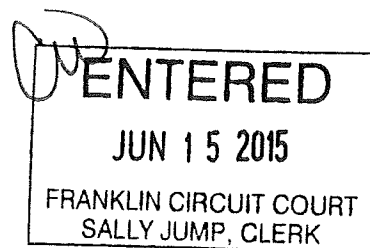


COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION No. 14-CI-418



---

DANIEL WERRE

PETITIONER

v.

KENTUCKY HORSE RACING  
COMMISSION

RESPONDENT

---

**OPINION AND ORDER**

This matter is before the Court upon Petitioner, Daniel Werre's, Petition for Review of the Final Order of Respondent, the Kentucky Horse Racing Commission ("the KHRC"), which pursuant to 810 KAR 1:028 imposed a one year suspension of his training license, a \$5,000 fine, disqualification of the horse and purse forfeiture. The Court heard the Parties' oral arguments on April 8, 2015. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby **REVERSES** the Commission's Final Order with respect to the one-year suspension of Mr. Werre's training license for violating 810 KAR 1:018 §2. The violation was based on post-race sampling of VOODOO DOCTOR, a horse trained and raced by Petitioner, which revealed Levamisole, a Class A prohibited substance.

**I. STATEMENT OF FACTS**

Petitioner, Daniel Werre, obtained his trainer's license in 2011. Mr. Werre was the trainer of the horse VOODOO DOCTOR in December of 2012. VOODOO DOCTOR finished first in the ninth race at Turfway Park on Friday, December 7, 2012. Post-race sampling of VOODOO DOCTOR's blood and urine revealed traces of Levamisole, a Class A prohibited substance. (A.R., p.438).

Mr. Werre claims Levamisole was never intentionally administered to VOODOO DOCTOR. Another horse stabled at Mr. Werre's barn in 2012, BETWEEN THE LINES, was receiving Levamisole to treat Equine Protozoal Myelitis (EPM). BETWEEN THE LINES was located in the stall directly adjacent to VOODOO DOCTOR's stall in Mr. Werre's barn. Mr. Werre believes that some of the feed containing Levamisole, intended for BETWEEN THE LINES, accidentally contaminated VOODOO DOCTOR's feed.

Prior to September 4, 2012, Levamisole was classified as a Class B substance. On or around September 4, 2014, the KHRC issued a memorandum about its reclassification of Levamisole from a Class B to a Class A substance.

On December 18, 2012, the KHRC issued a report identifying the positive for Levamisole in the urine of VOODOO DOCTOR and describing Levamisole as a Class B substance. On December 21, 2012, the KHRC issued a Second Report of Finding, identical to the first Report, with the exception that Levamisole was described as a Class A substance. A letter dated January 7, 2013, from the KHRC Chief Veterinarian to the split sample laboratory at Louisiana State University (LSU) identified Levamisole occurring at the rate of 5.3 nanograms per milliliter in the urine sample taken from VOODOO DOCTOR. (A.R. 587). LSU identified Levamisole at the rate of 2.6715 ng/ml in the split sample. (A.R. 593).

The Stewards issued a ruling dated February 9, 2013, which found Mr. Werre liable for a Class A violation. The Stewards suspended Mr. Werre's license for one year and fined him \$5,000. The Stewards also ordered disqualification of VOODOO DOCTOR and forfeiture of the purse. (A.R. at 649). Mr. Werre never had any kind of drug positive prior to the incident with VOODOO DOCTOR.

Petitioner, Mr. Werre, appealed the Steward's ruling and an administrative hearing was held on Oct. 1, 2013. The Hearing Officer found that Mr. Werre had violated 810 KAR 1:018 §2 and was responsible under the trainer responsibility rule found in §15 of that administrative regulation.<sup>1</sup> On January 18, 2014, the Hearing Officer issued his Recommended Findings of Fact, Conclusions of Law and Recommended Order, in which he recommended that the KHRC enter a Final Order affirming the Steward's Ruling. The KHRC and Mr. Werre both filed exceptions to the Recommended Order.

