



COMMISSION HEARING

TORONTO, ONTARIO – MAY 3, 2013

NOTICE OF DECISION

IN THE MATTER OF THE RACING COMMISSION ACT, S.O. 2000, c.20;

AND IN THE MATTER OF THE JAMIE WILSON APPEAL

Jamie Wilson appealed against Ruling Numbers SB 45183/2012, SB 45184/2012 and SB 45185/2012.

Date of Hearing: May 3, 2013

ORC Panel Members: Vice Chair Anthony Williams
Commissioner John W. Macdonald
Commissioner Daniel Nixon

Representative for Appellant: Self-represented

Counsel for the Administration: Jennifer Friedman

The Panel allowed the appeal in part.

The Panel's Reasons for Decision is attached to this Notice.

DATED at Toronto this 5th day of June 2013.

Steven Lehman
Executive Director

REASONS FOR DECISION

Background

1. Jamie Wilson ("Wilson"), was licensed by the Ontario Racing Commission ("ORC"), as a Standardbred Trainer, Owner, licence # J95917.

First positive test – East Meadow

2. On Monday, November 19, 2012, a horse trained by Wilson, East Meadow, tattoo # 3GB30, participated in the 10th race at Woodbine Raceway ("Woodbine"), a one mile pace, and placed 2nd.

3. A blood sample taken from the horse, following the race, resulted in a Certificate of Positive Analysis of an Official Sample, for the Class II drug Yohimbine, dated November 27, 2012.

4. On November 29, 2012, the judges, at Woodbine notified Wilson of the positive test for East Meadow.

Second positive test – Abigail Eden

5. On Sunday, November 25, 2012, another horse trained by Wilson, Abigail Eden, tattoo # 4DP83, participated in the 9th race at Flamboro Downs Raceway ("Flamboro"), a one mile trot, and finished 4th.

6. A blood sample taken from the horse, following the race, resulted in a Certificate of Positive Analysis of an Official Sample, for the Class II drug Yohimbine, dated December 5, 2012.

7. On December 7, 2012, the judges at Flamboro notified Wilson of the positive test for Abigail Eden.

Third positive test – Wedding Bell Blues

8. On Thursday, November 29, 2012, a third horse trained by Wilson, Wedding Bell Blues tattoo # 9FR23, participated in the 10th race at Woodbine, a one mile pace, and finished 2nd.

9. A blood sample, taken from the horse, following the race, resulted in a Certificate of Positive Analysis of an Official Sample, for the Class II drug Yohimbine, dated December 6, 2012.

10. On December 7, 2012, the judges at Flamboro, notified Wilson of the positive test for Wedding Bell Blues.

Suspension

11. On December 7, 2012, the judges at Woodbine suspended Wilson indefinitely, pending the outcome of the investigation into the three positive tests.

12. The chronology was as follows:

<u>Horse</u>	<u>Date of Race</u>	<u>Date of Certificate</u>	<u>Date of Notification</u>
East Meadow	November 19, 2012	November 27, 2012	November 29, 2012
Abigail Eden	November 25, 2012	December 5, 2012	December 7, 2012

The investigation

13. On November 29, 2012, Troy Moffatt ("Moffatt"), Investigator, ORC, was assigned to investigate the East Meadow positive test. On December 7, 2012, Moffatt was also assigned to investigate the Abigail Eden and Wedding Bell Blues positive tests. The investigations included, *inter alia*, multiple interviews of Wilson. Wilson was very cooperative throughout the investigative process.

The seizure

14. On December 17, 2012, at Wilson's training centre in Exeter, Ontario, Moffatt, with the consent and support of Wilson, seized 33 items, including a repackaged item marked "stomach guard" handwritten on a white plastic container, for analysis, in an attempt to discover the possible source of the prohibited drug.

The analysis

15. On February 4, 2013, Moffatt forwarded an Analysis Submission to Maxxam Analytics Inc., Forensic Equine Drug Testing Laboratory in Burnaby, British Columbia, with a request that an analysis be conducted for Yohimbine on four selected items.

