PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
FTC DOCKET NO. 9434

CHIEF ADMINISTRATIVE LAW JUDGE: DANIA L. AYOUBI

IN THE MATTER OF:

JIM IREE LEWIS **APPELLANT**

THE AUTHORITY'S PROPOSED FINDING OF FACTS,

CONCLUSIONS OF LAW AND ORDER

Comes now the Horseracing Integrity and Safety Authority, Inc. (the "**Authority**") pursuant to the briefing schedule of the Administrative Law Judge, dated July 19, 2024, and submits the following Proposed Findings of Fact, Conclusions of Law, and Order.

CERTIFICATE OF SERVICE

Pursuant to 16 CFR 1.146(a) and 16 CFR 4.4(b), a copy of this Proposed Findings of Fact, Conclusions of Law, and Order is being served on August 7, 2024, via Administrative E-File System and by emailing a copy to:

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PROPOSED FINDINGS OF FACT

1. Jim Iree Lewis ("**Appellant**") is a Covered Person under the Authority's Anti-Doping and Medication Control ("**ADMC**") Program, and, on July 8, 2023, he was the Responsible Person for the Covered Horse Hughie's Holiday.
2. On that date, after Race 7 at Ruidoso Downs in Ruidoso, New Mexico, Hughie's Holiday was subject to Sample collection. A blood Sample was collected, designated as #B100284546. Analytical testing on the blood Sample was conducted by Industrial Laboratories in Denver, Colorado, which resulted in a reported Adverse Analytical Finding ("**AAF**") for Clenbuterol, a Banned Substance.
3. On August 10, 2023, Appellant was notified that Hughie's Holiday's A Sample had returned an AAF for Clenbuterol in blood.
4. On August 11, 2023, the Owner of Hughie's Holiday requested B Sample analysis for the Sample at issue. Hughie's Holiday's B Sample was sent for analysis at Pennsylvania Equine Testing and Research Laboratory ("**PETRL**").
5. On September 18, 2023, PETRL notified HIWU of the results of the B Sample analysis, confirming the Presence of Clenbuterol.
6. On September 22, 2023, Appellant was charged for violating ADMC Program Rule 3212 for the Presence of Clenbuterol in Hughie's Holiday's Post-Race Sample. Appellant was Provisionally Suspended at that time.
7. On April 18, 2024, during the hearing before Arbitrator Hugh Hackney (the "**Arbitrator**"), Appellant did not challenge the finding that Clenbuterol was in the Covered Horse's Sample or put forth any evidence as how the Clenbuterol entered the Covered Horse's system. Appellant also did not (i) put forth expert testimony on his behalf, (ii) raise the issue of synthetic versions of Clenbuterol, or (iii) provide legitimate evidence to challenge HIWU's decision not to collect and analyze a subsequent hair Sample from the Covered Horse.

8. An AAF for Clenbuterol in a blood Sample is substantial proof that Clenbuterol was administered within the eight days prior to the Sample being drawn. Analysis of a hair Sample, at best, would narrow administration time to a three- to five-week period.
9. On June 11, 2024, the Arbitrator issued a decision (the "Final Decision") imposing Consequences, including a two-year period of Ineligibility, a fine of $15,000, and payment of $5,000 in adjudication costs.

PROPOSED CONCLUSIONS OF LAW

1. The Arbitrator, in the Final Decision, considered all relevant facts and circumstances in the imposition of the Consequences, including the financial penalties, in accordance with ADMC Program Rules 3223(b) and 7420(b).
2. Appellant was in violation of ADMC Program Rule 3212 because his Covered Horse Hughie's Holiday had Clenbuterol, a Banned Substance, in his Post-Race Sample #B100284546, collected on July 8, 2023.
3. Determination of a fine under ADMC Program Rule 3223(b) for a violation of Rule 3212, is at the discretion of the Arbitrator, based upon the evidence presented, and should be primarily based on the Responsible Person's degree of Fault.
4. The Arbitrator clearly weighed all relevant evidence and circumstances in making the determination that Appellant presented no evidence to support any of his speculations related to the source of Clenbuterol found in Hughie's Holiday's Post-Race Sample.
5. Appellant's speculations provide no evidence to support a finding other than Appellant was fully at Fault for the violation of ADMC Program Rule 3212. As such, the Arbitrator would have been justified in imposing the maximum fine of $25,000.
6. The Arbitrator properly exercised discretion and took other circumstances into account to ultimately conclude that the maximum fine of $25,000 should not be imposed, reducing the fine amount to $15,000 fine.

