



COMMISSION HEARING

TORONTO, ONTARIO – SEPTEMBER 15 & 16, 2009

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;
AND IN THE MATTER IN THE APPEAL AND REQUEST FOR HEARING OF
STANDBRED LICENSEE WILLIAM ELLIOTT**

Standardbred Licensee William Elliott requested a hearing under sections 22(3) and 23(3) of the *Racing Commission Act, 2000*, in relation to the Order of Immediate Suspension and Notice of Proposed Order issued against him, dated April 25, 2008 and June 17, 2008, respectively, wherein he was (a) ordered suspended for a period of ten (10) years, and (b) fined the sum of \$40,000.00, pursuant to sections 19, 21, 22 and 23 of the *Act*.

A Panel of the Commission consisting of Chair Rod Seiling, Vice Chair James Donnelly and Commissioner Bernard Brennan, DVM, convened the hearing on September 15 and 16, 2009. Brendan Van Niejenhuis and Andrea Gonsalves appeared as counsel for the Administration. Larry Todd appeared as counsel for William Elliott.

On being advised of the matters not in dispute between the parties, on hearing the evidence of Dr. Robert MacKenzie, Dr. Cornelius Uboh, Dr. Stephen Barker and William Elliott, and on reading the Exhibits and the written submissions of counsel, filed, the Panel ordered as follows:

1. The Panel confirmed the Order of Immediate Suspension, and imposed a full suspension on William Elliott for ten (10) years running from April 25, 2008;
2. The Panel varied the proposed fine, and imposed a fine of \$60,000.00.

The Panel gave written reasons for its decision, which are attached to this Ruling.

DATED this 27th day of October 2009.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Standardbred licensee, William Elliott, appealed a decision of the Director of the Ontario Racing Commission (ORC) wherein on April 25, 2008 his license was suspended via SB Ruling No. 73/2008 (Ex. 1, tab 2). The Ruling, COM SB 030/2009, was released on October 13, 2009, with Reasons for Decision to follow.

Background

2. On August 29, 2007 members of the ORC's Equine Medication Control Task Force met at William Robinson's Training Centre and at John Glasfod's Stables to obtain biological samples from twenty-nine horses trained by Mr. Elliott under the Commission's Out of Competition Testing Program (Ex. 1, tab 8). In total, Mr. Elliot had sixty seven horses tested by the ORC under this program over the course of about ten months. Under the Rules of Standardbred Racing at that time it was a violation of those rules to possess or use Erythropoietin (EPO) or Darbepoetin (SB 6.48.2). As an illegal, non-therapeutic drug there was and is a zero tolerance level for either drug.

3. The appellant argued that the Commission was not in compliance with its own rules under SB 6.48.04 wherein the Director was allowed to approve the testing methodology for EPO/DPO. Ms. Gonsalves, junior counsel for the Commission, in a letter dated June 27, 2008, confirmed that "there is no Director's approval for EPO/DPO tests in Dr. Uboh's lab for the indication of the administration of erythropoietin or any of its derivatives, nor is there a Directive setting limits for Dr. Uboh's test for EPO/DPO" (Ex. 1, tab 43). Undisputed testimony indicated that the reference was to an antibody test which neither Dr. McKenzie nor Dr. Uboh utilized in their respective processes in regard to sample #1120. The appellant's submission relating to Rule 6.48.04 is irrelevant.

4. Mr. Elliott was licensed with the ORC as an owner/trainer agent. He had held a licence since 1992. He had worked for a Mr. Durand and then Bill Robinson as an assistant trainer before heading up his own stable in 1995. Since the Order of Suspension of April 25, 2008 (Ex. 1, tab 2) he has worked at different jobs to support himself. Mr. Elliott's record showed two previous positive test rule violations, one for TCO₂ and the other he claimed was for a horse that the trainer was Bill Robinson, his employer, for whom he was working as an assistant trainer.

5. One of the horses tested, Michelles Power tested positive for Darbepoetin-alpha (DPO or Aranesp). The confirmatory test was conducted by Pennsylvania Equine Toxicology & Research Laboratory (PETRL) and confirmed (Ex. 1, tab 12) in a communication to Dr. Bruce Duncan, the ORC's Chief Veterinarian in a report dated April 14, 2008. The Panel was told that the Iowa State Laboratory, at the request of the appellant, on being supplied with a portion of sample #1120 undertook to perform a similar confirmatory EPO test and reported back with the same result. The confirmation by the Iowa laboratory was not disputed and no further information was provided. Dr. Al Kind, the Director of the Iowa State Laboratory was not called as a witness by the appellant.

6. A standard part of the Out of Competition Program is an interview of the trainer by an ORC investigator at the time of the samples being obtained from the horse(s). ORC investigator, Desmond Waithe, interviewed Mr. Elliott wherein he denied using any non-therapeutic drugs on any of his horses including EPO or Aranesp. Also standard in the interview is a reminder to the interviewee that the rules



require the person to be truthful and that any information provided could be used as evidence in a proceeding against him (Ex. 1, tab 6). Mr. Elliott repeated that same denial under oath and added that he did not believe the horse had a positive test as per Dr. Barker's report.

