Not Reported in S.W.3d, 2013 WL 1003534 (Ky.App.)
(Cite as: 2013 WL 1003534 (Ky.App.))

Court of Appeals of Kentucky.
Dr. Rodney STEWART, Appellant/Cross–Appellee
v.
KENTUCKY HORSE RACING COMMISSION, Appellee/Cross–Appellant.

Nos. 2010–CA–001929–MR, 2010–CA–001984–MR.
March 15, 2013.

Appeal and Cross–Appeal from Franklin Circuit Court, Action No. 09–CI–00861; Phillip J. Shepherd, Judge.
Michael D. Meuser, Michelle L. Hurley, Lexington, KY, Karen A. Murphy, Old Chatham, NY, Pro Hac Vice, for appellant/cross-appellee.

Robert M. Watt, III, Monica H. Braun, Lexington, Ky, for appellee/cross-appellant.

Before CAPERTON, STUMBO, and THOMPSON, Judges.

OPINION

CAPERTON, Judge.

***1** Dr. Rodney Stewart appeals a four-year suspension of his occupational license to practice veterinary medicine at racetracks under the jurisdiction of Appellee/Cross–Appellant, the Kentucky Horse Racing Commission (hereinafter "the Commission"), for possession of alpha-cobratoxin.

On appeal, Dr. Stewart challenges the constitutionality of the Commission's regulatory scheme, arguing that it is void for vagueness as applied. The Commission argues that Dr. Stewart's appeal should be dismissed due to failure to properly notify the Attorney General of a constitutional challenge. Upon review of the parties' arguments, the record, and the applicable law, we disagree with the Commission that Dr. Stewart's failure to notify the Attorney General of a constitutional challenge warrants dismissal of the appeal; ultimately we are in agreement with Dr. Stewart that the Commission's regulations are unconstitutionally vague as applied to him. Accordingly, we reverse and remand this matter for further proceedings.

The Commission also appeals from the circuit court's reversal of Dr. Stewart's one-year suspension for possession of Carbidopa–Levodopa. Dr. Stewart argues that the circuit court correctly reversed a consecutive one-year suspension on sufficiency of the evidence grounds. After our review of the parties' arguments, the record, and the applicable law, we agree with Dr. Stewart and affirm the cross-appeal.

The facts that give rise to this appeal stem from June 22, 2007, when the Commission's investigators conducted searches of three barns at Keeneland Association in Lexington, Kentucky, where trainer Patrick Biancone stabled thoroughbred racehorses. The search included Dr. Stewart's vehicle located at one of the barns. These searches produced three vials of alpha-cobratoxin and a bottle containing "Carbidopa and Levodopa " tablets. Dr. Stewart informed the investigators that the vials labeled alpha-cobratoxin contained cobra venom. The cobra venom was found in one of the barns and the bottle of Carbidopa and Levodopa was found in Dr. Stewart's vehicle. Dr. Stewart claimed that both the cobra venom and the Carbidopa and Levodopa belonged to him.

Following the search, Dr. Stewart was charged with nine violations of Commission regulations, including possession of cobra venom, Carbidopa and Levodopa at a location under the Commission's jurisdiction and which the Commission maintains are

prohibited substances.[FN1]

> FN1. The Commission's medical director testified that the administration of cobra venom to a horse could be exceedingly dangerous because of the venom's ability to eliminate the sensation of pain, causing the horse to overreach its physical limitations, which in turn causes a catastrophic breakdown of the horse and injury to the rider. Carbidopa and Levodopa, combined in one tablet, are medications used to treat humans for Parkinson's disease, with no known therapeutic use in horses.

A hearing regarding the charges was held before the Commission's Stewards on August 28, 2007. The Stewards' ruling, issued September 17, 2007, found Dr. Stewart to have violated the Commission's regulations in each instance. The Stewards suspended Dr. Stewart's license to practice veterinary medicine at Kentucky race tracks for four years for possession of cobra venom and one year for possession of Carbidopa and Levodopa, suspensions to run consecutively.

Dr. Stewart appealed the suspensions to the Commission. The Commission conducted a full evidentiary hearing before the hearing officer, who issued his findings of fact, conclusions of law, and recommended report on April 6, 2009, recommending that the Commission enter a final order affirming the Stewards' ruling of September 17, 2007. After Dr. Stewart filed his exceptions to the recommended order, the Commission entered its final order of May 12, 2009, adopting in full the recommended order.[FN2] Dr. Stewart appealed the Commission's final order to the Franklin Circuit Court.

> FN2. The Commission did correct a few citation references therein.

