PUBLIC

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

ADMINISTRATIVE LAW JUDGE: DANIAL. AYOUBI

IN THE MATTER OF:

JIM IREE LEWIS **APPELLANT**

APPELLANT'S REPLY BRIEF

INTRODUCTION

The Authority is attempting to pull the wool over your eyes. They ignore two of the statutory prongs of review in order to artificially narrow a de novo review into an arbitrary and capricious review. They say repeatedly that the starting point for a civil penalty is the maximum fine and that the fine can then be reduced according to the degree of fault of the covered person, but then assume, without basis, that the Arbitrator below reduced my civil penalty for reasons not related to fault. They dance around the subject of their expert's testimony, never outright contradicting the fact that it is incomplete and outdated, but rather suggesting that it doesn't matter that it's incomplete and outdated because in order for it to matter that it is incomplete and outdated, I would have had to prove something that I do not have the means to prove. They also conveniently ignore the fact that their own training and the ADMC Program Rules themselves contradict their expert's testimony. They explain the science and methodology behind a hair sample and how it could conclusively show that clenbuterol was in Hughie's Holiday's system prior to coming into my care, but then brazenly assert that it would prove no such thing because the rules say it wouldn't.

The evidence supports a finding that I bore no *significant* fault for the clenbuterol in Hughie's Holiday's system. Could I have done more to ensure she didn't run with it in her system? I

have to admit that the answer is yes, but given the information provided to me *by HISA* and other evidence presented in this case, the financial aspects of my penalty should be further reduced.

REPLY

I. The Authority attempts to arbitrarily narrow the standard of review.

The Authority attempts to limit the scope of review by corralling it into one of the three aspects of the statutory authority to review decisions made by the Authority. The statute governing review of civil sanctions imposed by the Authority provides that such sanctions are "subject to de novo review by an administrative law judge." 15 U.S.C §3058(b)(1). The statute goes on to provide three questions the administrative law judge may consider: (1) whether the appellant did what they are accused of doing, (2) whether what they are accused of doing constitutes a violation of the law, or (3) whether "the final civil sanction of the Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 15 U.S.C §3058(b)(2)(A). The Authority glosses over the "de novo" review part and places great emphasis on the "arbitrary, capricious, an abuse of discretion" part. But, at the heart of whether the sanctions levied against me are indeed arbitrary or capricious, is the degree of fault I bear for the rule violation. The Authority has stated as much in their supporting brief. *See* Authority's Supporting Brief at 5 ("Determination of the final amount is at the discretion of the Arbitrator and is generally connected to *the Covered Person's degree of Fault* for their ADVR") (emphasis added); Authority's Supporting Brief at 7 ("Fines are based on, but not limited to, *the degree of Fault* the Covered Person has with regard to the ADVR") (emphasis added); Authority's Supporting Brief at 8 ("Appellant's *degree of Fault* may be reduced—which may result in a lower fine being imposed . . . .") (emphasis added); Authority's Supporting Brief at 8 ("Appellant's request must first be evaluated with regard to whether he presented any evidence that would lessen his *degree of Fault*") (emphasis added). The degree of

fault I bear is a question considered de novo under a plain reading of the statute. Then, given my degree of fault, a decision as to whether the civil penalty levied against me is arbitrary and capricious should be made.

II. My degree of fault is the only rule-supported reason the Arbitrator would have reduced my civil penalty.

The default civil penalty for a a Covered Person's first Rule 3212 violation is a penalty of $25,000 and half of the arbitration costs. *See* ADMC Rule 3223. The Authority states as much both in their Supporting Brief and their Proposed Conclusions and Order. Authority's Supporting Brief at 7-8 ("The 'starting point' for determination of a fine for this violation should be the maximum fine under the Rule"); Authority's Proposed Conclusions and Order at 7 ("It is also logical that the 'starting point' for determination is the maximum fine allowed by the Rule"). They then claim that I presented no evidence to reduce my degree of fault and attribute the fact that the Arbitrator significantly reduced both the civil penalty and my share of the arbitration costs to "facts and circumstances unrelated to fault." Authority's Supporting Brief at 13 (suggesting that the Arbitrator based the reduction on considerations of my financial situation and history in horseracing). But that conclusion is supported by neither the Final Decision nor the ADMC program rules.

The Arbitrator did not explain the reason that he reduced my penalty other than to say it was "based on all of the facts presented." Final Decision Award #4. Nowhere in the rules does it state that the Arbitrator may reduce a penalty based on the financial position of the Covered Person or their history in horseracing. The ADMC program rules specifically provide reasons that a civil penalty may be reduced, degree of fault is one that the Authority has consistently conceded and is implied by the structure of the rules. The others are specifically listed in ADMC Program Rule 3226—Elimination, Reduction, or Suspension of Period of Ineligibility

or Other Consequences for Reasons Unrelated to Degree of Fault. None of the reasons the Authority attribute to the Arbitrator's decision appear in the rule which purports by its very name to provide the reasons, other than degree of fault, that a period of ineligibility *or other consequence* may be eliminated, reduced, or suspended. In fact, a reduction based on history would seem counterintuitive since the penalty in question is the penalty for *a first offense*. ADMC Rule 3223. Given that none of the permissible reasons for reducing the civil penalty other than degree of fault apply in my case, it seems more likely that the Arbitrator believed my testimony that I was not responsible for the presence of clenbuterol in Hughie's Holiday, but that the testimony of Dr. Knych convinced him that, at the very least, it had gotten there on my watch.

