Agenda Item #2.1

(Broken Into 3 Sections)

INDIANA HORSE RACING COMMISSION
BEFORE AN ADMINISTRATIVE LAW JUDGE

2015 FEB 19 P 12:41

INDIANA HORSE RACING COMMISSION STAFF Petitioner, v. THOMAS MURRAY AMOSS Respondent.	)	Amended Administrative Complaint 212001 Gordon E. White, Administrative Law Judge

NOTICE OF OPPORTUNITY TO PRESENT BRIEFS AND ORAL ARGUMENT

This matter is pending before the Indiana Horse Racing Commission ("Commission") on the Recommended Administrative Penalty against Thomas Amoss. On January 28, 2015, the Administrative Law Judge ("ALJ") designated by the Commission, Gordon E. White, issued his Recommended Findings of Fact, Conclusions of Law, Ultimate Finding of Fact and Order ("Recommended Order") in this case. On February 16, 2015, Amoss, by counsel, timely filed his objections to the Recommended Order objections to the ALJ's Denial of Amoss' Motion to Dismiss.

Notice is hereby given that the Commission will afford both parties an opportunity to present briefs concerning this case. Any briefs filed by Amoss or the Commission Staff must be received in the offices of the Commission by 4 p.m. on March 2, 2015. The Commission will accept electronic filing at hnewell@hrc.in.gov.

The Commission will also consider oral argument at its meeting on March 10, 2015. The oral argument will be limited to ten minutes per side.

SO ORDERED, 19th day of February 2015.

THE INDIANA HORSE RACING COMMISSION

By: Thomas K. Weatherwax

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

INDIANA HORSE RACING
COMMISSION STAFF,

Petitioner,

In Re: Preliminary Report
(Administrative Complaint)
212001

v.

THOMAS MURRAY AMOSS,

Respondent

RECOMMENDED FINDINGS OF FACT, CONLCUSIONS OF LAW,

ULTIMATE FINDING OF FACT AND ORDER

I.

Introduction

Thomas Amoss was licensed by the Indiana Horse Racing Commission ("Commission") as a trainer. Amoss trained a thoroughbred racehorse named [redacted] who finished third in the [redacted] race at Hoosier Park on [redacted]. Fluid samples were taken from [redacted] after the race to be tested for any unauthorized substances and the initial test showed that [redacted] had raced with methocarbamol in his system. If the test was accurate, the positive result was evidence of a violation of the rules of racing. Amoss subsequently exercised his rights as a trainer and requested that another laboratory conduct additional testing on the fluid samples. The second test showed that the samples tested

positive for methocarbamol as converted to guiafenesin, which is a metabolite of methocarbamol.

Based on the results of the two tests and the fact that horses trained by Amoss had tested positive for unauthorized substances on three separate occasions in the previous 365 days, the Executive Director of the Commission issued a recommended penalty of forfeiture of the purse, a fine of $5,000 and suspension of Amoss's license for 60 days.

Amoss appealed the director's decision and this administrative proceeding ensued. During the course of this case a third laboratory tested [redacted]'s samples. The last laboratory estimated that [redacted]'s serum showed an "'estimated' level of methocarbamol in the serum at one (1.0) nanogram per milliliter" in his system on race day. The Staff of the Commission ("Staff") then filed a motion for summary judgment, alleging that the three test results were dispositive evidence of a violation. Amoss responded to the motion for summary judgment by claiming that Staff had not provided him with materials from the last test and, according to Amoss's counsel, she could not craft a substantive challenge to the motion for summary judgment without the additional materials. But perhaps more significantly, Amoss also argued that this whole case should be dismissed because in May 2014 the Commission changed its rules to provide that a horse could have methocarbamol in its system while it was racing, provided the amount of the substance did "[n]ot . . . exceed one (1) nanogram per milliliter of methocarbamol in serum or plasma." 71 IAC 8.5·1·4.2(a)(14).

He submitted that the new rule should be applied retroactively to him and, if that were done, there would have been no violation in the first place.

