

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

NANCY D. JOHANSSON TAKTER,	:	
	:	
Appellant,	:	Case No. 23CVF-690
	:	
vs.	:	
	:	JUDGE BILL SPERLAZZA
OHIO STATE RACING	:	
COMMISSION,	:	
	:	
Appellee.	:	

**DECISION AND FINAL JUDGMENT
REVERSING ADJUDICATION ORDER BY
THE OHIO STATE RACING COMMISSION**

1. Overview

This is an administrative appeal from a January 18, 2023 Adjudication Order by Appellee Ohio State Racing Commission (the “Commission”). By that Order, the Commission found that Manchego, a racehorse trained by Appellant Nancy D. Johansson Takter, tested positive for a prohibited foreign substance in violation of Ohio Adm.Code 3769-18-01(B)(1). For that violation, the Commission suspended Ms. Takter from racing for 15 days, imposed a \$500 fine, and ordered the return of a \$25,000 first-prize purse that was awarded for Manchego’s race performance the day of the positive test.

As explained below, the Adjudication Order is **REVERSED**; it is not in accordance with law because the Commission failed to apply the gabapentin screening limit, which applied to all tests reported to the Commission on and after October 30, 2019, irrespective of the date of the subject race. The final test for

gabapentin in Manchego's blood was reported to the Commission on November 21, 2019, and was well below the screening limit. That test was negative for gabapentin under Commission rules, and the Commission was required to treat it as such.

2. Background

2.1 The Race and Initial Lab Test

On September 7, 2019, Manchego won Race 15 at Scioto Downs. Afterward, the horse provided a blood sample, which was sent to the Ohio Department of Agriculture's Analytical Toxicology Laboratory (the "ODA Lab") for prohibited-substance testing. On September 24, the ODA Lab issued a preliminary report to the Commission, reflecting that Manchego's blood was suspected to contain gabapentin. After additional testing, the ODA Lab issued a final report to the Commission on October 9, reflecting that Manchego's blood tested positive for gabapentin in the amount of 269 picograms per milliliter.

At that time, there was no screening limit for gabapentin. Thus, that level of gabapentin—even though infinitesimal—was considered a positive test. The race judges held an informal hearing and ordered the suspension, fine, and purse return.

2.2 Appeal and Request for Independent Testing

On October 17, 2019, Ms. Takter appealed to the Commission. Believing Manchego's blood sample had somehow been contaminated, she requested an independent analysis.

2.3 Adoption of Screening Limit for Gabapentin

On October 30, 2019, the Commission adopted an 8,000 picograms per

milliliter screening limit for gabapentin. That screening limit was adopted in response to the Commission's receipt of a report by an equine pharmacologist, Richard Sams, Ph.D. In that report, Dr. Sams explained that any amount of gabapentin below 34,000 picograms per milliliter is "irrelevant," and he recommended the screening limit be set at 8,000 picograms per milliliter, or "4-fold less" than (or $\frac{1}{4}$) the lowest relevant amount.

Importantly, "gabapentin is a classic case of a human medication transferring to the environment." *Tr.* at 210, lines 21-22. What's more: "It's one of the substances that's almost completely unmetabolized. [So,] once you take it into your mouth, that will pass out in * * * urine and presumably in feces * * * into the environment." *Id.* at 206, lines 17-23. In September 2019, there were 1.2 billion milligrams of gabapentin prescribed in Franklin County, where Scioto Downs is located. *Id.* at 209, lines 1-11. The screening limit was set to account for environmental contamination.

On October 30, 2019, the Director conveyed the screening limit to the ODA Lab and ordered it "enact[ed] immediately" and applied to all tests "for which [the lab] ha[d] not issued a final test report certificate." In other words, all results for gabapentin below 8,000 picograms per milliliter were to be reported as negative from that day forward, irrespective of when the race took place, and even if a preliminary test result suspecting gabapentin had been reported to the Commission.

2.4 Independent Testing and Results

On November 7, 2019, Texas A&M's Veterinary Medical Diagnostic Laboratory (the "TX Lab") received Manchego's blood sample for gabapentin

testing. However, the screening limit was not communicated to the TX Lab. On November 21, 2019, the TX Lab issued a test report to the Commission, reflecting that Manchego's blood tested positive for gabapentin in the amount of 273 picograms per milliliter.