16. On February 14, 2013, the Analysis Report from Maxxam revealed that the item marked stomach guard contained Yohimbine.

17. On March 27, 2013, the judges held a combined Positive Test Hearing for the three offences.

The Rulings

18. The judges issued four rulings against Wilson.

Particulars of the Rulings

19. (i) Standardbred Official Ruling, SB 45183, March 27, 2013 for East Meadow:

- (a) Purse ordered redistributed, ORC Rule 9.13;
- (b) Trainer/Driver fees redistributed, ORC Rule 18.08.01;
- (c) All horses owned in whole or in part by Wilson are not eligible to be entered in any race;
- (d) \$5,000 fine;
- and
- (e) 1 year full suspension, including time served from December 7, 2012 to December 6, 2013.

(ii) Standardbred Official Ruling, SB 45184, March 27, 2013 for Abigail Eden:

- (a) Purse ordered redistributed, ORC Rule 9.13;
- (b) Trainer/Driver fees redistributed, ORC Rule 18.08.01;
- (c) All horses owned in whole or in part by Wilson are not eligible to be entered in any race;
- (d) \$5,000 fine;
- and
- (e) 1 year full suspension, concurrent with SB 45183 from December 7, 2012 to December 6, 2013.

(iii) Standardbred Official Ruling, SB 45185, March 27, 2013 for Wedding Bell Blues;

- (a) Purse ordered redistributed, ORC Rule 9.13;

- (b) Trainer/Driver fees redistributed, ORC Rule 18.08.01;
- (c) All horses owned in whole or in part by Wilson are not eligible to be entered in any race;
- (d) \$10,000 fine;
- and
- (e) 2 year full suspension from December 7, 2013 to December 6, 2015.

(iv) Standardbred Official Ruling, SB 45186, March 27, 2013, Conditions upon reinstatement:

Five conditions were imposed upon reinstatement of Wilson's licence, to apply from December 17, 2015 to December 16, 2017. Book of Documents, Ex. 1, tab 13, page 135

Summary

20. In addition to the ancillary orders set out in Rulings SB 45183, SB 45184 and SB 45185, Wilson, in totality received the following penalty:

- (i) \$20,000 in fines;
- (ii) 3 years of suspensions;
- and
- (iii) 2 years of probation with conditions upon his licence.

The Appeals

21. On March 28, 2013, Wilson filed a Notice of Appeal against the March 27, 2013 Rulings. The Appeal contained three grounds:

- (i) that the penalty was "too severe";
- (ii) that "proper procedure was not followed during the investigation";
- and
- (iii) that "16 weeks to obtain a hearing is unacceptable."

The Stay Request

22. On March 28, 2013, Wilson requested a stay of the penalty.

Ruling on Stay

23. On April 5, 2013, the Deputy Director of the ORC issued Ruling Number SB 42/2013 which denied the request by Wilson for a stay.

Appeal against Denial of Stay

24. On April 9, 2013, Wilson appealed against Ruling Number SB 42/2013, the denial of his stay request.

25. On April 16, 2013, a panel of the ORC, comprised of Chair Rod Seiling, was convened for the purpose of hearing Wilson's appeal of Ruling Number SB 42/2013.

Appeal against Denial of Stay Denied

26. On April 16 2013, the panel denied Wilson's appeal.

Notice of Hearing

27. On April 18, 2013, a Notice of Hearing was issued to inform the parties that Wilson's hearing against penalty would be held on May 3, 2013.

The Hearing

28. On May 3, 2013, a panel of the ORC, comprised of Vice Chair Anthony Williams, Commissioner John W. Macdonald, Q.C. and Commissioner Daniel Nixon, was convened to hear the appeal by Wilson against the March 27 penalty.

29. Jennifer Friedman ("Friedman") appeared as counsel for the Administration of the ORC ("Administration").

30. Wilson was self-represented.

31. Three witnesses were called by Friedman:

- (i) Troy Moffatt, Investigator, ORC;
- (ii) Don Lawrence, Senior Track Judge, ORC;
and
- (iii) Adam Chambers, DVM, Commission Veterinarian, ORC;

Five exhibits were introduced.

