

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9426**

**COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson**

IN THE MATTER OF:

JONATHAN WONG

APPELLANT

AGENCY’S RESPONSE TO APPELLANT’S APPLICATION FOR REVIEW

Comes now the Horseracing Integrity and Safety Authority (“HISA”) pursuant to 16 CFR 1.147 and submits the following Response to Appellant’s Application for Review, dated May 22, 2024.

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Response to Appellant's Application for Review is being served on June 3, 2024, via Administrative E-File System and by emailing a copy to:

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/s/ Bryan Beauman

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I. OVERVIEW

On February 9, 2023, Arbitrator Hon. Nancy J. Holtz, Esq. issued a decision, as corrected, finding that Appellant violated Rule 3212(a) of HISA's Anti-Doping and Medication Control Program ("**ADMC Program**") for the presence of Metformin, a Banned Substance, in his Covered Horse, and imposed reasonable Sanctions on that basis. On February 14, 2024, Appellant appealed that decision, challenging those Sanctions and requesting a stay thereof. Appellant's request for a stay of Sanctions was denied on March 1, 2024. On April 22, 2024, Chief Administrative Law Judge D. Michael Chappell (the "**ALJ**") issued a decision affirming the imposition of the Sanctions and Appellant's liability under the ADMC Program (the "**ALJ's Decision**"). On May 22, 2024, Appellant filed a Notice of Appeal and application for Review. HISA submits this Response to Appellant's submission.

None of the alleged errors raised by Appellant warrant review, and none go to the heart of the legal bases establishing Appellant's liability, as found in the Arbitrator's Decision and affirmed by the ALJ's decision. The ADMC Program was accurately applied by the ALJ, and his Decision reaches the only conclusion supportable under the relevant ADMC Program Rules. Appellant's issues with immaterial provisions and the specific wording of the ALJ's Decision do not constitute substantive error or grounds for review by the Commission.

II. APPELLANT HAS NOT MET THE REQUIRED STANDARD FOR REVIEW

Appellant's application for review does not include any claim that there was any prejudicial error in the conduct of the proceedings before the ALJ, as he only challenges the legal conclusions and allegedly erroneous law and policy issues contained in the ALJ's Decision. His arguments

disputing those conclusions, properly assessed, do not rise to the level of the requirements for review set forth in 16 CFR 1.147(b)(4)(ii)(B).

First, the ALJ accurately set out and applied ADMC Rule 3122(c), pursuant to which laboratories are “presumed to have conducted Sample analysis and custodial procedures in accordance with the Laboratory Standards.” It is clear from the Decision that HISA’s obligation under Rule 7250 was met, and that the Decision as a whole is concerned with determining the admissibility, relevance, and materiality of evidence per Rule 7260(d). That the more specific provision regarding evidentiary weight and application was cited, rather than general evidentiary obligations under the ADMC Program (and the Federal Rules of Evidence), does not constitute a legal error, nor are the provisions mutually exclusive or functionally inconsistent. Appellant’s focus on peripherally relevant Rules obscures the fact that his primary arguments were ultimately decided under Rule 3122(c), the fulsome application of which by the ALJ Appellant has no grounds to dispute.

Second, the ALJ’s Decision at footnote 7 rightly notes that “because ADMC Rule 3122(c)-(d) allows Appellant an opportunity to present a defense through the establishment of departures that reasonably could have caused the AAF, adequate due process has been afforded to Appellant,” thereby addressing the crux of Appellant’s due process argument. There was no cogent evidence before the ALJ that HISA did not comply with its own rules, notwithstanding Appellant’s continued attempt to ignore the application of Rules 3122(c)-(d). Appellant commits the same error of logic as with his first argument, assuming that the failure to use specific wording means that the principle was not considered. It is apparent that the ALJ’s Decision did consider the impact of Appellant’s evidentiary arguments on due process, and found these arguments lacking.

The cases cited for this point by Appellant are not applicable in that they are not decided under the ADMC Program or the analogous international anti-doping regime (and all involve egregious departures from statutes that highlight the frailty of Appellant's argument). In any event, an alleged due process violation was not a proper ground for review before the ALJ, and nothing in the record suggests that Appellant was not provided with the requisite level of due process.

Third, while Appellant resisted Further Analysis, he did not specifically object to the Kenneth L. Maddy Equine Analytical Chemistry Lab (the "**Davis Lab**") performing the Further Analysis, as correctly noted by the ALJ. Appellant also presented no explanation as to why, having raised myriad issues regarding the testing conducted by the first two laboratories, he would not have welcomed Further Analysis.

Appellant's argument that no Further Analysis is permissible, full stop, is self-evidently untenable. ADMC Rule 3138(b) permits the assistance of Further Analysis in order to confirm that a Banned Substance has been properly detected. Moreover, Appellant fails to address (and failed to address before the ALJ) Rule 6313(b)(2), which allows HISA to choose which Laboratory will conduct the Further Analysis. As found by the ALJ, the Davis Lab's analysis was irrelevant to the finding on liability in any case, as the A and B Sample analyses were valid. HISA would therefore have "carr[ied] it's burden under ... Rule 3212(a)" in the absence of the Davis Lab's results. Appellant's final point on this issue, regarding the ALJ's permitting Appellant to adduce Supplemental Evidence speaking to proposed changes to the definition of Further Analysis, is irrelevant. The Davis Lab's analysis was proper under both the existing and proposed definitions. Appellant cannot be permitted to simultaneously complain that he was not afforded due process and seek to impugn the ALJ for permitting him maximal opportunity to present his case on appeal.

Fourth, the ALJ's decision directly addresses Appellant's purported issue, holding that a testifying scientist may also conduct the review required under Rule 6315(b). Appellant's argument was not misinterpreted, it was simply rejected. This was not a legal error and did not have any bearing on the finding of liability.

Appellant's attempt to quibble with the wording of the ALJ's decision does not sufficiently allege legal error, misapplication of ADMC Program Rules, or a reviewable exercise of discretion, and does not give any reason to challenge the bases for the finding of Appellant's liability.

As Appellant's application fails to meet the standard for review by the Commission set forth in 16 CFR 1.147(b)(4)(ii), Appellant's application for review should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd day of June, 2024.

/s/Bryan H. Beauman

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