On April 3, 2014, the KHRC entered a Final Order, adopting in full the Recommended Order, as well as the KHRC's exceptions, and affirmed the Stewards' Ruling. (A.R. at 791-793). Petitioner, Mr. Werre, filed his appeal on April 9, 2014, pursuant to KRS 13B.140, seeking reversal of the KHRC's Final Order and penalty. Specifically, Petitioner argues: (1) that the Stewards failed to consider mitigating circumstances, (2) that the classification of Levamisole as a Class A substance is per se arbitrary and capricious; (3) that the Schedule is unconstitutional as applied to Petitioner and it is facially unintelligible; (4) that the Schedule is unconstitutionally overbroad; (5) that the classification of Levamisole as a Class A substance violates Petitioner's right to due process of the law; and (6) that the KHRC failed to demonstrate the propriety of the penalty imposed.

On April 21, 2014, this Court entered an Order staying the Final Order of the KHRC, entered on April 3, 2014, suspending Mr. Werre's license and imposing a \$5,000 fine. Thereafter, the parties have briefed the legal issues and the Court has conducted oral arguments. The case is now ripe for decision.

---

<sup>1</sup> Under 810 KAR 1:018 §15(2): "A trainer shall be responsible for the presence of a prohibited drug, medication, substance, or metabolic derivative, including permitted medication in excess of the maximum concentration, in horses in his/her care." Additionally, under 810 KAR 1:018 §15(3), "a trainer shall prevent the administration of a drug, medication, substance, or metabolic derivative that may constitute a violation of this administration."

## II. STANDARD OF REVIEW

KRS 230.330 grants “[a]ny licensee or any applicant aggrieved by any final order of the commission” a right to appeal to this Court in accordance with KRS Chapter 13B. KRS 13B.150(2) provides, in relevant part, that “[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” That statute also “provides that the court may affirm or reverse, in whole or in part, the final order of an administrative agency and may remand the case for further proceedings if it finds that the agency’s order was in violation of constitutional or statutory provisions, was in excess of the agency’s statutory authority, was not supported by substantial evidence, was arbitrary, capricious, or characterized by abuse of discretion, [...] or was deficient as otherwise provided by law.” *Allen v. Kentucky Horse Racing Authority*, 136 S.W.3d 54, 58 (Ky. App. 2004) (citing KRS 13B.150(2)).

In determining whether an administrative agency decision was arbitrary, a court must determine: (1) whether the agency’s action was within the scope of its granted powers; (2) whether the agency provided procedural due process; and (3) whether the decision was supported by substantial evidence. *See Commonwealth Revenue Cabinet v. Liberty National Bank of Lexington*, 858 S.W.2d 199, 201 (Ky. App. 1993) (citing *American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm’n*, 379 S.W.2d 450 (Ky. 1964)). “If the decision of the administrative agency fails to meet any of these standards, it must be considered to be arbitrary.” *Allen*, S.W.3d at 59 (citing *Liberty National*, 858 S.W.2d at 201).

“If the findings of fact of an administrative agency are supported by substantial evidence of probative value, then they are binding on the reviewing court.” *Allen* at 59. *See also Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002). “The agency’s findings must be upheld if based on substantial

evidence ‘even though there exists evidence to the contrary in the record.’ Substantial evidence is defined as ‘evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [persons].’” *Allen* at 59 (quoting *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)). An administrative agency decision that is not supported by substantial evidence is arbitrary or clearly erroneous. *Landmark Cmty. Newspapers*, 91 S.W.3d at 579 (internal citations omitted). If substantial evidence supports the agency’s decision, then it cannot be said to be arbitrary. *Id.* The Commission, “as trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before the Commission.” *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