32. Wilson gave evidence. No other witnesses were called by Wilson.

33. Both Friedman and Wilson gave closing submissions.

The Evidence

Dr. Adam Chambers ("Chambers")

34. Chambers was qualified by the panel as an expert in relation to equine drugs and was permitted to give opinion evidence at the hearing.

35. Wilson had the dubious distinction to have had the first positive test for Yohimbine in Canada. Chambers said that Yohimbine has potential performance enhancing characteristics to "pump a horse up" and to make the horse "go faster". Yohimbine is a "reversal agent" designed to reverse sedation in horses. Chambers said that there are serious potential adverse side effects for the racehorse with the use of this drug.

The Appellant Wilson

(i) Background

36. Wilson is 53 years of age. He has been married for 32 years. His wife sat with him during the hearing. He has limited formal education. He has had employment at several long term jobs unrelated to racing. He lives with his wife in rented accommodation. His truck is twelve years old.

(ii) Horse Racing

37. He has been involved in the horse racing world for 34 years. He has never had a positive test before. During the racing season he lives in an 8' by 15' trailer. He describes his horses as "fat, plump and shiny". "My horses get treated like babies." He stated, "I am my horses."

(iii) The Purchase

38. Wilson said that he purchased two containers of “stomach stuff”, he believed it was “Jensen’s Stomach Care”, in October 2012, from a male vendor from the United States of America, at the “Horse Emporium”, at the Norfolk County Fair in southwestern Ontario.

39. Wilson gave one of the containers to a friend, Mitch Zahely. Wilson kept the other container for use on his own horses.

40. This product was purchased from an unlicensed source for whom Wilson had no name, no address and no contact information.

41. Wilson did not consult with a veterinarian before he used this product on his racehorses.

42. Wilson did not check the list of ingredients on the container.

43. Unfortunately, the original container was not available for production at this hearing as a result of an accident within the stables of Wilson.

(iv) The Positive Test

44. Wilson said:

- “I did not know that a performance enhancing drug was in the powder.”
- “I had no idea I was giving this stuff.”
- “I did not know of Yohimbine before.”
- “I’m not a cheater.”
- “I’m not trying to get away with anything.”
- “Call me an idiot, don’t call me a cheater.”
- “I’m 53 years old, (don’t) take my life and ruin it because I’m an idiot for one day.”

(v) Other consequences

45. Wilson said that:

- Before the positive tests (he) was “doing pretty good.”
- He had \$38,000 in an account (which has now shrunk to \$4,000).
- He sold one of his horses for \$3,000 (he felt that the potential value was \$10,000).
- He has lost face, reputation and friends in the horse racing community.

THE STANDARD BRED RULES**46. Trainer Responsibility****(i) All reasonable precautions**

26.02.01 A trainer shall be responsible at all times for the condition of all horses trained by him/her. The trainer must safeguard from tampering each horse trained by him/her and must exercise all reasonable precautions in guarding, or causing any horse trained by him/her to be guarded, from the time of entry to race until the conclusion of the race. No trainer shall start a horse or permit a horse in his/her custody to be started if he/she knows, or, if by the exercise of a reasonable degree of care having regard to his/her duty to safeguard their horse from tampering, he/she might know or have cause to believe, the horse is not in a fit condition to race or has received any drug that could result in a positive drug test. Without restricting the generality of the foregoing, every trainer must guard, or cause to be guarded by the exercise of all reasonable standards of care and protection, each horse trained by him/her so as to prevent any person from obtaining access to the horse in such a manner as would permit any person not employed by or not connected with the owner or trainer from administering any

drug or other substance resulting in a pre-race or post race positive test. Every trainer must also take all reasonable precautions to protect the horse and guard it against wrongful interference or substitution by anyone in connection with the taking of an official sample.

