PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
Office of Administrative Law Judges

Docket No. 09434

In the matter of

JIM IREE LEWIS,

Appellant

v.

HORSERACING INTEGRITY WELFARE UNIT

Appellee.

EAD 2023-32

SUMMARY AND RELIEF REQUESTED

From the beginning, I have been denied the opportunity to prove my innocence. A hair sample would have shown when the clenbuterol was administered and almost certainly would have shown that it was prior to my involvement with the Covered Horse, Hughie's Holiday. I acknowledge that there are things I could have done to ensure that the horse was clean prior to my running him, and for my failure to do those things, I accept all of the awards issued by the arbitrator with the exception of the $15,000 fine and $5,000 arbitration costs. A $20,000 fine against a low income, hobbyist trainer with a pristine record after a process that denied me the opportunity to prove my innocence at every turn, is categorically unfair.

Accordingly, I ask that the fine awarded by the arbitrator be significantly reduced if not eliminated. Separately, I also ask that I not be required to share in the cost of the arbitration, as it seems counter intuitive that I would qualify for a free attorney through HISA due to my low

income status, but then be asked to pay $5,000 for the arbitration, which was the only way for me to present my case.

BACKGROUND

I have been involved in the horseracing industry for over forty years and am proud of my record of having never used an illegal drug on any of my horses. *See* Final Decision ⁋2.10-2.12. When I was asked to take on the training of Hughie's Holiday, I knew that the horse was coming from a track not covered by Horseracing Integrity and Safety Authority (HISA) regulations and that the previous owner's reputation for using controlled substances was less than stellar. *See* Final Decision ⁋8.16. I asked if the Horse has been given anything that I should be concerned about, but the prior owner refused to give me a straightforward answer. *Id.*

HISA was relatively new in New Mexico at the time, and there was an informational meeting at the racetrack on how it would be implemented. *See* Final Decision ⁋2.16. At that meeting, the presenters specifically discussed the fact that trainers should wait at least twenty-one days after therapeutic treatment before racing a horse. *See* Final Decision ⁋2.16. Having recently taken over the training of Hughie's Holiday and, suspecting that she may have been being treated with clenbuterol by her prior owners, I waited about fifty days before entering her in a race, believing that would be more than enough time for any clenbuterol to be out of her system. *See* Final Decision ⁋8.3.

Hughie's Holiday won that race and was thus subject to testing. *See* Final Decision ⁋2.18. The test results administered by the track came back negative, and the winnings were subsequently released to me and Hughie's Holiday's owner. *See* Final Decision ⁋2.22. After that every horse in my barn was "randomly" tested. *Id.* Not a single horse tested positive for any controlled substance. *See* Final Decision ⁋8.8. Additionally, my barn, horse trailer, vehicles, and

my brother were all thoroughly searched. Lewis Affidavit ⁋16. No problematic substance of any kind, including clenbuterol, was found. *See* Final Decision ⁋8.8. That is when I was informed that Hughie's Holiday's blood sample—but not urine sample—had come back positive when tested by HISA. *See* Final Decision ⁋2.30.

When I was informed that the blood sample had come back positive for clenbuterol, I thought there must have been a mistake. Lewis Affidavit ⁋14. I had waited nearly twice the period the HISA officials told me I needed to before running her. *See* Final Decision ⁋2.16-17. As such, I asked that the DNA of the sample be confirmed. Lewis Affidavit ⁋14. That request was denied, and I was told my only option was to have the B sample tested. *Id*. So, I asked for the B Sample to be tested. *See* Final Decision ⁋8.6. When that also came back positive, I asked several veterinarians and fellow trainers if it would have been possible for clenbuterol to last more than fifty days. Everyone I talked to said that during the pandemic, due to shortages of certain ingredients, several synthetic forms of clenbuterol had been developed and that these forms were proving to last significantly longer in horse's blood. One HISA investigator even told me that he thought the synthetic forms could be found in a blood sample several months after administration, and that he had seen examples of it lasting almost a year. This is seemingly common knowledge, as clenbuterol has only recently become a zero-tolerance drug, and its use prior to the pandemic was common. *See* Final Decision ⁋8.17 ("it is *now* a zero tolerance drug") (emphasis added). Because of this, it did not occur to me that this was something I would need to establish at my hearing, and I was surprised when HISA's expert testified to the contrary.

I also learned of a case where a trainer had been exonerated during a HISA investigation by obtaining a hair sample because the hair sample can be used to determine an approximation of when the clenbuterol was administered, and in that case it had been administered prior to

implementation of the rule banning clenbuterol *several months* prior to the blood sample having been drawn. As such, I asked for a hair sample to be taken and was confident that it would exonerate me. *See* Lewis Affidavit ⁋14. But my request for a hair sample was denied. *See* Final Decision ⁋2.21.

I asked for a hearing to be able to explain all of this and try to demonstrate my innocence. Throughout the process, HISA investigators affirmed that they believed me that I was not responsible for the clenbuterol in Hughie's Holiday's system. I am also low income and thus qualified for a pro bono attorney which HISA coordinated for me. *See* Final Decision ⁋8.15. At the hearing with the arbitrator, HISA had an expert, Dr. Kynch, testify that it was very unlikely that the clenbuterol found in Hughie's Holiday's blood samples could have resulted from the horse being administered clenbuterol before she came into my possession. *See* Final Decision ⁋8.18. During Dr. Kynch's testimony I noticed that all of the studies she had been part of and cited to were from before 2020. *See* Exhibit B to Dr. Kynch's Report ⁋ (primary article relied on by Dr. Kynch, and only scientific work cited in her report which was published 2013[1]); *see also* Dr. Kynch's CV at 8-26 (Appeal Book at 323-341) (while an impressive list of published work and research, providing nothing related to clenbuterol after 2015). I texted my attorney to tell her to ask if Dr. Kynch was familiar with any of the new synthetic compounds of clenbuterol, but we were on Zoom and my attorney never asked. The arbitrator dismissed the possibility that the clenbuterol is Hughie's Holiday's blood sample could have been from before I took over as her trainer, seemingly based entirely on this testimony.

[1] In her report, Dr. Kynch states that this article was published in 2014. I believe this was a mistake as the pages of the journal she provided clearly indicate that it was a 2013 edition of the journal. But even if the article was published in 2014, it could not have considered the impact of synthetic clenbuterol which became prevalent during supply shortages during the COVID-19 pandemic.

As a result, despite my indigent status, I am responsible for paying $5,000 for the arbitration costs and a fine of $15,000 along with the disqualification of Hughie's Holiday's victory, forfeiture of the purse, and a two-year suspension as a Covered Person. And while HISA has stated that the $20,000 is not due until the end of my suspension, they have been sending me threatening text messages seemingly every few days warning me that the due date to pay the fine was coming and are now sending messages that the fine's due date is passed.

ARGUMENT

I seek only to appeal the financial aspect of the decision. I understand that Hughie's Holiday tested positive for clenbuterol, and that clenbuterol recently became a zero-tolerance drug. As such, I am not contesting any of the awards made by the arbitrator other than the financial ones. I understand that I could have had Hughie's Holiday tested myself, though it would have been at considerable expense, to make sure there was nothing in her system prior to entering her in a race. I concede that mine not having done so warrants the disqualification of the victory, forfeiture of the purse, a fourteen-month suspension for Hughie's Holiday, and a two-year suspension for myself. However, I believe that under the circumstances, I have presented sufficient evidence to prove that I was more than likely not the source of the clenbuterol in Hughie Holiday's system. In contrast to the period of ineligibility, which has both a maximum *and minimum* period (ADMC Program Rule 3225 provides that even if the Covered Person establishes that they bore No Significant Fault or Negligence for the ADMC rule violation, the period of ineligibility shall still be at least 3 months) the financial penalties of ADMC Program Rule 3223 do not have a minimum. ADMC Program Rule 3223 ("Fine **up to** $25,000") (emphasis added). When combined with the financial hardship that a $20,000 fine

would pose on me, I believe that the fine is contrary to the spirit of HISA and should be significantly reduced if not eliminated.

HISA insists that the fine is proper because I have not proven that I was not responsible. Throughout this process, I have been denied the opportunity to any form of investigation that would prove my innocence. I asked for the DNA of the blood sample to be confirmed. That request was denied. I asked for a hair sample to be taken. That request was denied. HISA had an expert testify that the clenbuterol could not have been administered prior to my involvement, but HISA's own investigators have admitted that that is no longer true. But none of them will testify on my behalf and I didn't have the opportunity to make them. Trainers throughout the industry know that synthetic clenbuterol can last months, but none of them wanted to get involved for fear of bringing HISA's attention to their own barns. Additionally, I cannot afford an attorney to help me through this process. I could not afford to hire my own expert at trial. I struggled at every step to figure out how to even file this appeal or write this brief, but apparently it is the only chance I will get to prevent financial ruin.

Additionally, the Arbitrator did not provide any reasoning as to the amount of the financial penalties and share of the arbitration costs awarded. The Rule provides that the financial penalties may be "up to $25,000 . . . and payment of some or all of the adjudication costs . . . ." ADMC Program Rule 3223(b). The Arbitrator seemingly arbitrarily chose a value of $15,000 for the penalty and $5,000 for the arbitration costs, providing no explanation as to his choice of either value. As such the awards should be considered arbitrary and capricious.

Notwithstanding the above, it was brought to my attention after I filed for the appeal, that the Fifth Circuit Court of Appeals on July 5, 2024, found that "HISA's enforcement provisions are facially unconstitutional" on the ground that its "enforcement provisions violate

the private nondelegation doctrine." *National Horsemen's Benevolent and Protective Association v. Jerry Black*, No 23-10520, slip op. at 3 (5th Cir. Jul. 5, 2024). Additionally, considering the Supreme Court's decision in *SEC v. Jarkesy*, No. 22-859 (U.S. June 27, 2024), it may also be unconstitutional in that a private entity is permitted to initiate an enforcement action fining me $20,000 without the right to a jury trial.

CONCLUSION

From the beginning, I have been denied the opportunity to prove my innocence. A hair sample would have shown when the clenbuterol was administered and almost certainly would have shown that it was prior to my involvement with the horse. I acknowledge that there are things I could have done to ensure that the horse was clean prior to my running her, and for my failure to do those things, I accept all of the awards issued by the arbitrator with the exception of the financial penalties. I cannot accept a $20,000 fine for something I know I didn't do, for something that I believe the evidence demonstrates I did not do. A $20,000 fine against a low-income, small-time trainer with a pristine record after a process that denied me the opportunity to prove my innocence at every turn, is categorically unfair.

Accordingly, I ask that the fine awarded by the arbitrator be significantly reduced if not eliminated. Separately, I also ask that I not be required to share in the cost of the arbitration, as it seems counter intuitive that I would qualify for a free attorney through HISA due to my low-income status, but then be asked to pay $5,000 for the arbitration, which was the only way for me to present my case.

Respectfully submitted,

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s/ Jim Lewis
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CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b). a copy of the forgoing is being served this 5th day of August, 2024 via Administrative E-File System and by electronic mail upon the following:

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