***2** The circuit court affirmed the Commission's final order with regard to the four-year suspension for possession of cobra venom and reversed in regard to the one-year suspension of possession of Carbidopa and Levodopa. It is from this opinion and order that the parties now appeal.

On appeal, Dr. Stewart presents two arguments, namely: (1) that he substantially complied with Kentucky Revised Statutes (KRS) 418.075(2) and Kentucky Rules of Civil Procedure (CR) 76.03(5), giving the Kentucky Attorney General actual notice of this appeal, that the Attorney General has not intervened and, therefore, the Commission's motion to dismiss should be denied; and (2) because 810 Kentucky Administrative Regulations (KAR) 1:018 § 20 [FN3] is irremediably in conflict with several of the Commission's other regulations, and that the statute and the attendant penalty provisions are void for vagueness and, therefore, unconstitutional as applied to Dr. Stewart.

> FN3. Dr. Stewart originally argues that Section 19 is unconstitutional. A review of the current regulation shows that Section 19 is inapplicable, *see infra,* whereas, Section 20 is applicable.
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> 810 KAR 1:018 Section 19 states:
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> Distribution of Purses, Barn Searches, and Retention of Samples. (1) Purse money shall be distributed seventy-two (72) hours after a race unless the commission laboratory has issued a preliminary or final report indicating the presence of a prohibited drug, medication, substance, or metabolic derivative in the biologic sample taken from a horse.
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> (2) The distribution of purse money prior to the issuance of a final laboratory report shall not be considered a finding that no prohibited drug, medication, substance, or metabolic derivative has been administered to a horse.
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> (3) After the commission laboratory issues a positive finding, the Executive Director of the commission or the stew-

ards shall immediately authorize and execute an investigation into the circumstances surrounding the incident that is the subject of the positive finding.

(4) At the conclusion of the investigation, a report shall be prepared and filed with the Executive Director and Chairman of the commission detailing the findings of the investigation.

(5) If the purse money has been distributed, the stewards shall order the money returned at the conclusion of an investigation finding that a prohibited drug, medication, substance, or metabolic derivative was administered to a horse eligible for purse money.

(6) At the conclusion of testing by the commission laboratory and split sample laboratory, the remaining portion of the samples at the commission laboratory and split samples remaining at the test barn may be retained at a proper temperature at a secure facility approved and chosen by the commission. If a report indicating a positive finding has been issued, the commission shall use its reasonable best efforts to retain any remaining portion of the sample until legal proceedings have concluded. The commission may freeze samples.

810 KAR 1:018 Section 20 states:

Section 20. Other Prohibited Practices.

(1) A drug, medication, or substance shall not be possessed or used by a licensee, or his designee or agent, to a horse within a nonpublic area at a location under the jurisdiction of the commission:

(a) The use of which may endanger the health and welfare of the horse; or

(b) The use of which may endanger the safety of the rider.

(2) Without the prior permission of the commission or its designee, a drug, medication, or substance that has never been approved by the U.S. Food and Drug Administration (USFDA) for use in humans or animals shall not be possessed or used at a location under the jurisdiction of the commission. The commission shall determine whether to grant prior permission after consultation with the Equine Research Drug Council.

(3) The following blood-doping agents shall not be possessed or used at a location under the jurisdiction of the commission:

(a) Erythropoietin;

(b) Darbepoietin;

(c) Oxyglobin;

(d) Hemopure; or

(e) Any substance that abnormally enhances the oxygenation of body tissue.

(4) A treatment, procedure, or therapy shall not be practiced, administered, or applied which may:

(a) Endanger the health or welfare of a horse; or

(b) Endanger the safety of a rider.

(5) Extracorporeal Shock Wave Therapy or Radial Pulse Wave Therapy shall not be used unless the following conditions are met:

(a) A treated horse shall not race for a minimum of ten (10) days following treatment;

(b) A veterinarian licensed to practice by the commission shall administer the treatment;

(c) The commission veterinarian shall be notified prior to the delivery of the machine on association grounds; and

(d) A report shall be submitted by the veterinarian administering the treatment to the commission veterinarian on the prescribed form within twenty-four (24) hours of treatment. The form to be used is the "Kentucky Horse Racing Authority Veterinary Report of Horses Treated with Extracorporeal Shock Wave Therapy or Radial Pulse Wave Therapy".

(6) An alkalizing substance that could alter the serum or plasma pH or concentration of bicarbonates or carbon dioxide in a horse shall not be used within twenty-four (24) hours prior to post time for the race in which the horse is entered.

(7) Without the prior permission of the commission veterinarian or his or her designee, based on standard veterinary practice for recognized conditions, a nasogastric tube which is longer than six (6) inches shall not be used for the administration of any substance within twenty-four (24) hours prior to the post time of a race in which the horse is entered.