(ii) Positive test - absolute liability

26.02.03 Notwithstanding 26.02.01, the Commission and all delegated officials shall consider the following to be absolute liability offences:

(a) Any trainer whose horse(s) tests positive for any substances determined to be non-therapeutic;

(c) Any trainer whose horse(s) tests positive resulting from testing in accordance with or under the *Pari-Mutuel Betting Supervision Regulations*;

(iii) Offence

26.02.02 Any trainer who fails to protect or cause any horse trained by him to be protected and a positive test thereby results or who otherwise violates this rule shall be guilty of an offence. Rules of Standardbred Racing, July 31, 2012, page 79

Notice to the Industry – Read the Label

47. “Trainers are once again reminded to read and examine product labels before administering any products to horses.

.....

Horse people need to be aware of all the ingredients being administered to their animals.

Trainers need to be vigilant and check the labels of all products given to the horses in their care. That’s a basic aspect of medication control.

Trainers are reminded that by being aware of the contents of all products administered to horses, they will be more likely to know if any ingredient will result in a positive test.” Book of Documents, Ex. 2, Notice to the Industry, October 3, 2011, tab 2, page 8

Notice to the Industry – herbals and natural products

48. Due to recent positives for ... drugs trainers are again reminded to use extreme caution and consult an Ontario Racing Commission (ORC) licensed veterinarian before administering any new or unknown products to horses – such as so-called herbals or natural products.

The *Rules of Racing* state that any horse with a positive for a Class I, II, III drug, or a substance determined to be non-therapeutic, shall be declared ineligible to race in Ontario for a period of 90 days. As well, under rule changes introduced in January of 2008, a horse with a positive test amounts to an absolute liability offence for the trainer.

ORC Veterinarian Supervisor Dr. Bruce Duncan says horse people need to be aware of all the ingredients being administered to their animals. “As part of a program of good medication control, trainers need to be vigilant and use caution with natural products. Simply checking the label is no guarantee of what is actually inside the product.”

Dr. Duncan pointed out that while natural health products are generally safe and have fewer side effects than traditional medications, they are not risk free. “Depending on the source or the country of

origin, there can be manufacturing problems – such as contamination, incorrect dosage or contain ingredients not mentioned in labeling.”

The racing community is reminded that a basic aspect of good medication control is ensuring that you only use products that are properly manufactured and clearly labeled, obtained from an authorized distributor, and only administered after consultation with an ORC licensed veterinarian.

By exercising diligence regarding the contents of such products, trainers will be more likely to know if use will lead to a positive test. Important note to trainers: caution on use of “herbals and natural products” may result in positive tests. Book of Documents, Ex. 2, Notice to the Industry, February 8, 2012, tab 2, pages 9-10

The Issue

49. What is the appropriate penalty?

Penalty

Guidelines

50. The Guidelines for penalties for equine drug offences are set out in Policy Directive No 1 – 2008.

The Penalty guidelines for Class II drugs are as follows:

“1 st Offence	2 nd Offence	3 rd Offence	4 th Offence
1-5 years plus \$5,000 fine	2-10 years plus \$10,000 fine	10 year suspension plus fine”	

51. What constitutes a second offence or third offence under the Guidelines?

Other Legislation

(i) Highway Traffic Act of Ontario

“Determining subsequent conviction

S.41 (2) In determining whether a conviction is a subsequent conviction or an additional subsequent conviction, as the case may be, The only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction”

52. If the approach set out under the Highway Traffic Act were to be applied to the Guidelines for equine drug offences, Wilson would be subject to a potential cumulative penalty for these three offences of:

\$15,000 or more in fines
and
13 years in suspensions as minimum sanctions.

(ii) Criminal Code of Canada

“s. 6 (1) Where an enactment creates an offence and authorizes punishment in respect of that offence, (a) a person shall be deemed not to be guilty of the offence until he is convicted or discharged ... of the offence.”