### III. ANALYSIS

It is a well-accepted proposition in Kentucky that horse racing can be regulated by the State under the police power of the government or prohibited altogether. *State Racing Commission v. Latonia Agricultural Association*, 123 S.W. 681, 685 (Ky. 1909). In *Kentucky State Racing Commission v. Fuller*, *supra*, Kentucky’s highest court addressed the question of whether the Commission had the authority to disqualify the winner of the Kentucky Derby and redistribute the purse money after the horse tested positive for a prohibited substance. The *Fuller* court noted that the Commission was “charged with the duty of maintaining integrity and honesty in racing,” and that it “was directed to promulgate rules and regulations ‘for effectively preventing the use of improper devices, the administration of drugs or stimulants or other improper acts for the purpose of affecting the speed or health of horses in races in which they are to participate.’” *Fuller* at 300 (quoting KRS 230.240). Additionally, the *Fuller* court found that

the Commission “was vested with all power necessary and proper to carry out fully and effectively those duties imposed upon it by the statutes.” *Id.* (citing KRS 230.260).

The *Fuller* court then addressed the reason that Kentucky’s legislature had vested such broad powers in the Commission:

The Kentucky State Racing Commission is more than an administrative agency having the quasi-judicial function of finding the facts and applying the law to the facts. [...] The Commission is vested with extensive authority over all persons on racing premises for the purpose of maintaining honesty and integrity and orderly conduct of Thoroughbred racing. On the basis of the [governing statutes], the Commission is charged with the duty of protecting [a] substantial public interest<sup>2</sup>

....

*Fuller* at 301. The legislature has given the Commission “the power ‘to regulate and maintain horse racing ... free of any corrupt ... or unprincipled horse racing practices, and to regulate and maintain horse racing ... so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.’” *Allen*, 136 S.W.3d at 56 (quoting KRS 230.215(2)).

In the present case the KHRC argues that the violation and penalty imposed on Mr. Werre should be affirmed because the Petitioner’s conduct clearly violated the regulations at issue, the penalty was consistent with the law, and the regulations –as well as their application to Mr. Werre- are constitutional. Mr. Werre has advanced several arguments in support of his request that the KHRC’s Final Order be reversed. This Court will discuss the arguments relevant to its ruling below.

---

<sup>2</sup> As the Fourth Circuit Court of Appeals has noted with respect to horse racing, “[t]he state has at least two substantial interests to be served. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized pari-mutuel betting and protecting patrons of the sport from being defrauded .... If a horse is fleeter or slower than his normal speed because of having been drugged, the integrity of the race is irretrievably lost.” *Hubel v. West Virginia Racing Commission*, 513 F.2d 240, 243-44 (4th Cir. 1975).

### A. Mitigating circumstances

Petitioner alleges that the Stewards and the KHRC failed to consider mitigating circumstances. The statute, 810 KAR 1:028 §1(3), provides that the Stewards and the KHRC shall consider any mitigating or aggravating circumstances properly presented when assessing penalties pursuant to this administrative regulation. Chief Steward, Barbara Borden, testified that the Stewards considered: (1) the fact that Mr. Werre had not had any previous drug rulings; (2) that Levamisole had a legitimate therapeutic use, and (3) the possibility of accidental administration. The Stewards concluded, without meaningful explanation, that they did not consider these to be mitigating circumstances sufficient to warrant a departure from the minimum penalty.

Petitioner argues that numerous mitigating circumstances exist in this case, including: (1) the drug was in Mr. Werre's barn pursuant to a prescription; (2) Mr. Werre cooperated in the search and explained the use of the drug to the KHRC investigators; (3) Levamisole was found in the horse's system in a very small quantity; (4) the stimulant metabolite aminorex was not found in the horse; (5) there is no evidence the drug was purposefully administered to the horse; (6) the drug has therapeutic uses and is FDA approved; (7) the drug does not meet the criteria for a Class A substance under the KHRC's own regulation; and (8) the KHRC issued a memorandum expressly sanctioning the therapeutic use of the substance.