7. Legal counsel for the ORC, Brendan Van Niejenhuis and Andrea Gonsalves, in conjunction with legal counsel for the appellant, Larry Todd, agreed that there would be no issues related to the chain of custody for the sample obtained from Michelles Power, #1120. Furthermore, there was no issue that Mr. Elliott was the trainer of record for the horse at that time.

8. Mr. Todd submitted that the ORC acted without a certificate of analysis of an official sample as required by SB Rule No. 9.02.01. It is the Federal Government that controls (prohibits drugs under S171 of the Pari Mutual Betting Supervision Regulations. These rules do not ban EPO/DPO.

9. The initial screening test (ELISA) for EPO and DPO conducted by Racing Forensics Inc. post the drawing of the plasma sample was reported negative (Ex. 1, tab 9). Laboratory Manager for Racing Forensics Inc., Dr. Robert McKenzie, testified that at that time period the policy established with the ORC was to only send samples for confirmatory testing if they had a reading of 10 milli IUs or higher and Michelles Power reading was 4.69 milli IUs. The policy was set based on past experience that confirmation for samples under this amount was unlikely and given the need to manage costs those samples under that amount were not sent for testing but still recognized as having a detectable level. The report "negative" was not a denial of EPO/DPO. It was a denial of a level confirmable by the then available testing protocol.

10. Mr. Todd queried Dr. McKenzie regarding the number of samples his lab has sent out for confirmation when they had a high reading and came back negative. The question was asked relative to the alleged testing at the Red Mile where ELISA tests conducted on horses ended up with negative tests. Dr. McKenzie answered that his lab had three that he could recall. One possibility for the negative confirmatory tests was that the ELISA test was picking up the illegal drug, mycera, which the current PETRL test cannot detect.

11. According to Dr. McKenzie, he and Dr. Cornelius Uboh, Director for the PETRL, had a discussion at a conference in Paris, France in late 2007 concerning the possibility of Racing Forensics sending some elevated level samples (under the 7 milli IUs) in a larger volume and their lab would run confirmatory testing on them. This offer was communicated to the ORC in an email to Dr. Duncan (Ex. 1, tab 10).

12. Dr. Duncan agreed to the proposal according to Dr. McKenzie with the proviso that Ontario would pay for all the tests not just any declared confirmations. Accordingly, Racing Forensics produced an amended analysis report for sample # 1120 (Michelles Power) with the results now reading "An elevated EPO ELISA response was observed but lower than the known confirmation limit" (Ex. 1, tab 11). Testimony revealed that sample # 1120 was one of three samples sent to the PETRL (Ex. 1, tab 13) under this trial and that two of three ended up being declared confirmed. There was no regulatory requirement to provide Mr. Elliott information regarding the reclassification of sample #1120, no new test had been performed on that sample by Racing Forensics Inc.



13. Legal counsel agreed with the Panel at the outset of the hearing that Dr. Uboh from the PETRL as referenced above, and Dr. Steven Barker, Professor of Veterinary Medicine and Comparative Biomedical Sciences at Louisiana State University as well as the State Chemist for the Louisiana State Racing Commission would be accepted as expert witnesses by the Panel.

14. Dr. Uboh confirmed that upon receipt of sample #1120, which was intact (Ex. 1, tab 12, p 10, 11 & 12), his lab ran its own ELISA screening test on April 7, 2008, using the same R & D test kit that Racing Forensics utilized. He acknowledged that this retest had not been requested by the client. His lab, as a consequence, reported the results in a different measurement. Dr. Uboh verbally converted those results into milli IUs. The net result was that they were slightly higher but statistically about the same as those reported by Racing Forensics in August of 2007.

15. Dr. Barker testified that he was provided samples of Michelles Power plasma by the appellant with the samples drawn about one year after sample #1120 was obtained. Dr. Barker ran antibody tests with the results being negative for DPO. It was agreed that if a horse has been administered EPO/DPO that antibodies may be detectable for three to four years post administration. It was also agreed that the horse may produce no antibodies. No documentation was provided to support those test results nor any evidence supplied to confirm the chain of custody related to the taking of the blood and its secure transportation. Dr. Uboh testified that the industry had at one time employed the anti body test but had stopped using it as it was too unreliable and unfair. Dr. Barker concurred.

16. Dr. Barker ran three ELISA screening tests on sample #1120 using a different test kit than the R & D kit utilized by both Racing Forensics and Pennsylvania. Two of the three results were negative according to Dr. Barker. Those test results are of little value in as much as they are screening (ELISA) only and no supporting documentation confirming integrity of the sample was provided.

17. EPO is a naturally occurring substance in both humans and horses (equine EPO). DPO is a synthetic product along with recombinant (rh) EPO. Both are illegal, non-therapeutic drugs. Any detectable level in a race horse is a violation of the Rules, SB No. 6.46.01(e). In either form the drugs help the body produce more red blood cells which carry oxygen and thus aid athletic performance. Previous testimony before this Commission clearly proved that such use could endanger the health of a horse.