(8) A serum total carbon dioxide (TCO2) level shall not exceed 37.0 millimoles per liter in a horse; except no violation shall exist if the TCO2 level is found to be normal for the horse following the quarantine procedure set forth in Section 21 of this administrative regulation.

(9) A blood gas machine shall not be possessed or used by a person other than an authorized representative of the commission at a location under the jurisdiction of the commission; and

(10) A shock wave therapy machine or radial pulse wave therapy machine shall not be possessed or used by anyone other than a veterinarian licensed by the commission at a location under the jurisdiction of the commission.

In response, the Commission argues that: (1) this Court should dismiss Dr. Stewart's appeal for failure to properly notify the Attorney General of a constitutional challenge; and (2) the regulations are constitutional.[FN4] In its cross-appeal, the Commission argues that the circuit court erroneously reversed Dr. Stewart's possession of Carbidopa and Levodopa because the Commission's finding was supported by substantial evidence.

FN4. In support thereof, the Commission further argues that: (1) because the possession regulation does not implicate a first amendment right and is neither a criminal nor punitive law, it must only satisfy the intelligibility standard; (2) the possession regulation is intelligible; (3) the possession regulation is constitutional under the test Dr. Stewart indentified; and (5) the suspension regulation is constitutional because it is intelligible.

In reply,[FN5] Dr. Stewart argues that dismissal of his appeal is unwarranted. In support thereof, Dr. Stewart further argues: (1) that he timely noticed his challenge to the constitutionality of 810 KAR 1:018 § 20; (2) the underlying intent and purpose of the notification statute has been satisfied; and (3) any failure to comply with KRS 418.075(2) would simply render the constitutional challenge "unpreserved" leaving this Court discretion to decide the issue. Thus, Dr. Stewart requests palpable error review under CR 61.02.

FN5. In reply the Commission argues that

> Dr. Scollay–Ward's testimony was excluded by the hearing officer and thus was not a basis for the decision; and the Commission's suspension was based upon substantial evidence.

Dr. Stewart also argues that the Commission has not rebutted his showing that 810 KAR 1:018 § 20 is void for vagueness and therefore unconstitutional as applied to Dr. Stewart. In support thereof, Dr. Stewart argues: (1) the intelligibility rule has no bearing on the applicability to this appeal; (2) 810 KAR 1:018 § 20 is in conflict with multiple regulations of the Commission; (3) there exists a "may endanger" vagueness problem and "prior permission"/USFDA approval vagueness problem. Last, Dr. Stewart argues that the circuit court correctly reversed a consecutive one-year suspension on the sufficiency of the evidence grounds.

We believe that these numerous arguments may be properly condensed into three issues for appeal: (1) whether Dr. Stewart's appeal should be dismissed for failure to notify the Attorney General of a constitutional challenge; (2) whether the Commission's regulations are unconstitutionally vague as applied to Dr. Stewart, warranting reversal of his four-year suspension for possession of cobra venom; and (3) whether the circuit court erred in reversing the one-year suspension for possession of Carbidopa and Levodopa. We now address each issue in turn.

***3** The first issue presented for appeal by the parties is whether Dr. Stewart's appeal should be dismissed for failure to notify the Attorney General of a constitutional challenge.

Of import, KRS 418.075 establishes when a party must notify the Attorney General:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.
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> (1) In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.
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> *(2) In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.*
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> (3) The Attorney General shall notify the Legislative Research Commission of:
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> (a) The receipt of a petition and the nature of any proceedings involving the validity of a statute; and
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> (b) The entering of a final judgment in those proceedings, if the Attorney General is a party to that action.
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> (4) Pursuant to Sections 43 and 231 of the Constitution of Kentucky, members of the General Assembly, organizations within the legislative branch of state government, or officers or employees of the legislative branch shall not be made parties to any action challenging the constitutionality or validity of any statute or regulation, without the consent of the member, organization, or officer or employee.
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> KRS 418.075 (emphasis added).

The notice to the Attorney General of the constitutional challenge to a statute is for the purpose of allowing the Attorney General an opportunity to

enter an appearance and consider the constitutional challenge. The notice, in essence, commences a time for the Attorney General to martial its forces and, in its discretion, vigorously defend the constitutionality of the statute. The brief tendered by Stewart to this Court was initially rejected. If we were to find that the initial filing of a rejected brief commenced the time for the Attorney General to perform its duty, whatever it be, then such would serve no purpose other than to allow additional notice. We fail to see how that would serve the interest of justice.