The penalty imposed against Petitioner for his violation of 810 KAR 1:018 was the minimum penalty permitted by the regulation, absent mitigating circumstances. In *Deaton v. Ky. Horse Racing Auth.*, 172 S.W. 3d 803 (Ky. App. 2004), the Court of Appeals held that "the assessment of a penalty is particularly delegated to [an] administrative agency... the assessment is not a factual finding but the exercise of a discretionary grant of power." (*Id.* at 808). *See also*

*Pankewicz v. Penn State Horse Racing Comm.*, 562 A.2d 917, 920 (Pa. CW 1989), “length of suspension is a discretionary matter.” The KHRC argues that in this case, the agency, finding there were no mitigating circumstances, assessed the minimum penalty under the regulations and that this was not an abuse of discretion. This Court disagrees and finds that there were numerous mitigating circumstances that the KHRC failed to consider when imposing a penalty requiring a one year suspension of Mr. Werre’s training license.<sup>3</sup>

This Court agrees with Petitioner that the fact that Levamisole has a commonly recognized therapeutic use and is FDA approved should have been considered a mitigating circumstance because it is indicative of the misclassification of Levamisole. If Levamisole had not been improperly reclassified as a Class A substance, Mr. Werre would have faced a much less severe penalty. The improper classification of Levamisole as a Class A substance led the KHRC to impose a penalty on Mr. Werre that was not proportionate to the seriousness of the violation, and this should have been regarded as a mitigating circumstance. The minimum penalty for a Class B violation is “a minimum fifteen (15) day suspension, absent mitigating circumstances.” 810 KAR 1:028, §4(1). The fine for a first offense Class B violation is \$500.00 to \$1,000. (*Id.*). The range of penalties that may be considered by the Stewards decreases sharply from Class A to Class B violations. Applying its own definition of a Class A substance (which excludes drugs that have therapeutic uses in horses), the KHRC improperly reclassified Levamisole as a Class A substance. As a result, after the KHRC determined a violation had occurred, a much more severe penalty was assessed against Mr. Werre than would have occurred if Levamisole had not been reclassified. Instead of a fifteen (15) day suspension and a \$500.00 fine, he was given a one (1) year suspension and ordered to pay a \$5,000 fine. The improper

---

<sup>3</sup> See R. Heleringer, *Equine Regulatory Law*, (2012), (“Case law has steadily evolved from the mid-twentieth century to the present time from a standard of near/absolute authority (to eject/revoke) with no serious questions asked (by the courts) to one of more regard for due process and constitutional rights of licensed participants.”)



classification of Levamisole as a Class A substance subjected Mr. Werre to a penalty that was disproportionate to the actual seriousness of the violation. This Court considers the improper classification of Levamisole to be a mitigating circumstance given the significant difference in the penalties that may be imposed for Class A and Class B violations.

Additionally, the fact that Mr. Werre never had any previous drug violations, along with the fact that the evidence indicates Levamisole was accidentally administered to VooDoo Doctor, should have been treated as mitigating circumstances. Counsel for Petitioner persuasively argues that Levamisole was found in Voodoo Doctor's system in a very low quantity, which is indicative of accidental ingestion, not administration for the alleged purpose of enhancing performance. For the KHRC to conclude that accidental ingestion of Levamisole should not be considered a mitigating circumstance is unduly harsh and appears to be based –in part- on its suspect reclassification of Levamisole from a Class B to a Class A substance.

While the Court recognizes that under 810 KAR 1:018 §15(2), the trainer is responsible for preventing the administration of a medication that may constitute a violation, it finds there is evidence that Mr. Werre attempted to prevent VOODOO DOCTOR from receiving Levamisole. Mr. Werre instructed his groom on how to provide the medication to BETWEEN THE LINES by mixing it with the feed, and emphasized that it was very important that only BETWEEN THE LINES receive Levamisole.

This Court agrees with Petitioner that the KHRC has not shown any change in the veterinary literature that would support the reclassification of Levamisole from a Class B to a Class A substance, with the accompanying change in the penalty range. At the administrative hearing, the KHRC only offered testimony regarding the alleged stimulatory effect of Levamisole in humans. Such evidence is insufficient to support a finding that Levamisole has a

stimulatory effect in horses, or to prove that it has an effect on the central nervous system of a horse. This Court finds that the KHRC's failure to consider the mitigating circumstances described above when penalizing Mr. Werre was an abuse of discretion.