18. PETRL, according to Dr. Uboh, undertook its work to detect EPO in horses because the then current methods were not sensitive enough. He stated that this fact was and is well known and that both the International Olympic Committee (IOC) and the World Anti Doping Agency (WADA) have made this fact known. The method those organizations rely upon is termed an Isoelectric method. Dr. Uboh stated that the racing industry needed a more sensitive process as the industry was very concerned about their use. In Ontario, the level of concern was such that the entire industry banded together to form and fund (million dollars annually) the Equine Medication Task Force.

19. The PETRL was successful in developing a new process and published their work in 2007 in the publication Analytical Chemistry (Ex. 1, tab 15), F. Guan, et al, LC-MS/MS Method for Confirmation of Recombinant Human Erythropoietin and Darbepoetin-a in Equine Plasma. The PETRL refined its process to be even more sensitive and published a new report carried in the same publication in 2008 entitled F. Guan, et al, Differentiation of Recombinant Human Erythropoietin and Darbepoetin-a in Equine Plasma. It was the latter process used by Dr. Uboh's lab on sample #1120.



20. In layman's terms, neither rhEPO nor DPO occurs naturally in a horse. Therefore the methodology targets looking for those substances, i.e. what is not supposed to be there. The process involves the use of antibodies that are commercially available. They act like a magnet. This facilitates the extraction of the foreign substance and after filtering and washing, a large molecule remains which is broken down by enzymes into peptides (fingerprints).

21. The Racing Testing Medication Consortium (RTMC), an industry wide association established to combat drug abuse in horse racing, ran a free seminar for the interested parties in equine drug testing to demonstrate the PETRL method. The "big" issue in racing at that time was the perceived use of protein based drugs in the sport. As a result of that conclave, three other equine forensic labs, the University of Florida, Iowa State and the University of California at Davis now use the same method as PETRL. Dr. Barker did not attend stating he did not have the time.

22. Dr. Uboh testified that his lab's methodology is both sensitive and reliable. The 2007 published PETRL method detected both recombinant human ethropoietin (rhEPO) and Darbeпоetin (DPO). Both are protein based drugs used to treat anemia. It utilized an LC-MS method. On page 4627 of the publication it states that this is the first method "with adequate sensitivity and specificity in providing unequivocal confirmation of rhEPO and DPO in equine plasma samples". Horses produce equine EPO but human EPO, rhEPO (recombinant EPO) and DPO (Darbeпоetin) are not natural products within a horse. The PETRL lab published a revised method (Ex. 1, tab 16) in 2008 that provided for the differentiation and identification of rhEPO and DPO in equine plasma. It was accomplished by liquid chromatography coupled to tandem mass spectrometry (LC-MS/MS) (Ex. 1, tab 16, p A). It was this method the lab used on sample #1120.

23. Differentiation and identification between rhEPO and DPO in equine plasma was made possible by cleaving off from the molecule peptides, T5 for rhEPO and T9 for DPO. The methodology is detailed in tab16 of Exhibit 1. On page C of the report the author writes under the heading, results, "Differentiation between rhEPO and DPO was based on the difference in amino acid sequence of rh EPO and DPO".

24. Dr. Barker provided a six point critique of the PETRL method (Ex. 1 a) claiming it was a good start but insufficient to be certain there was a confirmation of the drug and that the results were unproven. It was his claim that the results were lacking both scientifically and forensically to allow a regulatory body to accept. No testimony was presented that any person, organization or association in the scientific community had written or commented negatively on the methodology including Dr. Barker. It was recognized that before being published in a prestigious peer review publication such as Analytical Chemistry, the proposed report is reviewed beforehand by a select group (experts). That peer group can criticize, add suggestions or discard. Dr. Uboh testified that it was accepted as published. Dr. Barker, it was noted, sometimes serves as one of the reviewers. In terms of the forensic acceptability, it is up to the respective regulatory authorities to determine that standard. To date, in addition to the ORC, the Pennsylvania Racing Commission has on two occasions accepted the scientific and forensic validity of the PETRL methodology. Two separate judicial reviews in Ontario have supported those conclusions. The Panel notes three other United States labs that do the testing for their respective racing commissions have adopted the PETRL method. They are the University of Florida, the University of California at Davis and Iowa State University.



25. Dr. Barker had two major criticisms out of the six he listed in his critique. Number one (critique #1) was that there no certified standard with which to compare the result. The other (critiques #6) was that the confirmation was based on one peptide match instead of a minimum of two.