2.5 Administrative Hearing

On October 22, 2022, a Commission hearing officer held a hearing. On December 13, the hearing officer issued a decision, recommending the Commission uphold the race judges' findings and sanctions. The hearing officer concluded that environmental contamination was the source of the gabapentin in Manchego's blood. Indeed, the record establishes by a great probability that someone taking gabapentin urinated in a barn while working, and Manchego was later housed there, when she ate contaminated hay or licked a contaminated surface, thereby ingesting an infinitesimal amount of gabapentin, which gave rise to her positive test. What barn, where is unclear.

In further relevant part, the decision states:

In September 2019, the month the Race took place, there was **no minimum threshold screening** or testing limit for the presence of gabapentin. * * * On October 30, 2019, approximately **45 days after the Race, the Commission adopted a minimum threshold screening limit for gabapentin** that far exceeded the amount of gabapentin found in Manchego's blood.

* * *

On the day of the Race, the **gabapentin** found in Manchego's blood **was a foreign substance** prohibited under Ohio Admin. Code 3769-18-01(B)(1) and Ohio Admin. Code 3769-18-01(A)(2). Therefore, the Respondent as Manchego's trainer and absolute insurer violated Ohio Admin. Code 3769-18-01(B)(1) by racing the horse with gabapentin in its blood.

* * *

The Commission’s decision to adopt a minimum threshold amount in testing for gabapentin in October 2019 did not alter the fact that Manchego raced on September 7, 2019 with a prohibited foreign substance in its blood.

Though the issue had been raised, that decision did not address that, in adopting the gabapentin screening limit, the Director ordered it to be “enact[ed] immediately” and applied to all pending tests, *irrespective of the date of the subject race*.

2.6 Commission Hearing

On January 18, 2023, the Commission held a hearing on Ms. Takter’s appeal. One commissioner questioned why the TX Lab result was not negative, given the Director’s order that the gabapentin screening limit be “enact[ed] immediately” on October 30, 2019. Counsel for Ms. Takter argued it should have been treated as a negative. An assistant attorney general argued:

[The hearing officer] considered all these matters. * * * He considered what the standard was on the date that the sample was collected and what the rule was at the time based on that.

* * *

That’s our response on the split sample, and it does in fact confirm the presence of gabapentin on September 7th, which was before the adoption of the screening limit.¹

Ms. Takter’s counsel countered:

According to [the Director’s] edict, it doesn’t matter when the race was, doesn’t matter when you did the test. Doesn’t even matter when you wrote the report. All that matters is if you haven’t sent it to me before October 30, * * * if it’s under 8,000 picograms, it’s negative. * * * There’s no exception in his edict saying, “unless it’s a split sample.”

¹ A split sample is the portion of a horse’s blood sample the ODA Lab sets aside in case independent testing is requested.

The assistant attorney general responded, “as to the October 30th edict, it does say ‘for which you have not issued a final test report.’ At this point, the final test report had been issued. It had been issued on October 9th.”

The Commission adopted the hearing officer’s decision and upheld the suspension and sanctions entered by the race judges.

2.7 This Appeal

On February 1, Ms. Takter filed this appeal. She and the Commission filed merit briefs on May 12 and May 26, respectively. Ms. Takter filed a reply brief on June 2. This matter is ripe for decision.

3. Applicable Law

3.1 Standard of Review

A common pleas court must affirm an administrative order “if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.” R.C. 119.12(M). Absent such findings, a court “may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. *Id.*

Evidence “is reliable if it can be depended on to state what is true, and it is probative if it has the tendency to establish the truth of relevant facts.” *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, ¶ 12. To be “substantial,” evidence must have importance and value. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992). In determining whether evidence is reliable, probative, and substantial, a trial court

must appraise the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof. *Evans v. Dir., Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 14AP-743, 2015-Ohio-3842, ¶ 12. A reviewing court “must give due deference to the administrative resolution of evidentiary conflicts,” though “the findings of the agency are by no means conclusive.” *University of Cincinnati v. Conrad*, 63 Ohio St. 2d 108, 111, 407 N.E.2d 1265 (1980).