**B. The classification of levamisole as a Class A substance**

Petitioner has challenged the classification of Levamisole as a Class A substance, arguing that it is arbitrary and capricious per se. The KHRC responds that the classification of Levamisole as a Class A prohibited substance is a proper exercise of the KHRC's statutory authority, and is not arbitrary and capricious.

KRS 230.215(2) grants the KHRC with "plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon in conducted in the Commonwealth..." (KRS 230.215(2)). The KHRC is also required to promulgate administrative regulations for restricting and prohibiting the use and administration of drugs or stimulants. (KRS 230.240(2)). Pursuant to that authority, the KHRC enacted 810 KAR 1:040 and the Uniform Drug, Medication and Substance Classification Schedule (Schedule).

The Schedule is incorporated by reference into 810 KAR 1:018(6), which states that the Commission shall utilize the KHRC Schedule as provided in 810 KAR 1:040, for classification of drugs, medications, and substances violating this administrative regulation." 810 KAR 1:040 provides that the KHRC Schedule, KHRC 40-01, shall establish the respective classifications of all substances contained therein. Petitioner persuasively argues that 810 KAR 1:018(6) and 810 KAR 1:040 require the KHRC to apply and follow the entirety of the Schedule, including the *definition* of Class A drugs contained within the Schedule and previously adopted by the KHRC, each time it classifies or reclassifies a drug.

The Schedule defines Class A substances as “drugs that have no legitimate therapeutic indication in the equine athlete and have not been approved for use by the U.S. Food and Drug Administration (FDA).” (810 KAR 1:040). Levamisole has a therapeutic use and is FDA approved. This Court is not convinced by the KHRC’s argument that the portion of the schedule defining a Class A substance is merely “prefatory” or “descriptive” language. It finds Petitioner’s argument more compelling: that all parts of the Uniform Drug Schedule –including the definition of the criteria for a Class A drug classification- must be given meaning and effect. A regulation, like a statute, “must be construed as a whole,” and courts must construe a statute or regulation in a manner that permits “all its parts to have meaning, and for it to harmonize with related statutes.”<sup>4</sup>

Reading the regulation as a whole, this Court is in agreement with Petitioner that listing Levamisole as a Class A substance conflicts with the general definition of a Class A substance as set forth in the regulation. Given this internal inconsistency, this Court is in agreement with Petitioner, that the classification of Levamisole as a Class A substance is arbitrary and capricious.

**C. Petitioner’s Claim that the KHRC failed to demonstrate the propriety of the penalty imposed**

In all administrative hearings, the agency bears the burden to show the propriety of a penalty imposed. KRS 13B.090(7). In the administrative action below, the Commission bore the burden of showing the propriety of the one year suspension of Mr. Werre’s trainer’s license for a violation of 810 KAR 1:018 §2. The trier of facts, as in *Fuller*, “saw each witness and was in a superior position to evaluate the situation as well as the conduct and demeanor of each witness as

---

<sup>4</sup> Commonwealth v. Wright, 415 S.W. 3d 606 (Ky. 2013), citing *Hall v. Hospitality Resources, Inc.*, 276 S.W. 3d 775, 784 (Ky. 2008).

he testified; to consider the credibility of the witness; and to determine the weight as between conflicting statements of witnesses or even a single witness.” *Fuller* at 308. “The assessment of a penalty is particularly delegated to the administrative agency. Its choice of sanction is not to be overturned unless ‘it is unwarranted in law’ or ‘without justification in fact.’ The assessment is not a factual finding but the exercise of a discretionary grant of power.” *Deaton* at 808 (quoting *Vanhoose v. Commonwealth*, 995 S.W.2d 389, 393 (Ky. App. 1999)).