26. With respect to critique #1, Dr. Barker agreed that he could have done the work with respect to testing the peptides as he has the capability in his lab and the cost to acquire the material would be under \$1000. He claimed that he did not do the work to save his client the cost. Dr Uboh responded that to do so would have been unnecessary as Amgen, the manufacturer of the product, provided him the reference standard utilized for the comparative match. It was agreed that if a horse person were to administer DPO to a horse they would use the commercial product (Amgen). Therefore, the results would be the same to the comparative spiked test samples that are run in conjunction. The University of Florida did do the test as it related to the 2007 publication and the peptides in question in that report. Their work confirmed the published results.

27. Number two criticism (critique #6) was that the confirmation was based on identifying one peptide. Furthermore, that the instrumentation employed by the lab should be able to go to the 3rd or 4th power versus just to the first power as the lab currently does although he agreed that data to the first decimal point is meaningful. Dr. Barker also argued that one would need to identify a minimum of two peptides, not one. He quoted a published report that Dr. Uboh provided to Mr. Todd at the end of the first day of the hearing but was never provided to the Panel as evidence. Dr. Uboh responded that it was unnecessary because the identification of peptides (mass spectra) is a science, not an art as suggested by Dr. Barker and that his lab uses recognized instruments that are accepted worldwide for the task. Dr. Barker did not provide any alternatives nor did he profess to have any expertise in this area.

28. Critique #2 was that the antibodies used in the process might bind to substances other than DPO. The objective of this step as per Dr. Uboh's testimony is to trap (extract) molecules that are possibly DPO. If no DPO was found in the subsequent steps a negative report would be issued. Dr. Uboh also stated that it would be unlikely in any event and Dr. Barker did not offer any potential alternative solution.

29. Critique #3 was that the filter used during the process may pull out other substances and or complicate the results. He stated that with no analysis being done, Dr. Uboh cannot be sure that the filtering is doing what is the intent, therefore it may be removing or interfering or possibly altering compounds. Dr. Uboh responded that in as much as companies test and validate the filter and that it is widely used there are no issues with its use. The objective is to isolate molecules of the same size and weight as EPO/DPO. Further, that if any other proteins were retained they would see them with the mass spec process and they do not see any, therefore the materials trapped on the filter were the peptides that they were looking for.

30. Critique #4 is that with the administration of DPO and with the laboratory claiming it has identified small pieces of the DPO molecule that is unequivocal proof of DPO administration. Dr. Barker claimed that you needed to, through analysis, as the IOC and WADA do, identify the intact protein (rhEPO or DPO). Dr. Uboh's response was that his method is far more sensitive than that used by the IOC and WADA, therefore there was no need to go backwards to their level as the newer instruments which are acknowledged around the world, far exceed those used in the IOC/WADA process. Dr. Uboh quoted a 2005 New York Times article in which the IOC stated that its method was not sensitive enough in the detection of EPO and was looking for something better. It was this pronouncement back then that



triggered the decision to develop a methodology for horses. He added that the PETRL method will work on humans but his focus is detecting what should not be in a horse.

31. Critique #5 was that the pieces of the molecule examined for either rhEPO or DPO have been altered through the process (adding PNGase). These pieces are not identical to the original pieces to what drug was administered. Dr. Uboh agreed that there is a change but stated it did not change the result as the change is a predictable result, the same as in the sample supplied by the manufacturer.

32. Reference was made to a BLAST search result for the presence of the T5 or T9 peptides. Anything less than a 100% sequence in a species indicates that for that peptide it is not normally found in the animal. For example on page 28 of the 2008 publication, S-Table 2, erythropoietin is listed at 68% for the T5 peptide and 76% for the T9 peptide. The pertinent facts are that in this table is that DPO (synthetic protein) is not found in any being. It is 80% similar to human EPO and 76% similar to equine EPO it is not the same. The reasonable conclusion must then be when a DPO peptide is identified in the plasma sample it came via administration of DPO.

Issue

33. Is the testing methodology performed by the PETRL laboratory scientifically and forensically valid and therefore reliable for a regulatory body to accept as a violation of its rules and by extension, the basis on which to impose penalties as established? Did the Director, in issuing the Notice and Order act within the rules of racing? Was the penalty assessed to Mr. Elliott appropriate given he was the trainer of record?

Decision

34. After carefully reviewing the testimony, the evidence and the submissions, the Panel denies Mr. Elliott's appeal. The Order of the suspension of Mr. Elliott is confirmed. Furthermore Mr. Elliott's fine is varied to \$60,000.

Reasons For Decision

35. The Panel did not choose between two varying scientific opinions but is satisfied on the basis of clear, cogent and compelling evidence that the method published by Guan et al in the 2008 Analytical Chemistry can and does accurately and reliably identify DPO in blood samples. Dr. Barker's criticisms, at best, might improve the scientific aspect of the PETRL methodology but the process is both scientifically and forensically valid as relating to the detection of both EPO and DPO. Therefore, on a balance of probabilities, Michelles Power plasma sample, #1120 with a confirmatory report for DPO is valid.