The Administrative Law Judge ("ALJ") denied the motion to dismiss, concluding that with rare exceptions statutes and rules are to be applied prospectively only and that these new rules did not meet those exceptions. The remaining issue before the ALJ, therefore, is a ruling on Staff's motion for summary judgment which is set out below.

II.

Summary of the arguments

On February 3, 2014, Staff moved for summary judgment in this matter under the authority of IC 4-21.5-3-23. The motion is accompanied by a designation of evidence as supported by affidavits. Amoss challenged the motion, claiming that resolving this case through means of the summary judgment procedure is inappropriate. The foundation of his argument is that the ALJ should not base a decision solely on hearsay (the affidavits in support of Staff's motion) and that Amoss should be allowed to present testimony and cross examine witnesses. He maintains that issuing a ruling grounded on hearsay evidence would be a violation of the residuum rule, and that the inability to present testimony and cross-examine witnesses would violate his due process rights. He also argues that the Commission's rules (71 IAC 10) mandate a full evidentiary hearing.

A. Discussion of Amoss's position

Amoss's arguments are not persuasive. Motions for summary judgment are a long-standing component of civil trials and administrative proceedings. Since 2011 they have essentially mirrored each other. P.L. 32-2011, Sec. 5. By law, disciplinary proceedings before the Commission are governed by the Administrative Orders and Procedures Act ("AOPA"). IC 4-31-6-9. By challenging the summary judgment procedure itself, Amoss is essentially claiming that not only does he have a right to due process, the Commission rules entitle him to *more* due process than other civil litigants whose cases are governed by the rules of civil procedure, be they before an administrative body or a trial court. Amoss unquestionably has due process rights in defending the status of his license. *Barry v. Bachi*, 433 U.S. 55 (1979). And Amoss is being afforded all the procedural safeguards to which any civil litigant is entitled. But to conclude that his due process rights are *enhanced* by 71 IAC 10 leads to an absurd result. The ALJ is not obliged to interpret the Commission's rules in such a manner and will not do so. "We will not interpret a regulatory phrase in a way that both produces absurd results and vitiates other regulatory provisions for the sake of strictly applying the 'plain meaning' canon of regulatory interpretation." *Natural Resources Defense Council v. Poet Biorefining-North Manchester, LLC,* 15 N.E.3 d 555, 565 (Ind.2014). Based on the forgoing reasons, the ALJ will consider Staff's motion for summary judgment on its merits.

B. Staff's motion for summary judgment

Staff's pleadings comport with the trial rules and the AOPA. But aside from objecting to the nature of summary judgment proceedings, Amoss only makes one substantive argument that is supported by an affidavit. The affidavit, dated June 10, 2014, is from counsel, Karen Murphy, and in it she claimed that she did not receive "additional testing data" concerning the third and final (2013) test of [redacted]'s fluid samples which were collected on race day. She had sought the materials in a discovery request and maintained that, "The additional testing data has also been sought as it may supply a further substantive challenge to the Commission's motion for summary judgment." Affidavit of Karen Murphy, paragraph 14.

But in a pleading filed on July 24, 2014, counsel for Staff informed the ALJ that on July 10, 2014, he gave counsel for Amoss the materials from the laboratory that did the additional testing. After obtaining those materials Amoss made no "substantive challenge" to the evidence designated by Staff. Neither did he claim that additional discovery was necessary nor did he ask for a continuance of the summary judgment hearing which took place on October 30, 2014, over three months after he received the materials.

From the inception of these proceedings, Amoss has argued that the lab results of [redacted]'s fluid samples were flawed or did not support Staff's position that the horse had an unauthorized foreign substance in its system on race day. But the fact that those arguments now appear in the form of an affidavit submitted by counsel is not enough to defeat a motion for summary judgment. Ms. Murphy is a skilled advocate but she does not hold herself out as a trainer, veterinarian or chemist.

> . . . Ind. Rules of Procedure, Trial Rule 56(E), requires that supporting affidavits to be sufficient to ground a judgment must be made on personal knowledge, shall affirmatively show that the affiant is competent to testify on the matters included, and must set forth such facts as would be admissible in evidence. The assertion in an affidavit of conclusions of law or opinions by one not qualified to testify to such will not suffice.