Petitioner argues that the KHRC has not shown the propriety of the penalty in this case, given the dearth of evidence regarding the alleged stimulatory effect of Levamisole on the central nervous systems of horses, and given that the KHRC initially classified Levamisole as a Class B substance. Petitioner cites to *Stewart v. Kentucky Horse Race Commission*, 2012 WL 1003534 (Ky. App. 2013), a non-binding, unreported case, in support of his argument that the KHRC did not introduce sufficient evidence that Levamisole can have a stimulatory effect, therefore, it failed to meet its burden of showing the propriety of the penalty imposed. This Court disagrees with the KHRC’s claim that Petitioner’s reliance on this case is misplaced. In *Stewart*, the Circuit Court reversed the one-year suspension of Dr. Stewart’s veterinary license based on his possession of carbidopa/levodopa tablets because the KHRC “did not sustain its burden of showing the propriety of the penalty imposed.” *Stewart* at 6. The Court of Appeals affirmed and held that there was insufficient evidence on the effect of these drugs on the health and welfare of *horses*... and the KHRC’s finding that the drugs may endanger the horse or the rider is too speculative based on the lack of evidence. *Id.*

The KHRC is correct that the regulation at issue in *Stewart* is different from the one at issue in this case. In *Stewart*, the regulation required a finding that the substance may endanger the horse or the rider, whereas in this case the regulation requires a finding that while running in

the race, the horse carried a substance that could affect its central nervous system. Despite the difference in the regulations at issue, Petitioner's citation to *Stewart* remains persuasive because in *Stewart* the holding was based on the fact that the KHRC failed to present evidence regarding the effect of the drugs in horses and only provided testimony about the effect of the drugs on humans, which the Court deemed overly speculative. Like *Stewart*, in this case, the KHRC failed to present any evidence about the stimulatory effects of Levamisole in horses. In *Stewart*, Dr. Scollay, the expert witness for the KHRC, testified that she was unaware of any literature describing the effect of the drugs on horses. In the present case, Dr. Scollay appeared again as the expert witness for the KHRC and testified that her opinion that Levamisole has a stimulatory effect in horses was based on literature she read about humans using Levamisole to cut cocaine. (Tr., p.127). This Court agrees with Petitioner that Dr. Scollay's testimony in *Stewart* was similar to the testimony she provided in this case (i.e. the attempt to extrapolate the potential effects of a drug on the horse solely from literature concerning its effect in humans). In *Stewart*, as here, the KHRC cannot meet its burden and prove the propriety of the penalty based on evidence about the effects of drugs in humans.

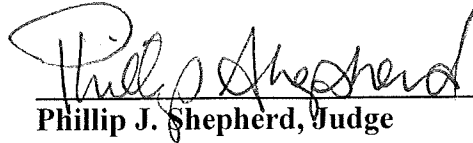
Based on the evidence, this Court finds that the KHRC has not met its burden of showing the propriety of the one year suspension of Mr. Werre's trainer's license for a violation of 810 KAR 1:018 §2.

#### IV. CONCLUSION

**ACCORDINGLY**, the Final Order of the Commission entered April 3, 2015, suspending Mr. Werre's trainer's license is **REVERSED** with regard to the one year suspension for violating 810 KAR 1:018 §2.

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 15th day of June, 2015.

A handwritten signature in black ink, reading "Phillip J. Shepherd". The signature is written in a cursive style with a large, looped initial "P".

---

**Phillip J. Shepherd, Judge**  
**Franklin Circuit Court**  
**Division I**

**DISTRIBUTION:**

Michael D. Meuser  
Michelle L. Hurley  
MILLER, GRIFFIN & MARKS, P.S.C.  
271 West Short Street, Suite 600  
Lexington, KY 40507

Katherine Paisley  
Susan Speckert  
Kentucky Horse Racing Commission  
4063 Ironworks Parkway, Bldg. B  
Lexington, KY 40511

Records Custodian  
Horse Racing Authority  
4063 Ironworks Pike, Bldg. B  
Lexington, KY 40511

Mike Wilson  
Hearing Officer  
PO Box 4275  
Lexington, KY 40544-4275

Jack Conway, Attorney General  
Commonwealth of Kentucky  
118 State Capitol  
700 Capital Avenue  
Frankfort, KY 40601