36. This Commission has witnessed first hand the scientific integrity of the methodology as per the Scott case (Ruling No. SB 021/2007). In that instance, Mr. Scott admitted to administering Aranesp (DPO) to his horse and Dr. Uboh's lab was able to successfully confirm its detection in a plasma sample obtained via the Commission's Out of Competition Testing Program just as sample #1120 was obtained. That decision was upheld in the Ontario Superior Court of Justice, Brian Scott v. Ontario Racing Commission, Divisional Court File No. 07-DV-001344.



37. The Pennsylvania Racing Commission has on two separate occasions accepted the validity of the PETRL method as being scientifically valid. Supporting the validity of PETRL is the fact the state of California just engaged PETRL as its lab of choice for EPO/DPO testing.

38. Further support and weight for the validity of the science was the confirmatory result reported by the Iowa State laboratory's on the same sample, #1120. That work was undertaken by way of a split sample at the request of the appellant who opted not to provide any information to the Panel about the test result. Neither was Dr. Al Kind, Iowa State's Lab Manager called to testify as a witness.

39. What better endorsement of the PETRL science than adoption of it in its entirety by three other respected laboratories that perform EPO/DPO testing. The Panel notes the judgment of Iowa State, the University of Florida and the University of California at Davis that the PETRL methodology for the testing of EPO/DPO is both scientifically and forensically sound. Surely, it is reasonable to expect that their experts with their respective wealth of scientific expertise including proteomics and the reliance by other regulators carry more weight than Dr. Barker in terms of the scientific and forensic reliability of the methodology. Had Dr. Barker shown enough interest to take advantage of the RMTTC free offer, one might be inclined to accept that he has a thorough understanding of the methodology.

40. The horse racing industry recognized Dr. Uboh and PETRL for their work in developing a valid test that could detect EPO/DPO with two separate awards. One was from Harness Horse International, the very people who own and train horses and the other was Harness Writers Association.

41. No other questions or criticisms of the published work in the 2008 edition of Analytical Chemistry were produced. Would it not be reasonable to expect that if Dr. Barker had valid criticisms of the methodology, he would have brought them forth before his appearance on behalf of the appellant? As an acknowledged member of the peer review group for the publication, he certainly would be familiar with how best to make his views known even if he was not an actual participating member on this publication. In as much as Dr. Barker has not done any work in this area or published his criticisms for peer review, the Panel must assign the appropriate weight to his testimony.

42. Finally and conclusively, Dr. Barker agreed that he was unable to prove the T9 peptide was not present from the administration of DPO. There is no dispute that DPO is a synthetic product and its presence in sample #1120 can only be explained that it was administered. The appellant's reliance on a published report suggesting that more than one match is required carries little weight when matched up to the overwhelming support for the PETRL science as published.

43. With respect to Dr. Barker's criticisms of the PETRL science, he could easily have provided conclusive proof to at least one of them as it relates to his critique for the need for a certified standard. The University of Florida's Dr. Sams undertook such a study for the T6 and T7 peptides and found that the published work in the 2007 edition was accurate. That result bodes well as to the validity of the PETRL science and to the reliability of Dr. Uboh as a scientist and witness. Dr. Barker, as per his own admission, could have done the same; capability was not an issue according to him. He testified he chose not to because of the cost to Mr. Elliott but as per his own estimate, that would have been no more than \$1,000, a relatively small amount given the importance of the issues. Did he know that Dr. Uboh was right; there was no need just as the standard provided by the manufacturer, Amgen, as in the 2007 publication was right.



44. His performance at the hearing was more in line as an advocate rather than an independent expert witness. The SOAR handbook defines an expert witness in the Manual for Ontario Adjudicators on p. 113, paragraph 4. It reads “if the expert is to assist, he or she must participate as an independent scientist or professional rather than as an advocate for his or her client”. In contrast, Dr. Barker made an emphatic, repetitious, presentation. He was very much and ever the advocate. Impartial or above the fray he was not. He described having testified on eight occasions – each time for the defence. No decisions supporting his views on the matter in issue were cited. He would not even accept that the drug mycra might be the reason for the alleged three false positives reported by Racing Forensics Inc utilizing the ELISA tests claiming it “hearsay” and attempted to minimize the Iowa State results for sample #1120.

45. Questions were raised during the hearing related to false positives and or false negatives regarding the ELISA testing and the alleged different results obtained on sample #1120 between Racing Forensics Inc and PETRL. Dr. Uboh’s unchallenged explanation demonstrated that on conversion to the same measurement, the PETRL result was statically the same as that obtained by Racing Forensics for the ELISA test on sample #1120. The Panel is aware that Racing Forensics and other jurisdictions in the United States have had elevated ELISA test readings for EPO/DPO with no detection utilizing the PETRL methodology. Anecdotal evidence supported by Dr. McKenzie’s testimony suggests one possible and logical explanation is that the ELISA tests were correctly identifying mycra. It is an EPO/DPO type of drug that the current test using the PETRL methodology is not yet able to confirm. Therefore, those matters are red herrings and irrelevant.