III. The Authority's own rules and training contradict their expert's testimony.

I attended a training session, put on by HISA, where I was told clenbuterol could last in a horse's system for periods of at least 21 days. *See* Final Decision 2.16. They explained at the training that even if prescribed by a veterinarian, a horse would need to wait 21 days and then provide a clean blood test before being allowed to run. *Id; see also* Appendix 1 to Rule Series 4000. They emphasized that it was possible, and the rules contemplate such a possibility, that a horse could still test positive *after* the 21-day period. *See* Appendix 1 to Rule Series 4000 (the following statement appears in the column labeled "**detection time**" for clenbuterol: "Treated horse Vet listed for minimum 21 days after last treatment. Official workout and Clearance Testing (blood and urine) required to re-establish eligibility to race"). Why would HISA require a clean test prior to the race, after a period of 21 days, if clenbuterol is so definitively gone within eight days of treatment? HISA's own training and program rules contradict their expert's testimony.

It is worth pointing out that, in addition to their own rules and training accounting for the possibility of clenbuterol being detected at longer periods, at no point in their brief does the Authority contradict that fact. Not once do they deny that synthetic clenbuterol can be detected well beyond seven days. They merely state that I would have had to prove that what was detected was synthetic clenbuterol and that I didn't do that, thus failing to meet my burden of proof. But how am I, a small-time trainer with limited resources, financial or otherwise, supposed to prove something like that?

IV. The Authority's Supporting Brief explains how a hair sample could have tended to prove that I was not at fault.

The Authority explained in detail how a hair sample can be used to estimate the period when a drug was administered: dividing the sample into one-inch segments corresponding to periods of three to five weeks. Hughie's Holiday had only been under my care for 48 days (seven weeks). As such, a hair sample three inches long (corresponding to a maximum period of fifteen weeks) would have shown conclusively whether clenbuterol had been in her system prior to coming under my control. The Authority's protestations to the contrary, such a finding would have at a minimum tended to support my assertion that she had been being treated with a synthetic form of clenbuterol by her prior owner (an owner with an established history of rule violations).

I have been racing horses for over forty years and have never had a single incident, doping or otherwise. Every horse in my barn was tested and my barn and vehicles were searched before I found out that there was even an accusation being made against me. At the time, as far as I knew, Hughie's Holiday's test results had come back negative because the winnings had been released. Not a single horse tested positive for any banned substance and nothing suggesting use of a banned substance was found in my barn or any of my vehicles. And

I knew that clenbuterol could show up on a test result for 21 days. The idea that I would risk my pristine record by administering clenbuterol in a period of less than seven days from a race is fantastical.

The Arbitrator seemingly understood and believed that I was not responsible. But Dr. Knych's testimony convinced him that at a minimum the clenbuterol had been administered on my watch. Accordingly, he reduced my penalty by nearly half, and my share of the costs seemingly by a great deal.[1]

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. 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.

The Arbitrator seemingly believed that I was not fully at fault, there being no other rule-based reason he would have reduced my penalty. But the lack of the hair sample and Dr. Knych's testimony convinced him that the controlled substance was nonetheless administered while the horse was under my care. I am certain that is not true. A hair sample, by the

[1] Until reading the Authority's Supporting Brief, I had been under the impression that the costs were $10,000 and that I was paying half of the costs. The idea that bringing a case to prove your innocence would cost anything, let alone an amount in excess of $10,000 is quintessentially unfair and frankly absurd.

Authority's own explanation, could have shown that the clenbuterol was in the horse's system before coming into my care. The Authority's own rules and training provided to horse trainers contradict Dr. Knych's testimony.

Accordingly, I ask that the fine awarded by the Arbitrator be further 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,

_____

Jim Iree Lewis (*Pro Se*)
116 Red Rock Canyon Rd
Patagonia, AZ 85624
(520) 604-0313
jimireelewis@gmail.com

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 16th day of August, 2024 via Administrative E-File System and by electronic mail upon the following:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Suite CC-5610 Washington. DC 20580
Via e-mail to oalj@ftc.gov

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
Via email: electronicfilings@ftc.gov

BRYAN BEAUMAN
REBECCA PRICE
333 W. Vine Street, Suite 1500
Lexington, Kentucky 40507
Telephone: (859) 255-8581
Via email to bbeauman@sturgillturner.com and
rprice@sturgillturner.com

Horseracing Integrity & Welfare Unit
4801 Main Street, Suite 350
Kansas City, Missouri 64112-274
Via email to mpujals@hiwu.org