However, “the judicial branch is *never* required to defer to an agency’s interpretation of the law.” *TWISM Ent., LLC v. State Bd. of Professional Engineers & Surveyors*, ___ Ohio St.3d ___, 2022-Ohio-4677, ¶ 3 (emphasis sic). Indeed, “where a statute or administrative rule is clear and unambiguous, our task is not to *interpret* it at all—with or without any consideration of the administrative agency’s view of its meaning—but rather to construe and apply it according to its plain language.” *Gerritsen v. Med. Bd. of Ohio*, 10th Dist. No. 22AP-466, 2023-Ohio-943, ¶ 19 (emphasis sic). Where a statute or administrative rule is unclear or ambiguous, “it remains the judiciary’s role to independently interpret the law; the weight to be given the agency interpretation depends on its persuasiveness.” *TWISM* at ¶ 47.

3.2 Substantive Law

Ohio Adm.Code 3769-18-01(B)(1) states:

It shall be the intent of this rule to protect the integrity of horse racing, guard the health of the horse, and safeguard the interest of the public and racing participants through the prohibition or control of drugs, medications, and substances foreign to the natural horse. In this context:

Except for regulatory thresholds of such non-steroidal anti-inflammatory drugs authorized for use by order of the commission, and except for those horses eligible for the use of furosemide as permitted by paragraph (B)(1)(b) of this rule, **no horse entered to race shall carry in its body on race day any prohibited foreign substance.**

Ohio Adm.Code 3769-18-01(A)(2) further provides:

“Foreign substances” shall mean all classified substances except those which exist naturally in the untreated horse at normal physiological concentrations and include all narcotics, stimulants, depressants, or other drugs. **The commission may, by order, establish a system of classification of prohibited foreign substances, to include methods of detection and/or regulatory thresholds thereof,** recommended penalties and disciplinary measures for the presence of said substances in test samples.

In that regard, the Commission adopted an 8,000 picograms per milliliter screening limit for gabapentin, effective on October 30, 2019.

Pursuant to Ohio Adm.Code 3769-18-02(A):

The trainer shall be the absolute insurer of, and responsible for, the condition of the horse entered in a race, regardless of the acts of third parties. Should the chemical or other analysis of urine or blood specimens prove positive, showing the presence of any foreign substance not permitted by rule 3769-18-01 of the Administrative Code, the trainer of the horse * * * may, in the discretion of the commission, be subjected to penalties [].

Moreover, “[a] finding by the chemist that a foreign substance * * * is present in the urine or blood sample [of a horse] shall be considered a positive test and a violation of this rule.” Ohio Adm.Code 3769-18-01(B)(10).

However, “[t]he trainer or owner of a horse for which a positive test result was reported may request that the retained specimen or a portion thereof be retested in accordance with this rule.” Ohio Adm.Code 3769-18-12(B)(1). And

“[n]o action shall be taken against the trainer or owner if the results of the retesting are negative.” Ohio Adm.Code 3769-18-12(C)(1).

4. Merits

Ms. Takter raised numerous issues on appeal. Because one is dispositive, the court need address only it: The TX Lab result was negative under the Commission’s gabapentin-screening-limit rule, and thus, the Commission lacked authority to take further action against Ms. Takter. *See* Ohio Adm.Code 3769-18-12(C)(1).

4.1 The Screening-Limit Rule Clearly and Unambiguously Applied “Immediately” to All Tests Pending on October 30, 2019, Irrespective of the Date of the Race

The only direct evidence in the record about the implementation of the gabapentin screening limit is the Director’s email to the ODA Lab on October 30, 2019. That email states in full:

Please enact immediately the reporting recommendations for Gabapentin, Dextromethorphan, Hydrochlorothiazide and Venlafaxine in the attached memorandum. These reporting recommendations shall also be applied to these four substances for which you have not issued a final test report certificate.

The record is clear that the “attached memorandum” was the Sams Report. Thus, as of October 30, 2019, the 8,000 picogram per milliliter gabapentin screening limit applied to all pending tests, even if the race had already occurred, the sample had already been taken, the test had already been done, the Commission had already been informed that the presence of gabapentin was suspected, and the lab had already prepared a final report.

