respect to any of the findings in Stewards’ Ruling No. 15600.

ULTIMATE FINDING OF FACT

The findings by Industrial Laboratories and LGC clearly established that Trainer Scotty McNair violated two Commission equine medication rules, specifically 71 IAC 8.5-1-2 and 71 IAC 8.5-1-4.2 (21).

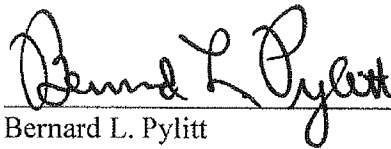
RECOMMENDED DECISION

Based upon the findings of fact and conclusions of law herein, ALJ Pylitt recommends that the Commission Staff's Motion for Summary Judgment be GRANTED pursuant to IC 4-21.5-3-23 (b), McNair's appeal be DENIED/DISMISSED, and that Stewards Ruling No. 15600 be AFFIRMED in all respects.

Since ALJ Pylitt may only render a Recommended Decision concerning the IHRC Staff's Motion for Summary Judgment, the evidentiary hearing presently scheduled for April 19, 2016 at 9:30 a.m. and all previously ordered deadlines are VACATED pending a final ruling by the Indiana Horse Racing Commission.

Pursuant to IC 4-21.5-3-29(d), either party hereto, has 15 days following receipt of this Recommended Order to file written exceptions with the Indiana Horse Racing Commission.

IT IS SO RECOMMENDED THIS 14TH DAY OF MARCH, 2016.



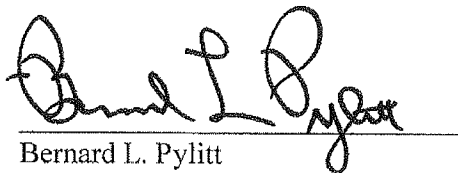
Bernard L. Pylitt
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served via first-class United States mail, postage prepaid, and via email, this 14th day of March, 2016 to the following parties of record:

Scotty D. McNair
P.O. Box 118
Scott, AR 72142
Email: mcnairsr30@aol.com

Lea Ellingwood
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Bernard L. Pylitt

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334 North Senate Avenue
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Brown, Debria L

From: Ellingwood, Lea
Sent: Monday, March 14, 2016 9:57 AM
To: Pitman, Deena; Brown, Debria L
Cc: Newell, Holly; Smith, Michael D
Subject: FW: IHRC.McNair
Attachments: Ltr to IHRC w-Recommended order 3-14-2016.pdf; ALJ's Recommended Order Granting IHRC Staff Motion for SJ (1).pdf

FYI. McNair has 15 days to file objections, so we're not going to be able to get it on the agenda for this meeting but we'll need to make sure it goes on the agenda for the June meeting.

Thx!
Lea

From: Bernard Pylitt [<mailto:BPylitt@katzkorin.com>]
Sent: Monday, March 14, 2016 9:52 AM
To: Ellingwood, Lea; msmith@hrc.in.com; 'Scotty'
Cc: Vicky Bland
Subject: IHRC.McNair

**** This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ****

Attached is my Recommended Decision granting IHRC'S Motion for Summary Judgment.

Bernard L. Pylitt
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