Henry B. Gilpin Co. v. Moxley, 434 N.E.2d 914, 921 (Ind.Ct.App.1982).

After receiving the materials related to the 2013 test, Amoss further developed the motion to dismiss he filed in conjunction with his response to Staff's motion for summary judgment. But as far as designating any evidence in response to the motion for summary judgment is concerned, he has done nothing. Inactivity is not an adequate response to Staff's designation of evidence.

> While it is true that it is generally improper for a court to grant summary judgment while reasonable discovery requests that bear on issues material to the motion are still pending, *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 698 (Ind.2000), Leasing One makes no assertion that there were any pending discovery requests. Moreover, nowhere does Leasing One allege, and our review of the record does not indicate, that Leasing One or any other party requested additional time to conduct discovery prior to the summary judgment hearing or prior to the trial court's

> ruling on the motion. *See, e.g.,* Ind. Trial Rule 56(F) (permitting trial court to order continuance on summary judgment motion where responding party submits affidavit indicating need for additional discovery). We conclude that the trial court did not err when it ruled on Caterpillar's summary judgment motion without ordering, *sua sponte*, additional discovery.

Leasing One Corp. v. Caterpillar Financial Services Corp., 776 N.E.2d 408, 411 (Ind.Ct.App.2002).

II.

Pertinent elements for assessing summary judgment in this matter

A. Designated evidence

Staff designated evidence to the ALJ supported by affidavits, but Amoss has not designated any evidence.

> The moving party has the burden of making a prima facie showing from the designated evidentiary matter that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. . . .. If the moving party satisfies this burden, then the non-moving party must show from the designated evidentiary matter the existence of a genuine issue of fact precluding summary judgment. . . .. In ruling on summary judgment, a court considers only the designated evidentiary matters, and all evidence and inferences are reviewed in the light most favorable to the non-moving party. (citations omitted)

Smith v. Delta Tau Delta, Inc., 9 N.E.3d 154, 160 (Ind.2014).

"As our supreme court recently reaffirmed, summary judgment is a 'high bar' for the moving party to clear in Indiana." *Cox v. Mayerstein-Burnell Co., Inc.,* 19 N.E.3d 799, 803 (Ind.Ct.App.2014). "Indiana consciously errs on the side of letting marginal cases proceed to trial on the

merits, rather than risk short-circuiting meritorious claims." *Hughley v. State.*, 15 N.E. 3d 1000, 1004 (Ind. 2014). Even "a perfunctory and self-serving" affidavit if it "specifically controverted the . . . prima facie case" is sufficient to defeat a motion for summary judgment. *Id. at 1004.* But in his response to Staff's motion for summary judgment, Amoss's claim is not supported by any designated evidence, perfunctory or otherwise. The evidence that the ALJ will consider in making a ruling, therefore, is the evidence designated by Staff.

B. Entitlement to judgment as a matter of law

The ALJ recognizes that the lack of an adequate response to a motion for summary judgment does not mean that the moving party is automatically entitled to summary judgment. *Countrywide Home Loans, Inc. v. Holland*, 993 N.E.2d 184, 189 (Ind.Ct.App.2013). The movant must still show it is "entitled to judgment as a matter of law." Ind. Rules Procedure 56(C). Amoss has very diligently argued that the law supports the dismissal of this case because of a recent change in Commission rules.

In May 2014, the Commission amended its rules to provide that a horse could have methocarbamol in its system while it was racing, provided the amount of the substance did "[n]ot . . . exceed one (1) nanogram per milliliter of methocarbamol in serum or plasma." 71 IAC 8.5-1-4.2(a)(14).

In responses to requests for admissions, Staff agreed that the last test conducted on [redacted]'s serum showed an "'estimated' level of

methocarbamol in the serum at one (1.0) nanogram per milliliter," but at the same time it speculated that if the test had been conducted closer to race day that the amount discovered by the laboratory might have exceeded that amount. Responses to Request for Admissions 16 &17.