46. The argument advanced by the appellant that there was some type of a breach of SB Rule No. 6.48 through to 6.48.08 is irrelevant. SB 6.48 was promulgated prior to the development of the PETRL methodology. It utilized an antibody test which was acknowledged to be unfair as it can detect the presence of EPO/DPO antibodies years after use. Therefore, the November 3, 2003 Directive No. 6/2003 (Ex.1, tab 37) is not applicable as it dealt with an immunoassay test that the Commission no longer utilizes. Since the adoption of the PETRL methodology the Commission has discontinued the 6.48 testing making any arguments related to it specious. Furthermore, 6.48 dealt specifically with the horse and did not address penalties for the horse person. Therefore, the argument that the Director did approve the tests as referenced under this rule bears no weight. For greater certainty, Dr. Duncan, as head of the Commission’s veterinarians, operates on a delegated authority as per the Racing Commission Act, 2000, Section 11.3. As such, his discussions and communications with both Dr. McKenzie and Dr. Uboh represent de facto approval on behalf of the Commission for the guidelines, methodology, limits etc.

47. The argument advanced by the appellant re the CPMA (federal) role in drug testing is not applicable. The CPMA rules apply to horses entered into race, Out of Competition testing is not governed by the Pari-Mutuel Betting Supervision Regulations. The Commission clearly has the statutory authority in this regard under Section 19 (conduct of licensees) of the Racing Commission Act, 2000. The Courts, by way of judicial review in both the Scott and Gray cases, have recognized that authority. The confirmatory test satisfied the statutory conditions of section 19 of the Act. Similarly, no Certificate of Positive Analysis is called for as suggested by the appellant under SB. No. 9.02. The confirmatory notice issued by PETRL is sufficient as evidence of the presence of DPO in sample #1120.



48. It is irrelevant to the hearing that Mr. Elliott had some sixty-six horses test negative for EPO/DPO. It is akin to a person stopping at sixty-six stop signs and arguing that there should not be a penalty for going through the sixty-seventh. As per the testimony, when it comes to detecting the administration of EPO/DPO timing is everything. As per the testimony, post race detection is nearly if not entirely impossible. Administration of the drug occurs as part of a program that takes place days before the race. To be detected, a plasma sample needs to ideally be obtained within 5 to 7 days of the administration of the drug although a longer time frame may be successful as per Dr. McKenzie, hence the need for Out of Competition testing. The horse may or may not produce antibodies so an absence of antibodies is inconclusive. The antibodies may remain and be detectable for years, the drug does not. Hence the May 6, 2008 test on Michelles Power could very well be negative for DPO while the August 29, 2007 test was confirmatory for it.

49. The decision by Racing Forensics Inc, in conjunction with Dr. Duncan, to issue an Amended Report of Analysis (Ex. 1, tab 11) on April 2, 2008 was reasonable and correct. It supported the Commission's objective of protecting the health of the horse and protecting the public interest. With PETRL offering an opportunity to lower the detection limits by using an increased volume of the sample it afforded the Commission a real chance at catching potential cheaters who previously were escaping detection with what amounted to a false negative. There was no dispute that the ELISA tests were confirming the presence of EPO/DPO but unfortunately until the decision to use a larger volume of plasma PETRL was unable to confirm and with the costs, the Commission had wisely opted to not send samples which past history had shown would not likely result in a confirmatory call. There was no need to inform Mr. Elliott, no new tests were performed on sample #1120.

50. Sample #1120 was not the only sample that underwent an Amended Report of Analysis. It was one of three with two others besides #1120 being reported by PETRL as confirmed. The evidence does not support the appellant's suggestion Mr. Elliott was targeted. Furthermore, Out of Competition testing is based on change of performance or investigative information.

51. The appellant, by way of written argument, argued that the administration failed to demonstrate that Mr. Elliott had violated SB Rules. Nos. 26.02.01 and 02, more commonly referred to as "trainer responsibility". It was agreed by the parties that the applicable rules were those in force as found in the Commission's 2005 Rule Book, therefore a strict liability defence would be applicable as it relates to the aforementioned rules.

52. The onus is clearly on Mr. Elliott to demonstrate what due diligence he undertook to protect Michelles Power. SB 26.02.01 states " A trainer shall be responsible at all times for the condition of all horses trained by him/her. The trainer must safeguard from tampering each horse trained by him/her and must take all reasonable precautions in guarding. Without restricting the generality of the foregoing, every trainer must guard, or cause to be guarded by the exercise of all reasonable standards of care and protection. So as to prevent any person not employed by or not connected with the owner or trainer from administering any drug or any other substance resulting in a pre-race or post race positive test". SB 26.02.02 states "Any trainer who fails to protect or cause any horse trained by him to be protected and a positive test thereby results or otherwise violates this rule shall be guilty of an offence".



53. Mr. Elliott denied administering DPO to Michelles Power.

54. The standard of proof is identified in *F.H v McDougall* [2008] 3 SCR 41 (para 49).

“In the result I would reaffirm that in civil cases there is only one standard of proof and that is on a balance of probabilities. In all civil cases, the trial Judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.”