7. Given the fact that Appellant could have been responsible for half of the adjudication costs of the proceeding below under Rule 7420(b), the Arbitrator's imposition of the payment of $5,000 is clearly supported by the evidence and was a significant reduction in the amount that Appellant could have been required to pay.
8. The financial penalties imposed were not arbitrary or capricious, an abuse of discretion, an error in judgment, or otherwise not in accordance with law.
9. The Arbitrator properly gave no consideration to Appellant's assertions that HIWU prevented Appellant from "obtaining evidence to the contrary" of the blood Sample results by denying Appellant the collection and analysis of a hair Sample.
10. The Arbitrator properly determined that another ADMC Program matter relating to a Clenbuterol AAF from a hair Sample would have not affected the finding with respect to Appellant's degree of Fault.
11. Evidence with respect to synthetic Clenbuterol would have not affected the finding with respect to Appellant's degree of Fault.

PROPOSED ORDER

The undersigned Administrative Law Judge ("ALJ"), having reviewed the parties' submitted proposed findings of fact and conclusions of law, supporting legal briefs and reply to conclusions of law and briefs, hereby makes the following findings of fact and conclusions of law.

Introduction

On July 8, 2024, Appellant Jim Iree Lewis ("Appellant"), pursuant to 15 U.S.C. § 3051 *et seq.*, and 5 U.S.C. § 556 *et seq.*, filed an Application for Review of a June 11, 2024, decision of an Arbitrator, as corrected, (the "Final Decision"). The Final Decision determined that Appellant violated Rule 3212 of the ADMC Program due to the Presence of the Banned Substance Clenbuterol in his Covered Horse, Hughie's Holiday, and imposed civil sanctions, including, a two-year period of Ineligibility, a $15,000 fine, and a $5,000 payment of adjudication costs in accordance with ADMC

Program Rules 3223(b) and 7420(b).

In his Application for Review, Appellant requested an evidentiary hearing to supplement the record with further evidence. Appellant requested the review pursuant to 15 U.S.C. § 3051 to reduce the financial penalties imposed against him, thereby implicitly asserting that the Arbitrator's imposition of the fine was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. On July 19, 2024, Appellant's request for an evidentiary hearing was denied, and it was ordered that this appeal would be limited to briefing by the parties. Under 15 U.S.C. § 3051(b)(2), a civil sanction is reviewed *de novo*, however, review is limited to whether the imposition of the civil sanction was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law.

In this matter, Appellant only challenges the financial penalties imposed against him. Therefore, this review is limited to the existing record and whether imposition of those penalties by the Arbitrator was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The Authority's Rule on Sanctions and Consequences

The Final Decision below concerned an Anti-Doping Rule Violation ("ADRV") pursuant to Anti-Doping and Medication Control ("ADMC") Program Rule 3212. Rule 3212 holds a Responsible Person "strictly liable for any Banned Substance or its Metabolites or Markers found to be present in a Sample collected from his or her Covered Horse." Further, Rule 3212(b)(2) prescribes that sufficient evidence of an ADRV is established when, as occurred here, the B Sample from the collection is analyzed by a second laboratory which confirms the Presence of the Banned Substance detected by the initial laboratory in the A Sample. Appellant, therefore, violated Rule 3212; this is not in dispute.

Appellant is challenging the financial penalties imposed against him for the ADRV. These sanctions include a fine of "up to $25,000." This is in contrast to the mandated period of Ineligibility to be imposed of "2 years." However, if the Responsible Person is able to establish No Significant Fault or Negligence with respect to the ADRV, they may be entitled to a reduction of this mandatory

"starting point" of a two-year period of Ineligibility. As relevant to periods of Ineligibility, once a Responsible Person can prove the source of the Banned Substance, the Rules permit the Arbitrator to use their discretion to impose a period of Ineligibility between three months and two years, based on the degree of Fault. This "degree of Fault" is a determination made by the Arbitrator based upon factors provided in the Rules. Yet, even if the Responsible Person can prove the source of the Banned Substance, the Arbitrator has discretion as to whether or not to reduce the sanction and to what extent.

Rule 3223(b)'s language imposing a fine of "up to" $25,000, and the absence of any other Rule that permits an Arbitrator to lower the fine assessed makes the fine imposed discretionary in the same way that the period of Ineligibility is once the Responsible Person can establish source. Therefore, it is logical that the fine should also be tied to the Responsible Person's degree of Fault. It is also logical that the "starting point" for determination is the maximum fine allowed by the Rule. A proven violation of Rule 3212 without more presumes imposition of the full fine.