The answers to discovery revealed, therefore, that the exact amount of methocarbamol in [redacted]'s system might have been at or below the new threshold. For that reason, Amoss took the position that the legal foundation underlying the case against him had shifted, and that under the authority of the amended rule, the case against him should have been dismissed. But even if the evidence were uncontroverted that [redacted] had less than the new legal threshold for methocarbamol in his system, to prevail on that legal argument the new rule would have to be applied retroactively. The ALJ has declined to do that because with rare exceptions rules and statutes are to be applied prospectively. The ALJ's reasoning is set out in detail in the ruling on Amoss's Motion to Dismiss which was issued on October 10, 2014.

III.

Conclusion

The complexity of the legal arguments presented by the parties notwithstanding, the designated facts in this case are very simple. The fluid samples taken from [redacted] on [redacted], were tested three times

by three different labs. Each of those tests show that [redacted] had an unauthorized foreign substance in his system on race day, and Amoss has not designated any evidence challenging those results. "Considering *only those facts that the parties designated to the trial court,* we must determine whether there is a 'genuine issue as to any material fact' and whether 'the moving party is entitled to a judgment as a matter of law.'" *Dreaded, Inc. v. St. Paul Guardian Ins. Co.,* 904 N.E.2d 1267, 1269-70 (Ind.2009)(emphasis added). "If the opposing party fails to meet its responsive burden, the court *shall* render summary judgment." *Sheehan Const. Co., Inc. v. Continental Cas. Co.*, 938 N.E.2d 685, 689 (Ind.2010)(emphasis added).

Based on the designated evidence it is clear that a full evidentiary hearing in this matter is not necessary, and therefore the ALJ issues the following Recommended Findings of Fact, Conclusions of Law, Ultimate Finding of Fact and Order.

FINDINGS OF FACT

1. Thomas Amoss was licensed as a thoroughbred owner, trainer and authorized agent by the Commission in 2011.
2. Amoss was the trainer of [redacted], a thoroughbred racehorse that competed in the eighth race at Hoosier Park on [redacted].
3. [redacted] placed third in the race and was awarded a purse of $1,000.

4. Following the race, and pursuant to 71 IAC 8.5-2-3(b)(2), post-race blood (serum) and urine specimens were taken from [redacted].

5. The [redacted] primary urine specimen, labeled Sample No. 104078, was sent to the Commission's primary approved laboratory, Truesdail Laboratories, Inc., for analysis pursuant to the Commission's rules.

6. On November 4, 2011, Truesdail Lab reported to the Commission Staff that Sample 104078 tested positive for methocarbamol, a prohibited substance under the rules governing medication of thoroughbred horses.

7. Amoss timely requested split sample testing of the [redacted] specimen.

8. The Commission Staff then sent split urine Sample 104078 to be tested at the University of California-Davis ("UC-Davis") lab.

9. UC-Davis confirmed the presence of methocarbamol on November 23, 2011.

10. On February 22, 2012, UC-Davis issued another letter confirming the presence of methocarbamol as converted to guiafenesin, which is a metabolite of methocarbamol.

11. In light of Amoss's contention that the results of the second test did not confirm the results of the first test, the ALJ ordered additional testing of the serum and urine sample #104078 to be performed by HFL Sports Science Laboratory ("HFL") by Order dated March 13, 2013.

12. The additional testing of serum and urine Samples No. 104078, performed by HFL, confirmed the presence of methocarbamol in [redacted]'s system.

13. Methocarbamol is a substance foreign to the natural horse that is classified by the ARCI Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule, Version 1.1 revised January 2011 (hereinafter "ARCI Uniform Guidelines"), as a Class 4 drug with a category "C" penalty classification ("Class 4-C 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 the ARCI Uniform Guidelines.

15. The primary factors in determining the severity of a licensed trainer's or owner's penalty are the number and recency of any past violations.