“s. 255 Punishment, Annotation, second on subsequent offence [subsec. 1 (a) (ii) and (iii)]. The increased penalty for a “second” or “subsequent” offence does not apply where the offence is committed prior to the conviction for the offence relied on as a prior offence even if committed after this prior offence.” R. v. Negridge (1980), 54 C.C.C. (2d) 304 (Ont. C.A.), Martin’s Annual Criminal Code, page 517, Annotation at page 520

53. If the approach set out in the Criminal Code were to be applied to the Guidelines for equine drug offences, Wilson would be subject to a potential cumulative penalty for these offences as three “first offences”,

and,

if concurrent, to a

(a) \$5,000 fine;

and

1 year suspension

or,

if consecutive, to a

(b) \$15,000 fine

and

3 years in suspension as a minimum sanction.

(iii) the ORC

54. “Applications of the Guidelines will take into consideration the following:

1. The Commission and/or its representatives will consider all offences for the purposes of assessing a penalty as a second or subsequent offence under these Guidelines.
2. The suggested penalties (suspensions and fines) are guidelines only.”
3. The Commission and/or its representatives may take into consideration any mitigating circumstances surrounding a positive test case,
and may do any of the following:
 - (i) impose a penalty that is lower than is suggested in these guidelines ...”
4. “The Commission and/or its representatives may exercise discretion in interpreting these Guidelines and assessing penalties, ...”
8. “Multiple offences occurring on the same race day to different horses of the same trainer may be considered as individual offences in appropriate circumstances.” Guidelines, Penalties for Equine Drug Offences, Book of Documents, Ex. 2, tab 1, pages 3-4

55. It would appear, that the Guidelines, have been crafted in such flexible language, that neither of the approaches contained in the Highway Traffic Act or the Criminal Code, while instructive, are binding upon the Commission and/or its representatives on the matter of interpretation of what constitutes second and third offences.

Purpose and principles of Sentencing –The Criminal Code

(i) Fundamental Principle

718.1 *A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender....*

(ii) Other Sentencing Principles

718.2 *A Court that imposes a sentence shall also take into consideration the following principles:*

- a) *a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender*;
- b) *a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances*;
- c) *where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;* Martin's Annual Criminal Code 2013, Criminal Code of Canada, pages 1442-1445

Findings

56. The panel makes the following findings:

- (i) that Wilson did not apparently know, nor in his view did he suspect, that the product he used on his horses contained a prohibited drug that had the potential to enhance the performance of a racehorse;
- (ii) that Wilson did not attempt to cheat;
- (iii) that there has been severe collateral damage to Wilson and his stable;
- (iv) that the negative impacts likely could have been avoided if Wilson had purchased:
 - (a) approved products;
 - (b) from a licensed vendor;
 - (c) read the label;
 - or
 - (d) consulted a veterinarian as to the ingredients of the "stomach stuff".

The ancient English proverb ".....A stitch in time may save nine." would appear to apply in this sad tale of Wilson. It is apparent, from the evidence, that "the discoverable causative flaw could be readily remedied in this case." *Liat Podoloky ("EcoJustice") v Cadillac Fairview Corp et al., Green, M., OCJ., at Toronto, February 11, 2011, pages 44-56, para 43.*

- (v) Wilson did not exercise due diligence in the care and protection of his horses. Wilson was in violation of the Trainer Responsibility Rule, Rule 26.02.01 of the Standardbred Rules
- (vi) that Wilson was treated in accordance with the rules of procedural fairness by both the investigator and the track judges of the ORC;
- (vii) that the proper prescribed procedures for notification of a trainer of a positive test was followed by both the investigator and track judges;
- (viii) that the claim that "16 weeks to obtain a hearing is unacceptable" was sincerely held by Wilson but not well founded in the evidence. This time period included interviews of a set of witnesses for each positive test, seizure of 33 items from the stable of Wilson, selection of items for further analysis, analysis submission, analysis report, disclosure and selection of a hearing date. The considerable delay between seizure and submission for analysis was unfortunate but understandable in the circumstances.
- (ix) Aggravating Factors:
 - o The three Class II positive tests occurred in a period of ten days;
 - o The drug had the potential to enhance the performance of a racehorse;
 - o The drug also had the potential to cause severe adverse side effects to the racehorses;
 - o The appellant raced his third horse following notification of a positive test from a race held ten days before without knowing the source of the prohibited drug, albeit when he was, as he stated "in race mode";
 - o Wilson failed to take any reasonable steps to discover the contents of the container.