Fault is defined as "any breach of duty or lack of care appropriate to a particular situation." A Responsible Person's degree of Fault may be reduced – which may result in a lower fine being assessed – by demonstrating factors such as his "experience and special considerations such as impairment, the degree of risk that should have been perceived by [him], and the level of care and investigation exercised by [him] in relation to what should have been the perceived level of risk." However, an Arbitrator is not limited to considering evidence with regard to a Responsible Person's degree of Fault. As a fine is discretionary, the Arbitrator may take other facts and circumstances into account.

Under Rule 7420(b), the Arbitral Body "shall split the costs of the proceeding before an arbitrator . . . equally amongst the parties." As a result, the Arbitrator's imposition of the payment of $5,000 is a significant reduction in the amount that Appellant could have been required to pay.

The Final Decision

The Arbitrator found that Appellant violated ADMC Program Rule 3212 because Hughie's Holiday's A blood Sample was positive for Clenbuterol and the B Sample was analyzed and confirmed

the finding of Clenbuterol in the A Sample.[1] The Arbitrator properly found that the Appellant's asserted theories to explain this violation were mere speculation and provided no evidence of the actual source of Clenbuterol.[2]

The Arbitrator heard and considered evidence related to Appellant's theory that a contaminated water bucket in the test barn at the time the blood Samples were taken from Hughie's Holiday could have been the source of Clenbuterol. The evidence that was presented by HIWU suggests that it is highly unlikely that the water bucket could have been, let alone was, the source of Clenbuterol.[3] Appellant provided no evidence, other than his statements, that support this theory that would warrant a reduction in his degree of Fault.

The Arbitrator heard and considered evidence related to Appellant's theory that HIWU prevented him from obtaining evidence to counter HIWU's assertion that he violated Rule 3212. Specifically, Appellant asserted that HIWU refused him the collection and analysis of a hair Sample which would prove that the administration of Clenbuterol occurred more than 48 days prior to when the Sample was drawn. To support his position, Appellant only provided an article from an industry publication detailing the events of another trainer who was permitted a hair test and ultimately not charged with an ADRV due to the results.[4]

HIWU's evidence in regarding the time frame which Hughie's Holiday was administered the Clenbuterol found in the blood Sample is overwhelming. HIWU's expert witness, Dr. Heather Knych, has vast experience in the relevant areas of expertise,[5] and co-authored the most recent Clenbuterol study that specifically addressed how long Clenbuterol remains detectable in a blood Sample after administration.[6] Her study supported her expert opinion that the concentration of Clenbuterol detected

[1] *See* Final Decision, at paras. 8.3 – 8.5, HAB Tab 22, p. 955
[2] Final Decision, at para. 8.16, HAB Tab 22, p. 957; Final Decision, at para. 8.22, HAB Tab 22, p. 958.
[3] Audio Recording 1 of April 18, 2024 JAMS Hearing, HAB Tab 20, at 0:53:42.
[4] "HIWU Drops Clenbuterol Case Against Jeffrey Englehart After Hair Test", *Paulick Report*, February 23, 2024, HAB Tab 18, p. 905 – 912.
[5] Knych quals, HAB Tab XX, p. X.
[6] Knych quals, HAB Tab XX, p. X.; *See Detection, pharmacokinetics and cardiac effects following administration of clenbuterol to exercised horses*, Equine Medical Journal, *Knych, Mitchell, Steinmetz and McKemie*, June 6, 2013 (showing that Clenbuterol is typically not detectable in the blood 7 days after administration), HAB Tab XX, p. xx.

in Hughie's Holiday's blood Sample was consistent with an administration of Clenbuterol within eight days of the Sample being drawn. It was highly unlikely that the Clenbuterol detected in Hughie's Holiday's Sample, drawn on July 8, 2023, would have been administered before May 22, 2023.[7]

The Arbitrator found Dr. Kynch to be extremely well-qualified and found her testimony to be the most compelling evidence that a pre-implementation administration of Clenbuterol was not possible.[8] Also, given Dr. Kynch's testimony and the other evidence submitted by HIWU, the Arbitrator correctly found that HIWU's denial of Appellant's request for hair sampling of the Covered Horse, under the circumstances of this case, was proper, as it was unnecessary and would not provide evidence relevant and material to the case.[9] Because no useful information could have come from a hair Sample, HIWU's denial did not affect Appellant's ability to defend himself and does not in any way lessen his degree of Fault. In addition, Appellant failed to put forth any evidence relating to synthetic Clenbuterol below and any such evidence would not have been relevant or material here, since there is no evidence the Covered Horse was administered one of these substances.