16. After further investigation following the issuance of the Preliminary Report, the Commission learned that Amoss had been sanctioned in four other incidents (three prior to [redacted] taking place within the past 365 days of the [redacted] race at Hoosier Park involving the presence of Class 4-C substances in a race horse for which he was responsible, as set forth below:

State	Date of Race	Ruling No.	Date of Ruling	Drug
LA	12/5/2010	18450	12/15/2011	Naproxen
KY	5/14/2010	11-0029	5/28/2011	Methocarbamol
KY	10/7/2011	11-0071	10/23/2011	Methocarbamol
KY	10/22/2011	12-0010	1/20/2012	Methocarbamol

17. Taking all these facts into consideration, the Commission recommended that Amoss be fined $5,000 and be suspended for sixty (60) days in addition to loss of purse (for third place finisher [redacted] from Race [redacted] held at Hoosier Park on [redacted].

CONCLUSIONS OF LAW

1. A horse participating in a race in Indiana is prohibited from carrying in its body any foreign substance that is not specifically authorized by Commission rules. IC 4-31-12-2.
2. The Commission rules direct the Executive Director to consider the ARCI Uniform Guidelines in both classifying a foreign substance and when imposing penalties and proposing sanctions. 71 IAC 8.5-1-7.
3. 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).

4. 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).

5. Positive laboratory results 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.

6. 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).

7. 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).

8. 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).

9. "The presence of a drug or drug metabolite in any quantity . . . is sufficient for a finding of a positive test." 71 IAC 8.5-3-3(g).[1]

[1] The Commission adopted a new rule in May 2014 that provides that a horse may have up to one (1) nanogram per milliliter of methocarbamol in serum or plasma in its system on race day. 71 IAC 8.5-1-4.2(a)(14).

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

11. ARCI Uniform Guidelines' recommended minimum penalty for a *third* violation (in any jurisdiction within 365 days) involving a Class 4-C substance, such as methocarbamol, is a suspension of at least 30 days and a minimum $2,500 fine (absent mitigating circumstances).

12. The Commission Staff recommended a penalty for a *fourth* violation within 365 days (as is the case in this matter) at a suspension of 60 days and a fine of $5,000, in addition to the forfeiture of the purse. That is consistent with the ARCI Uniform Guidelines. For example, the ARCI Uniform Guidelines' recommendation for a horse owner facing a third violation in a 365-day period in any jurisdiction related to a Class C violation is the loss of purse, minimum $5,000 fine, and horse placed on the veterinarian's list for 60 days and must pass examinations before being eligible to run again.

ULTIMATE FINDING OF FACT

There was no Commission rule that authorized the presence of methocarbamol in a horse at any level on [redacted]. Methocarbamol was considered an unauthorized foreign substance under the Commission's rules, and its presence in [redacted] on October 21, 2011, constituted a violation of the Commission's foreign substances rule. 71 IAC 8.5-1-2(a).

ORDER

Amoss is fined $5,000 and suspended for sixty (60) days in addition to loss of purse (for third place finisher [redacted] from Race [redacted] held at Hoosier Park on [redacted].

Date: January 28, 2015.

Gordon E. White, Deputy Attorney General
Administrative Law Judge
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(317) 232-6307

NOTICE OF RIGHT TO OBJECT TO RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Either party may object to the ALJ's Recommended Findings of Fact, Conclusions of Law, and Order. Any objection must be filed with the Indiana Horse Racing Commission, identifying the basis of the objection with reasonable particularity, no later than eighteen days from the ISSUANCE of this order, unless such date is a Saturday, a Sunday, a legal holiday under state statute or a day that the Indiana Horse Racing Commission offices are closed during regular business hours, in which case the deadline would be the first day which is not a Saturday, a Sunday, a legal holiday under state statute or a day that the Indiana Horse Racing Commission offices are closed during regular business hours. The ALJ's Recommended Findings of Fact, Conclusions of Law, and Order is not the final order of the Indiana Horse Racing Commission in this proceeding. In the absence of any objection, the Indiana Horse Racing Commission may affirm the ALJ's Recommended Findings of Fact, Conclusions of Law, and Order as its final order or will serve notice of its intention to review any issue related to the ALJ's Recommended Findings of Fact, Conclusions of Law, and Order.

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