(It was difficult to comprehend the use of “the grey powder” by Wilson without any attempts by him to discover its ingredients before he used it on his racehorses.)

(x) Mitigating Factors:

- There were no prior positive tests in thirty-four years of racing;
- There was no intention to cheat;
- There was no knowledge of presence of the prohibited drug in the container;
- There has been severe collateral damage upon Wilson and his stable;
- Wilson provided his full cooperation during the investigation, the track judges’ hearing and the Commission hearing.

(xi) The track judges exercised considerable care in crafting a penalty in this rather unusual, if not unique situation, a trainer whose horses had three positive Class II violations for the same prohibited drug over a span of ten days.

The penalty imposed followed a good faith review of the Penalty Guidelines Directive by the track judges.

(xii) Sentencing principles require that a sentence must:

- (a) be proportionate to the gravity of the offence;
and
- (b) the degree of responsibility of the offender;
and
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

(xiii) The total penalty imposed by the track judges was:

- (a) \$20,000 in fines;
- (b) 3 years of suspensions;
and
- (c) 2 years of probation.

57. The Appellant claims the penalty is “too severe.”

58. On this trial de novo, after consideration of the circumstances of this offender and these offences and the actual delicts or faults of Wilson that led to the three positive tests results, the panel agrees that the penalty was too severe.

The Result

I East Meadow

59. The appeal against Standardbred Official Ruling SB 45183, is allowed in part as to penalty:

- (a) the \$5,000 fine remains in effect;
- (b) the 1 year suspension remains in effect, from December 7, 2012 to December 6, 2013, however, the portion of the suspension from June 6 2013 to December 6, 2013 is stayed upon the anticipated continued good behaviour of the licensee; if Wilson, as a trainer, receives a further Class I, II or III equine drug positive test during the stay, the stay will be rescinded and the remnant of the stay period will be consecutive to his suspension;
- (c) The 2 year probation which included 5 conditions upon reinstatement of his licence, from Standardbred Official Ruling SB 45186 remains in effect.

II Abigail Eden

60. The appeal against Standardbred Official Ruling SB 45184, is allowed in part as to penalty:

- (a) the \$5,000 fine remains in effect, however, this fine is concurrent with the \$5,000 fine for East Meadow;
- (b) the 1 year concurrent suspension remains in effect upon the same terms as for East Meadow;
- (c) the 2 years probation upon reinstatement of licence, concurrent to East Meadow remains in effect.

III Wedding Bell Blues

61. The appeal against Standardbred Official Ruling SB 45185, is allowed in part as to penalty:

- (a) The \$10,000 fine is set aside and is replaced by a fine of \$5,000, concurrent with the \$5,000 fines for East Meadow and Abigail Eden;
- (b) The 2 year suspension is set aside and replaced with a 1 year suspension concurrent and concurrent, with the same terms and conditions as for East Meadow and Abigail Eden;
- (c) The 2 years probation concurrent upon reinstatement of licence remains in effect.

The Summary

I East Meadow

- (i) \$5,000 fine;
- (ii) 1 year suspension; (6 months time already served and serving until June 6, 2013, then 6 months conditional stay)
and
- (iii) 2 years probation upon conditions.

II Abigail Eden

- (i) \$5,000 fine concurrent;
- (ii) 1 year suspension concurrent;
and
- (iii) 2 years probation concurrent.

III Wedding Bell Blues

- (i) \$5,000 fine concurrent and concurrent;
- (ii) 1 year suspension concurrent and concurrent;
- (iii) 2 years probation concurrent and concurrent.

62. In totality, the penalty consists of:

- (i) \$5,000 fine;
- (ii) 1 year suspension (6 months time already served and serving until June 6, 2013, then 6 months conditional stay);
- (iii) upon reinstatement of licence, 2 years probation upon 5 conditions.

DATED this 5th day of June 2013.



Anthony Williams
Vice Chair