Because Appellant offered no evidence to support his claims, he likewise did not offer any evidence to be considered in lowering his degree of Fault. The Arbitrator would have been fully within his discretion to impose the maximum $25,000 fine for his ADRV, yet he did not do so. Instead, the Arbitrator exercised his discretion and imposed a $15,000 fine.[10] The Arbitrator heard and considered evidence from Appellant related to Appellant's past, present, and future financial circumstances,[11] as well as Appellant's good racing history.[12] The Arbitrator imposed the fine "based on all of the facts presented"[13] and properly imposed a $15,000 fine. In addition, while the Arbitrator could have required Appellant to pay half of the adjudication costs under Rule 7420(d), he ordered Appellant to pay a

[7] Final Decision, at para. 8.21, HAB Tab 22, p. 957.
[8] Final Decision, at para. 8.21, HAB Tab 22, p. 957.
[9] *See* ADMC Program Rule 6313(e) ("Alternative biological matrices. Any negative Analytical Testing results obtained from hair, hoof, saliva or other biological materials shall not be used to counter Adverse Analytical Findings or Atypical Findings from urine, blood (including whole blood, plasm or serum), or hair).
[10] Final Decision, at Award para. 4, HAB Tab 22, p. 958.
[11] Final Decision, at para. 8.15, HAB Tab 22, p. 956.
[12] Final Decision, at para. 8.16, HAB Tab 22, P. 956 - 957.
[13] Final Decision, at Award para. 4, HAB Tab 22, p. 958.

nominal amount of $5,000 based upon the facts presented below.

The Arbitrator's imposition of the $15,000 fine and $5,000 in adjudication costs was in accordance with the applicable Rules and was rationally connected to the evidence.

The Standard of Appeal on Review

Pursuant to 15 U.S.C. § 3058(b)(1), whether Appellant violated ADMC Program Rule 3212 is subject to *de novo* review in this matter is limited to the factual record below. Pursuant to 15 U.S.C. § 3058(b)(3), a civil sanction is subject to *de novo* review by an Administrative Law Judge; however, the review at hand is limited to a determination of whether "the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Generally, a decision or sanction will not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law where (i) the decision abides by the applicable rules, and (ii) the sanction is rationally connected to the facts.[14]

Conclusions of Law

1. The Arbitrator, in the Final Decision, considered all relevant facts and circumstances in the imposition of the Consequences, including the financial penalties, in accordance with ADMC Program Rules 3223(b) and 7420(b).
2. Appellant was in violation of ADMC Program Rule 3212 because his Covered Horse Hughie's Holiday had Clenbuterol, a Banned Substance, in his Post-Race Sample #B100284546, collected on July 8, 2023.
3. Determination of a fine under ADMC Program Rule 3223(b) for a violation of Rule 3212, is at the discretion of the Arbitrator, based upon the evidence presented, and should be primarily based on the Responsible Person's degree of Fault.
4. The Arbitrator clearly weighed all relevant evidence and circumstances in making the

[14] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

determination that Appellant presented no evidence to support any of his speculations related to the source of Clenbuterol found in Hughie's Holiday's Post-Race Sample.

5. Appellant's speculations provide no evidence to support a finding other than Appellant was fully at Fault for the violation of ADMC Program Rule 3212. As such, the Arbitrator would have been justified in imposing the maximum fine of $25,000.
6. The Arbitrator properly exercised discretion and took other circumstances into account to ultimately conclude that the maximum fine of $25,000 should not be imposed, reducing the fine amount to $15,000 fine.
7. Given the fact that Appellant could have been responsible for half of the adjudication costs of the proceeding below under Rule 7420(b), the Arbitrator's imposition of the payment of $5,000 is clearly supported by the evidence and was a significant reduction in the amount that Appellant could have been required to pay.
8. The financial penalties imposed were not arbitrary or capricious, an abuse of discretion, an error in judgment, or otherwise not in accordance with law.
9. The Arbitrator properly gave no consideration to Appellant's assertions that HIWU prevented Appellant from "obtaining evidence to the contrary" of the blood Sample results by denying Appellant the collection and analysis of a hair Sample.
10. The Arbitrator properly determined that another ADMC Program matter relating to a Clenbuterol AAF from a hair Sample would have not affected the finding with respect to Appellant's degree of Fault.
11. Evidence with respect to synthetic Clenbuterol would have not affected the finding with respect to Appellant's degree of Fault.

Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED AND ADJUDGED** as follows:

The Commission hereby **AFFIRMS** the Final Decision and **UPHOLDS** the financial penalties imposed in the Final Decision, dated June 11, 2024.

Entered this _____ day of _____, 2024

_____
Dania L. Ayoubi
Administrative Law Judge