As counsel for Ms. Takter pointed out to the Commission, there is nothing in the Director’s edict that states the screening limit shall not apply to pending

independent tests. To reach that result, the court would have to read words into the Director's edict, as it does not say that the screening limit applies "only to tests pending at the ODA Lab" or that it is "inapplicable to pending independent tests." *See Everhart v. Coshocton County Memorial Hospital*, 10th Dist. No. 21AP-74, 2022-Ohio-629, 186 N.E.3d 232, ¶ 20 ("An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words.")

The argument that the edict applies only to ODA Lab results based on the words "final test report certificate" is creative but unpersuasive. Nowhere is that phrase defined to mean a final report issued only by the ODA Lab. Rather, its use underscores the immediacy of the screening limit's enactment by clarifying that it applies even if a preliminary result suspecting gabapentin had already been reported to the Commission. Its use confirms that the screening limit applies to all pending matters.

On October 30, 2019, Ms. Takter's appeal was pending. Ms. Takter had requested independent testing, and Manchego's blood sample was not even sent to the independent lab until after October 30, 2019. Further, the independent lab's results were not reported to the Commission until weeks after the adoption of the screening limit, and those results are dispositive under Ohio Adm.Code 3769-18-12(C)(1).

4.2 To the extent the Screening-Limit Rule is Unclear or Ambiguous, the Court Interprets it to Apply to All Tests Pending on October 30, 2019, including Independent Tests

As an initial matter, the Commission's interpretation of the screening-limit rule is unpersuasive; as such, it deserves no weight. *See TWISM* at ¶ 47. The

Commission adopted the hearing officer's decision without modification, even though it set forth patently incorrect reasoning. Central to the hearing officer's conclusion that the screening limit is inapplicable here was that there was no screening limit on the day of Manchego's race. That analysis—adopted by the Commission—ignored that the screening limit applied to all test results reported to the Commission on and after October 30, 2019, even if the race took place before October 30, 2019.

Concluding that the screening limit applies to all pending matters is consistent with the Commission's intention in enacting it immediately and the history of the screening-limit rule. *See Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8 (listing appropriate considerations when interpreting an ambiguous statute). In those regards, the Commission hired Dr. Sams to provide an opinion on gabapentin testing because it had grown concerned about a rash of recent, low-level gabapentin results. That, paired with the fact that, upon learning of positive test results, horsemen and women were uniformly adamant they had not administered gabapentin.

By the Sams Report, the Commission learned that gabapentin in a horse's blood below 34,000 picograms per milliliter has no significance. Indeed, the record elsewhere confirms that a horse would have to take 10 million picograms of gabapentin to experience performance enhancement. *Tr.* at p. 224, lines 1-11; *Decision* at ¶ 22(m). In response, the Commission took a rare, if not unprecedented, move and enacted the screening limit to all pending tests, irrespective of the date of the race, rather than applying it to all tests from races held on and after October 30, 2019. The screening limit was enacted immediately

to all pending matters to prevent environmental contamination cases from further resulting in unfair, unwarranted findings of prohibited-substance violations.

5. Decision

Based on the foregoing, and upon review of the entire record, the court concludes that the January 18, 2023 Adjudication Order by Appellee Ohio State Racing Commission is not in accordance with law. The January 18, 2023 Adjudication Order is therefore **REVERSED**. This appeal is **DISMISSED WITH PREJUDICE**. Costs taxed to the Commission.

IT IS SO ORDERED.

***** THIS IS A FINAL, APPEALABLE ORDER *****

Franklin County Court of Common Pleas

Date: 07-26-2023
Case Title: NANCY D JOHANSSON TAKTER -VS- OHIO STATE RACING
COMMISSION
Case Number: 23CV000690
Type: JUDGMENT ENTRY

It Is So Ordered

The signature "Bill Sperlazza" is written in a cursive, black ink style. It is positioned over a circular official seal of the Franklin County Court of Common Pleas. The seal features a central figure and the text "FRANKLIN COUNTY OHIO" and "COMMON PLEAS" around the perimeter.

/s/ Judge Bill Sperlazza

Court Disposition

Case Number: 23CV000690

Case Style: NANCY D JOHANSSON TAKTER -VS- OHIO STATE
RACING COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes