



COMMISSION HEARING

TORONTO, ONTARIO – JULY 13, 2009

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

**AND IN THE MATTER OF AN APPEAL AND REQUEST FOR
HEARING OF STANDARDBRED LICENSEE MICHAEL VANDERKEMP**

On June 28, 2009, the Judges issued Standardbred Official Ruling SB 39651 to TRUEYS LEGACY with the penalty of “ineligible to race in Ontario for a period of 90 days - April 29/09 to July 27/09” as a consequence of having obtained a positive for the Class III drug, Trenbolone, following race 13 at Chester Downs on April 15, 2009, contrary to ORC Rule 11.10.02. The Judges also issued Standardbred Official Ruling SB 39653 to TRUEYS LEGACY with a penalty of “declared ineligible and disqualified, purse money, driver trainer fees to be returned and redistributed” in connection with the May 2, 25, 30, June 6 and 13, 2009 races at Mohawk, pursuant to ORC Rule 18.08.01.

On June 28, 2009, the Judges issued Standardbred Official Ruling SB 39647 to UP FRONT HOTSEY with the penalty of “ineligible to race in Ontario for a period of 90 days - April 29/09 to July 27/09” as a consequence of having obtained a positive for the Class III drug, Trenbolone, following race 8 at Chester Downs on April 16, 2009, contrary to ORC Rules 11.10.02. The Judges also issued Standardbred Official Ruling SB 39652 to UP FRONT HOTSEY with a penalty of “declared ineligible and disqualified, purse money, driver trainer fees to be returned and redistributed” in connection with the June 6 and 13, 2009 races at Mohawk, in accordance with ORC Rule 18.08.01.

Michael Vanderkemp (“Vanderkemp”) entered the horses, TRUEYS LEGACY and UP FRONT HOTSEY, in the subject races in Ontario.

On July 8, 2009, Gerald Sternberg (“Sternberg”), counsel on behalf of Vanderkemp, filed a Notice of Appeal. Sternberg requested a stay of the orders pending the disposition of the appeal and the scheduling of an emergency hearing.

On July 13, 2009, a Panel of the ORC, comprised of Vice Chair Hon. James M. Donnelly, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. Sternberg attended the Hearing as counsel for Vanderkemp.

Upon considering the Agreed Statement of Facts, hearing the testimony of Senior Judge Craig Walker, reviewing the exhibits filed, and upon hearing the submissions, the Panel dismissed the Appeal with reasons to follow. In its subsequently released Reasons, among other things, the Panel ruled as follows:

- i) Under Rule 1.07, the owner by having the horse entered in ORC regulated events is bound by ORC rules.
- ii) Rule 11.10.02 rendered the horses ineligible.
- iii) Rule 18.08.01 requires redistribution of the purse.
- iv) The four rulings by the Judges are confirmed. The disqualifications as referenced therein are verified. As a matter of course Rule 18.08.01 must be applied. Hence, the return of purse money with redistribution as ordered by the Judges is confirmed.



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Commission

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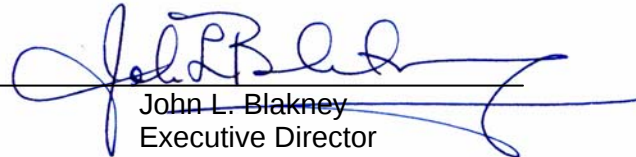
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The Panel's Reasons for Decision is attached to this Ruling.

DATED at Toronto this 27th day of July 2009.

BY ORDER OF THE COMMISSION



John L. Blakney
Executive Director



REASONS FOR DECISION

The Appeal

1. This Appeal comes forward on an emergency basis as requested by counsel for Michael Vanderkemp (Vanderkemp). In consequence, the Chair directed that the proceeding be heard by the Vice Chair as a Panel of one. (Section 4.2.1 (1) Statutory Powers and Procedure Act)
2. The Appeal was dismissed on the date of the Hearing with Reasons to follow. These are the Reasons.
3. On Wednesday, July 8th, counsel for Vanderkemp, requested an emergency HEARING on July 13th or 14th. That Hearing, being an appeal from four rulings by the Judges at Mohawk on June 26, 2009, convened at 9:00 a.m. on July 13th.

The Appeal Hearing

4. The parties filed an Agreed Statement of Facts which included the following:
 1. Michael C.J. Vanderkemp is licensed with the Ontario Racing Commission ("ORC") as a Driver/Trainer/Owner/Authorized Agent.
 2. The horse, TRUEYS LEGACY (tattoo #48373), participated in the following races at Mohawk Racetrack ("Mohawk"):
 - May 2 Race 10/Finish 6/Purse \$30,000
 - May 23 Race 4/Finish 4/Purse \$28,000
 - May 30 Race 8/Finish 5/Purse \$28,000
 - June 6 Race 5/Finish 6/Purse \$28,000
 - June 13 Race 13/Finish 4/Purse \$28,000
 3. The horse, UP FRONT HOTSEY (not tattooed), participated in the following races at Mohawk:
 - June 6 Race 6/Finish 4/Purse \$92,030
 - June 13 Race 3/Finish 6/Purse \$353,710
 4. Vanderkemp entered TRUEYS LEGACY and UP FRONT HOTSEY on the foregoing dates.
 5. On June 18, 2009, the Judges at Mohawk ("the Judges") were notified through the Standardbred Canada website of steroid positives in Pennsylvania for trainer Noel Daley. The Judges contacted Judge Mike Hall at Chester Downs.
 6. On June 19, 2009, Judge Hall advised that on April 29, 2009, he received notification of steroid positives for the horses, TRUEYS LEGACY and UP FRONT HOTSEY.
 7. On June 25, 2009, Vanderkemp attended at Mohawk. The Judges notified him that a Hearing was scheduled.
 8. On June 26, 2009, the Hearing proceeded. The Judges reserved their decision.
 9. On June 28, 2009, the Judges issued Standardbred Official Rulings:
 - SB 39651 to TRUEYS LEGACY with the penalty of "ineligible to race in Ontario for a period of 90 days, April 29, 2009 to July 27, 2009," following race 13 at Chester Downs on April 15, 2009.



- SB 39653 to TRUEYS LEGACY with a penalty of "declared ineligible and disqualified, purse money, driver trainer fees to be returned and redistributed" in connection with May 2, 23, 30, June 6, 13, 2009 races at Mohawk.
- SB 39647 to UP FRONT HOTSEY with the penalty of "ineligible to race in Ontario for a period of 90 days, April 29, 2009 to July 27, 2009", following race 8 at Chester Downs on April 16, 2009.
- SB 39652 to UP FRONT HOTSEY with a penalty of "declared ineligible and disqualified, purse money, driver trainer fees to be returned and redistributed" in connection with June 6 and 13, 2009 races at Mohawk.

5. Counsel for Vanderkemp filed in evidence:

- Photocopy of a letter from Ted Mazzarisi, DVM, from Chesterfield, NJ stating that on May 29, 2009, UP FRONT HOTSEY and TRUEYS LEGACY tested negative "for all anabolic steroids including Trenbolone Actetate (levels less than 100 ng/dl)".
- Photocopy of a ruling by Joseph V. Mushalko, Director of operations for the Pennsylvania State Harness Racing Commission on June 11, 2009, confirming a pending Appeal by trainer Noel Daley of the Chester Downs Ruling 09062 C.D. dated June 5 relating to TRUEYS LEGACY.
- Letter from lawyer Howard Taylor of Philadelphia confirming that he was acting for the appellant trainer Noel Daley on a similar appeal regarding UP FRONT HOTSEY.
- Copy of a notice that the Canadian Pari-Mutuel Agency would commence testing for the veterinary approved anabolic steroids Boldenone, Nandrolone, Stanozolol and Testosterone on June 1, 2009.

6. No other evidence was called on behalf of the Appellant nor did he testify.

7. A book of documents was filed in evidence by the Administration with consent by Vanderkemp's counsel. Acting Senior Judge Craig Walker (Walker) was the only witness called by the Administration.

8. Walker testified that on June 18, while assigned to the Mohawk races, through the use of his computer he first became aware of these positive tests and the Pennsylvania Rulings. He explained that currently there is no protocol in place for notification of such results in other racing jurisdictions. On June 19, he obtained the identification date from Judge Michael Hall of Chester Downs, Pennsylvania. He immediately left messages for the trainer of record, Vanderkemp, to contact the Mohawk Judges.

9. Vanderkemp was provided with a print-out of the horses' race lines, the USTA notice of the positive tests, ORC Rule 11.10.02 and the ARCI Guidelines identifying Trenbolone as a Class III drug. A HEARING date was arranged at a time convenient to Vanderkemp who was notified of his right to appear with counsel, and the right of the owners of the horses to participate.

10. The Hearing proceeded on Friday, June 26. The Decision was reserved and was released June 28.



Reciprocal Enforcement

11. Reciprocal enforcement is a fundamental component of racing integrity. The reciprocity issue is not without difficulty. There is benefit, there is burden.

12. The benefit is self-preservation. Only by death wish could Ontario racing permit itself to become a modern day pirate's Barbary Coast - a safe haven for pirates of the seven seas. Ontario will not become a landfill site for those whose racing privileges have been suspended, revoked, denied or banned in other jurisdictions.

13. The burden is that the issue of fairness and due process in those jurisdictions is beyond the reach of the ORC. Of necessity, pursuing those objectives must be resolved in the jurisdiction imposing the sanction and must be the responsibility of the licensee. There is neither intent nor capacity for Ontario to re-open, re-try or overrule a non-Ontario decision resulting in a finding of breach of the rules of racing.

14. Recognition of the breach underlying the penalty is an element of reciprocity. In this case, that underlying breach being a positive test, the 90-day racing ban for the horse is triggered in Ontario by Ontario Rules.

Integrity

15. Integrity in terms of values and behaviour is the foundation of public confidence in horse racing. Earning public trust is a continuing responsibility. That obligation is discharged by an all inclusive on going culture of integrity. Exacting standards of honest, ethical behaviour are required with accountability for breaches.

Notice to the Industry

16. On January 23rd, 2008, the Chair of the Ontario Racing Commission issued an industry bulletin regarding health, safety and regulatory measures. Thereby notice was given that effective January 31, 2008, a positive test horse would immediately be rendered ineligible to race in Ontario for 90 days. That bulletin included a copy of Rule 11.10.02.

Rule 11.10.02

17. The broad purpose underlying rule 11.10.02 is integrity. That is, protection of the "purity of the turf", and the health of the horse. In specific terms the purpose is to identify the owner's responsibility for rule breaches involving his/her horse. No longer may owners evade liability by saying "look to the trainer under rule 26.02.01," (the trainer responsibility rule). Rule 11.10.02 provides incentive:

- to owners to take positive action to protect their purses and reputations by insisting that their trainers play by the Rules of Racing.
- to trainers to comply with owner/trainer harmony at risk.



18. The importance of Rule 11.10.02 and its integrity component is underscored by designation as an absolute liability offence.

19. By virtue of participation in an Ontario race meeting the owner is obliged to abide by Ontario rules. Rule 1.07 is as follows:

1.07: "Every person participating in and every patron of a meeting shall abide by these rules and accept the decisions of the Judges, subject to the right of appeal to the Commission"

Pennsylvania Appeal

20. In the course of the Hearing, it was disclosed that both rulings in Pennsylvania were under appeal. Stays were granted in connection with each appeal.

21. Consideration was given to adjourning the Hearing and seeking cooperation by the Pennsylvania racing authority in expediting the appeals.

22. No evidence was lead before this Panel as to:

- The grounds of Appeal
- The evidence upon which the Appeals are based
- Any allegation of defects in the testing procedures or the integrity and continuity of the samples
- Any allegation of inadequacy or impropriety in laboratory procedures
- Any new evidence to be introduced on the Appeal
- Any contrary laboratory test results
- The probability or otherwise of success on the Appeal.

23. As a result, there was no evidentiary basis for assessing the merit of the Appeals.

24. There is a downside to adjourning an Ontario proceeding pending the result of a hearing or appeal in another jurisdiction. Control of the timing of the Ontario proceeding is thereby lost. Adjournment would have been considered upon fulfillment of pre-conditions as follows:

- The issue for determination in the foreign jurisdiction must be relevant to the Ontario issue (not solely a penalty appeal).
- There must be a demonstration of some merit in the Appeal in the foreign jurisdiction.
- The foreign jurisdiction's compliance with an ORC request that the Appeal be expedited.
- An undertaking by the Appellant that the foreign Appeal will be conducted expeditiously.
- A fixed date for final disposition of the Ontario Appeal. Depending on the circumstances that final disposition may occur even if the foreign Appeal was still pending.

25. With an adjournment in contemplation, during a recess telephone enquiry was made by counsel for the Administration. It was reported by the Pennsylvania Racing Commission that a typical Appeal period was four to six weeks. However, in the course of submissions, counsel for Vanderkemp explained that the owners of these two horses had a third horse which they raced with



Trenbolone. That horse was said to have been tested and no positive result ensued. Mr. Sternberg explained that following that result, the owners raced UPFRONT HOTSEY and TRUEYS LEGACY on the same steroid.

26. In result, there is no indication in the evidence or by submissions that the Appeal relates to the positive test being in error. The stated purpose of the appeal relates to diminished responsibility by the owners and the affect, if any, that would have on penalty. A penalty appeal is irrelevant to this proceeding. Accordingly, there will be no adjournment. It is appropriate to deal with the matter now and on this evidence.

Finding of Fact

The following are found as facts:

- the post race sample for TRUEYS LEGACY taken at Chester Downs on April 15th, 2009 tested positive for Trenbolone,
- the post race sample taken from UP FRONT HOTSEY at Chester Downs on the following day April 16th tested positive for Trenbolone,
- the Association of Race Commissioners International Inc. Uniform Classification Guidelines for Foreign Substances identified Trenbolone as a Class III drug.
- The identification date under Rule 11.10.02 for TRUEYS LEGACY and for UP FRONT HOTSEY was April 29, 2009.

The Identification Date

27. Counsel for Vanderkemp contended forcefully and repeatedly that the 90-day ineligibility period should commence on the date that the Ontario Racing Commission (ORC) received notification of the positive test. That interpretation would be contrary to the plain language of the Rule. It would be contrary to the intent underlying the Rule. Clearly on the face of the Rule the triggering mechanism for the ineligibility is establishment of the linkage between the laboratory test result and the horse which was the donor of the tested sample. The Rule provides in part:

“for a period of 90 days from the date of the identification of the horse with the positive test.”

28. That linkage of cause and effect relationship was identified in the Scott McFadden Ruling SB 003/2009. A retroactive suspension (to the date the blood was drawn) was sought in the McFadden case. A deferred suspension is sought in this case. The Rule is unequivocal. There is no discretion. The ineligibility commenced with linkage of the positive test sample to the horse.

29. The contention that the identification date should be the date on which the ORC received notification of the positive is premised upon a misapprehension of the operation of the Rule. The ineligibility does not arise as a result of knowledge by the ORC followed by some ORC action rendering the horse ineligible to race in Ontario. The Rule is framed so that the ineligibility automatically flows from and commences with “the date of identification of the horse” as the donor of the positive sample.



Equitable Relief

30. In the McFadden Reasons, there is discussion about the appropriateness or otherwise of an intervention under the plenary power in Rule 1.09 as follows:

“Provided however the Commission in its absolute discretion may waive breach of any rules which waiver or breach the Commission does not consider prejudicial to the best interests of racing.”

31. Similarly in this case, the overall good of racing takes precedence over individual convenience and financial benefit. No basis exists for Rule 1.09 intervention.

32. The disqualification at Chester Downs, coupled with the penalties imposed and the loss of the purses impresses upon the owners knowledge of the two positive tests at the time the horses were shipped to race in Ontario. That knowledge coupled with the failure to disclose to or enquire from the ORC before racing the horses, disentitles the owners from equitable relief.

33. If the correct identification date had been June 19 as contended by counsel for the Appellant and not April 29, then all of the Ontario Races would have been before the identification date and neither disqualification nor purse redistribution would result.

The Subsequent “Clean” Test

34. No submission was made that the “clean” tests on May 29 called into question the validity of either positive test. That either horse tested negative for certain substances on another occasion does not alter the positive test result and so is irrelevant.

Return of Stakes Payments

35. The issue of the return of the stake payments was not dealt with in the Judges rulings. The issue was not argued on this Appeal although it is noted in the Notice of Appeal. Hearings before a panel of the Commission are in the nature of an appeal from decisions made under delegated authority. Commission Panels do not determine issues in first instance, or as otherwise put, as a trial court. Any stakes payment issue should be determined by the authority conducting the stakes event in accordance with the rules of that event. Any appeal from that decision would be to a panel of the Commissioners.

Vanderkemp

36. No proceedings were taken against Vanderkemp under Rule 11.04. It is noted that Vanderkemp was not the trainer of record at Chester Downs. That he had no knowledge of the positive tests when he entered the horses to race in Ontario is accepted. The Judges were correct in their conclusion that there was no wrong doing by him.

37. As an administrative matter perhaps procedure should be reviewed to facilitate prompt dissemination of positive test information amongst racing authorities.



Result

38. Under Rule 1.07, the owner by having the horse entered in ORC regulated events is bound by ORC rules. Rule 11.10.02 rendered the horse ineligible, Rule 18.08.01 requires redistribution of the purse.

39. The four rulings by the Judges are confirmed. The disqualifications as referenced therein are verified. As a matter of course rule 18.08.01 must be applied. Hence, the return of purse money with redistribution as ordered by the Judges is confirmed.

40. The appeal is dismissed.

Footnote

41. By way of footnote, the Judges and Stewards continue to impress with the quality of discharge of their adjudicative function.

DATED this 27th day of July, 2009.

James M. Donnelly
Vice Chair



Standardbred Rules

Rule 11.04

Any participant who declares, or causes to be declared, an ineligible horse to start shall be guilty of a violation of the rules and subject to disciplinary action by the Judges. If after declarations close, and prior to the race, the Judges become aware that an ineligible horse has been declared, they shall immediately scratch the horse and starting fees, if applicable, shall be forfeited.

Rule 11.10.02

Any horse that obtains a positive test from a jurisdiction outside Ontario for any of the following shall be ineligible to race in Ontario for a period of 90 days from the date of the identification of the horse with the positive test:

1. Class I;
2. Class II;
3. Class III;
4. TCO₂;
5. Substance determined to be non-therapeutic.

Rule 18.08.01

If for any reason a horse is disqualified or declared ineligible, any purse monies or trophies received by the owner, or driving and/or training fees (paid under Rule 18.11 to the driver and/or trainer of the horse in the race) shall be returned, within 15 days of notification, to the association for redistribution.