That civil standard is applicable to administrative tribunals and is in contradistinction to the criminal standard, beyond reasonable doubt.

55. The Johnston case references inherent “probabilities or improbabilities” in relation to assessment of evidence.

56. Elliott’s denial that he administered the DPO must be assessed for credibility and reliability. Factors include:

- The drug is illegal and so ought not to be available for administration by mistake.
- Being an injectable, it is unlikely to be administered inadvertently or by accident. A deliberate action is required by someone.
- The drug is foreign to a horse and so must be administered exogenously.
- The drug is refrigerated for storage or shipment (see the Scott Decision) and so requires a certain level of care.
- An administration costs in the range of \$750 (Scott Decision).
- Michelles Power was a valuable horse with substantial earning power. The inherent probability is that it would be provided with care and protection commensurate with its value.
- There is a further inherent probability that only a small group of persons would have an interest in enhancing the horse’s racing capability.
- Elliott has two prior positive tests on his racing record. This is cited in relation to credibility and reliability rather than propensity. (It is noted that in his testimony he sought to attribute one of those positives to his former employer Bill Robinson).
- On Elliott’s racing record, there is reference to enquiry over a seven-second improvement in performance. An eyebrow raiser requiring a formidable explanation.
- That the incident occurred at a training centre where there was another EPO/DPO violation (Brett Robinson) resulting in a ten-year suspension.
- There was no evidence to support malicious or hostile third party administration.

57. However, even if Elliott’s denial under oath is totally rejected, that rejection does not become evidence that Elliott did administer the drug. That issue remains to be decided on the balance of the evidence.

58. Entirely apart from his denial, there is not sufficient evidence to support a finding that his was the guilty hand. The matter does not end there. The evidence clearly establishes Elliott’s breach of the Trainer Responsibility Rule in failing to safeguard the horse, Rule 26.02.01. No evidence was introduced which was capable of supporting a due diligence defence.



59. That denial does not fulfill or constitute the requirements to satisfy a strict liability defence. As the admitted trainer he must demonstrate what precautions/safeguards he employed to protect Michelles Power as required by the rules. No evidence was led in this regard as to what, if any, due diligence he undertook. No attempt was made to lead independent evidence in support of a due diligence defence – such as feed and water arrangements, security, personnel with caretaker responsibility and access, other occupants of the premises, public access, locked facilities such as feed, medicine cabinets and the like, grooms, other trainers and so on. As in almost all trainer responsibility violations, no one admits to responsibility, it is virtually impossible to produce the “smoking gun”. Here we have an illegal synthetic drug that does not naturally occur in the horse’s system, Mr. Elliott bears that responsibility. He did not fulfill his obligations under SB 26.02.01 and 02. There is no need to prove he had possession or used DPO.

60. Under Section 21 of the Racing Commission Act, 2000 the Director has the authority to suspend a licensee. Notice of the suspension must include the reasons and the right of an appeal which were provided (Ex. 1, tab 2). With a confirmatory notice that DPO was found in plasma sample #1120, the Director had no other alternative than to proceed with the Notice and Order. Mr. Elliott’s actions clearly indicated those conditions outlined below were present. They are:

- There were reasonable grounds to believe that while he carried out his activities for which a licence is required, he will not act in accordance with the law or with integrity, honesty or in the public interest in regard to his past conduct.
- He was carrying out activities that were in contravention of the rules and the terms of his licence.
- His conduct placed the integrity of the horse racing industry in Ontario in question.
- The public interest requires that his licence be suspended.

61. The Commission, by way of a Notice to Industry (Ex. 5) dated April 19, 2006, communicated to the industry that the acquisition, possession and or use of Aranesp (DPO) would carry severe penalties. The 10-year suspension and \$40,000 assessed by the Director falls within the published Commission Penalty Guidelines for illegal, non-therapeutic drugs.

62. The Commission is mandated to protect the health and welfare of the horse and the public interest. Previous testimony before this Commission has conveyed that the administration of EPO/DPO can threaten the health of a horse. It is well accepted that the use of these drugs by athletes, human or equine, dramatically affects performance.

63. It is not necessary to expound on the evils of EPO/DPO and their negative impacts on the horse racing industry. They are well detailed in the Todd Gray and Brian Scott Decisions.

64. Suffice to say that cheaters who use illegal, enhancing performance drugs, sap the lifeblood from an industry and sport that depend on public confidence for their life support, wagering. Fans need to be reassured and have confidence that the product is drug free. Because of its large and multi faceted agriculture base, thousands of jobs across the province are put at risk by those few who look for a chemical, high test boost in performance, by using illegal drugs such as EPO/DPO.

65. The Commission clearly has the authority to impose penalties that support its objectives of protecting both the health of the horse and the public interest. This fact is supported by the Divisional



Court, Brian Scott and Ontario Racing Commission, File No. 07-DV- 001344, Date 20090702 at para 29. “The penalty imposed by the Commission is also subject to review on a reasonableness standard as determined on of appropriate penalties in the context of regulating the horse racing industry is firmly within the mandate and expertise of the ORC: Gray v. Ontario Racing Commission [2008] O.J. No. 1205 at para 35 (Div Ct), the Court stated, “The devastation of public confidence exacted by the use of EPO/Aranesp required a hard line response That response is stern but fair given the high profile, long term program responding to this industry threat to the future of horse racing.”