This Court believes that the purpose of the statute and rule is better served, as is justice, by finding that notice pursuant to KRS418.075 and CR 76.03(5) is complied with when the Attorney General is notified upon the filing of a proper brief. Therefore, it is our opinion that Dr. Stewart timely notified the Attorney General of his constitutional challenge prior to submitting the re-brief to this Court. Thus, dismissal of his appeal is unwarranted and we turn to the second issue raised by the parties, whether the Commission's regulations are unconstitutionally vague as applied to Dr. Stewart, warranting reversal of his four-year suspension for possession of cobra venom.

***4** In support of his argument that the Commission's regulations are unconstitutionally vague as applied to him, Dr. Stewart directs this Court's attention to the Commission that permitted the use of snake venom in standardbred horses and racing, for which he was also a licensed veterinarian. Dr. Stewart asserts that such permitted use in standardbred horses, combined with the lack of express forbiddance of snake venom in thoroughbred racing regulations, creates an impenetrable ambiguity that does not give a veterinarian of ordinary intelligence a reasonable opportunity to know that the Commission intended to prohibit snake venom in thoroughbred racing.[FN6]

> FN6. We note that the Commission has subsequently remedied this issue with the adoption of 810 KAR 1:110 and 811 KAR 1:240 which explicitly forbid the presence or administration of snake venom to thoroughbred and harness racing horses. Moreover, the regulation cited to by Dr. Stewart permitting the use of snake venom in standardbred horses, 811 KAR 1:085, was subsequently amended removing the permissive use of snake venom, presumably to clear up any confusion with this issue.

At the outset we note that whether a statute is unconstitutional is a question of law subject to *de novo* review. *Wilfong v. Commonwealth,* 175 S.W.3d 84, 91 (Ky.App.2004).

The void-for-vagueness doctrine emanates from the due process provisions of the United States and Kentucky Constitutions. *Commonwealth v. Kash,* 967 S.W.2d 37, 42 (Ky.App.1997), citing *Raines v. Commonwealth,* Ky.App., 731 S.W.2d 3, 4 (1987). Whether a statute is unconstitutionally vague must be assessed in the context of the particular conduct to which it is being applied. *Doe v. Staples,* 706 F.2d 985, 988 (6th Cir.1983), citing *United States v. National Dairy Products Corp.,* 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).

Our Kentucky Supreme Court addressed a void-for-vagueness argument in *State Board for Elementary and Secondary Education v. Howard,* 834 S.W.2d 657, 662 (Ky.1992), and stated:

> In reviewing the standard for vagueness, this Court and the United States Supreme Court have followed two general principles underlying the concept of vagueness. First, a statute is impermissibly vague if it does not place someone to whom it applies on actual notice as to what conduct is prohibited; and second, a statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory enforcement.

Further, we note that when considering the vagueness challenge to administrative regulations,

the regulation must be considered in its entirety and not piecemeal. *See Alliance for Kentucky's Future, Inc., v. Environmental and Public Protection Cabinet,* 310 S.W.3d 681, 689 (Ky.App.2008). *See also Commonwealth v. Kash,* 967 S.W.2d 37, 44 (Ky.App.1997) ("Under the doctrine of *in pari materia,* statutes having a common purpose or subject matter must be construed together.")(Internal citations omitted).

We are ultimately in agreement with Dr. Stewart that the Commission's permissive use of snake venom under standardbred horse regulations coupled with the lack of express forbiddance of snake venom in thoroughbred racing regulations creates an ambiguity, which does not give a veterinarian of ordinary intelligence a reasonable opportunity to know that the Commission intended to prohibit snake venom in thoroughbred racing.

Accordingly, we must agree that the regulation relied upon by the Commission to suspend Dr. Stewart's license was impermissibly vague because it does not place a veterinarian to whom it applies on actual notice as to what conduct is prohibited, arguably leading to an arbitrary enforcement of the regulation. Thus, we reverse the trial court's affirmance of the Commission's suspension of Dr. Stewart's license for possession of cobra venom and remand this matter for further proceedings.

***5** Finally, we address the cross-appeal issue raised by the parties, namely, whether the circuit court erred in reversing the one-year suspension for possession of Carbidopa and Levodopa.

Concerning our review of an administrative action, the court in *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission,* 379 S.W.2d 450 (Ky.1964) held:

> Basically, judicial review of administrative action is concerned with the question of arbitrariness....The above three grounds of judicial review, (1) action in excess of granted powers, (2) lack of procedural due process, and (3) lack of substantial evidentiary support, effectually delineate its necessary and permissible scope....In the final analysis all of these issues may be reduced to the ultimate question of whether the action taken by the administrative agency was arbitrary.

American Beauty Homes Corp. at 456–57 (internal citations omitted).

Generally speaking:

> The circuit court's role as an appellate court is to review the administrative decision, not to reinterpret or to reconsider the merits of the claim, nor to substitute its judgment for that of the agency as to the weight of the evidence. Thus, the circuit court must determine both "[i]f the findings of fact are supported by substantial evidence of probative value" and "whether or not the administrative agency has applied the correct rule of law to the facts so found." "The test of substantiality of evidence is whether ... it has sufficient probative value to induce conviction in the minds of reasonable [persons]." Further, " 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' " As long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence.
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> An administrative agency, such as the Cabinet, is "afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it" [citation omitted]. "[A]lthough a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not necessarily deprive the agency's decision of support by substantial evidence" [citation omitted]. Further, even if this Court would have come to a different conclusion if it heard the case de novo, it must affirm the administrative agency's decision if supported by substantial evidence. "[I]t is the exclusive province

of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence" [citation omitted]. Indeed, an administrative agency's trier of facts may hear all the evidence " 'and choose the evidence that he believes' " [citation omitted]. " 'If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found' " [citations omitted].

***6** *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet,* 204 S.W.3d 121, 131–32 (Ky.App.2006) (internal citations omitted).

Sub judice, the circuit court reversed Dr. Stewart's suspension for possession of Carbidopa and Levodopa because the Commission did not sustain its burden of showing the propriety of the penalty imposed,[FN7] as the evidence presented regarding Carbidopa and Levodopa only spoke to the effects of the drug in humans. The court concluded that mere possession of the drug, which has been approved for use in humans, cannot form the basis for imposing a penalty absent some testimony to support a finding that its use would endanger the health or welfare of the horse or the safety of the rider. In reaching this conclusion, the trial court looked directly at the regulation in question, 810 KAR 1:018 § 20, which states:

> FN7. The trial court cited to KRS 13B.090(7) which states:
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> > In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

(1) A drug, medication, or substance shall not be possessed or used by a licensee, or his designee or agent, to a horse within a nonpublic area at a location under the jurisdiction of the commission:

(a) The use of which may endanger the health and welfare of the horse; or

(b) The use of which may endanger the safety of the rider.

(2) Without the prior permission of the commission or its designee, a drug, medication, or substance that has never been approved by the U.S. Food and Drug Administration (USFDA) for use in humans or animals shall not be possessed or used at a location under the jurisdiction of the commission. The commission shall determine whether to grant prior permission after consultation with the Equine Research Drug Council.

The trial court properly noted that Carbidopa and Levodopa had been approved by the USFDA for use in humans and thus Section 20(2) cannot apply. Thus, the issue became whether possession of Carbidopa and Levodopa would endanger the health and welfare of the horse or endanger the safety of the rider pursuant to Section 20(1).

Sub judice, the Commission presented testimony through its medical director, Dr. Scollay–Ward, that Carbidopa and Levodopa have been approved by the USFDA for use in humans in treating Parkinson's disease, and that there is no known

therapeutic use in horses. Dr. Scollay–Ward further testified that in humans, Carbidopa and Levodopa function as stimulants, increasing heart rate, cardiac output and respiration, and excessive use in humans has been associated with the onset of belligerent and even psychotic behavior. Because of the negative effects the drugs have on humans and the lack of known therapeutic use in horses, the Commission found that the drugs may endanger the health and welfare of the horse and the safety of the rider. FN8

> FN8. The Commission notes its classification system of these drugs; however, the classification system seems to rely heavily on the lack of known therapeutic use in horses, which does not lend any additional support to its position.

We agree with the trial court that this finding was not based on substantial evidence. Simply stated, there was a dearth of evidence on the effect of these drugs on the health and welfare of *horses,* which by inference may endanger the rider; however, to the contrary, there was testimony that there was no known therapeutic use in horses.FN9 Indeed, Dr. Scollay–Ward testified that she was unaware of any literature describing the effect of the drugs on horses. The Commission's finding that the drugs may endanger the horse or rider is too speculative based on the lack of evidence. As such, we find no error with the trial court's reversal of the Commission's one-year suspension for possession of Carbidopa and Levodopa and accordingly affirm the circuit court.

> FN9. We disagree that this raises the Commission's burden of proof to a "will endanger" standard instead of the "may endanger" standard applicable by regulation.

*7 Accordingly, we hereby reverse and remand Dr. Stewart's appeal and affirm the circuit court's reversal of the Commission's one year suspension for possession of Carbidopa and Levodopa.

ALL CONCUR.

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