66. In the Scott Decision, the Court said at para 74, “Imposition of penalty is neither a precise equation nor is it intended to be. Hence a “range of appropriate penalty” evolves. The general rule is that similar offences by similar offenders in similar circumstance should be visited by similar penalties,” [2007] O.R.C.D. No. 18, Ruling Number Com SB 021/2007. Other EPO/DPO suspensions have been set at 10 years as per the Commission’s Penalty Guidelines (appended to this decision). The Panel believes, therefore, 10 years to be appropriate.

67. The Industry Penalty Guidelines suggest a suspension for a positive test for Aranesp (DPO) at 10 years. The term has become the norm for this type of violation as per Moffatt, Scott, Gray, and Siddall. This violation is one of the most egregious in horse racing.

68. For this stark reality, the Commission has acted to attempt to eradicate the use of both DPO and EPO in horse racing in Ontario. As Vice Chair Donnelly wrote in the Scott decision, p 79, “Doping horses is an exit ticket”. As in p 83 of that same decision, “The dominant principles for the determination of the penalty are extracted from S 718 c.c:

The fundamental principle is to protect the industry
Denunciation clear and unmistakable
To deter like minded individuals
To separate offenders from the industry
To provide reparation for the vast number of victims by restoring viability and truly
protecting integrity
Rehabilitation”

69. The penalty needs to be such that it serves to protect the horse, a stated goal of this Commission, as well as the public interest. The former is self evident, included in this latter grouping are the participants who were cheated by having to unfairly compete in races in which they were decidedly disadvantaged. Hay and oats versus DPO is not a contest, it is a “fixed” race.

70. The Commission has varied the fine, see again Moffatt, Scott, Gray and Siddall from a low of \$10,000 to \$40,000. The major mitigating factor was level of industry involvement buttressed by economic wherewithal.

71. Michelles Power raced at the very highest level of her class, the top stakes races in Ontario and across North America. Her earnings in these races add up into hundreds of thousands of dollars. The impacts are far reaching, not just for the other owners and horse people or fans who were cheated, but for breeders whose offspring were denied winning records that would increase values for their respective bloodstock. A fine of \$60,000 would be reasonable given these circumstances.



72. Nothing is to be gained by repeating the notices to the industry and the peril for the industry associated with EPO/DPO. The Gray/Scott Decisions are adequate chronicles for that purpose. The penalties therein were judicially reviewed and confirmed. Consideration of Michelle Power's racing status and success requires an elevated fine. The penalty dealing with livelihood is severe but it must be. The industry cannot license that which it cannot survive.

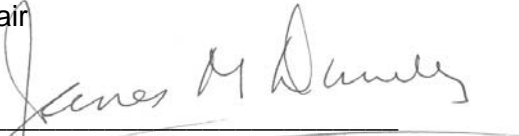
73. The proposed order is granted as requested. An order will issue:

- (a) Confirming the Order of Immediate Suspension.
- (b) Imposing a full suspension on William Elliott for 10 years from April 25, 2008.
- (c) Imposing a fine of \$60,000.

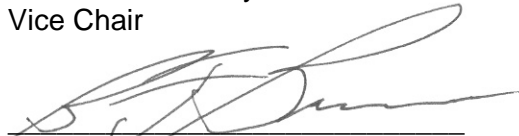
DATED this 27th day of October 2009.



Rod Seiling
Chair



James M. Donnelly
Vice Chair



Barnard Brennan
Commissioner

Attachment



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January 23, 2008

POLICY DIRECTIVE NO. 1–2008

Penalty Guidelines for Equine Drug, TCO₂ and Non-Therapeutic Drug Offences

The Ontario Racing Commission at its meeting of Tuesday, January 22, 2008, approved the Penalty Guidelines for Equine Drug, TCO₂ and Non-Therapeutic Drug Offences Policy as follows, effective January 31, 2008:

Guidelines

Penalties for Equine Drug, TCO₂ and Non-Therapeutic Drug Offences

Class of Drug	1st Offence	2nd Offence	3rd Offence	4th Offence
Class I	1 – 5 years plus \$5,000 fine	5 – 10 years plus \$20,000 fine	10 year suspension plus fine	
Class II	1 – 5 years plus \$5,000 fine	2 – 10 years plus \$10,000 fine	10 year suspension plus fine	
Class III	60 – 180 days plus \$1,500 fine	6 months – 1 year plus \$5,000 fine	1 year – 2 years plus \$10,000 fine	2 years or more plus \$20,000 fine
Class IV	15 – 75 days plus \$1,000 fine	30 – 150 days plus \$2,000 fine	60 – 300 days plus \$4,000 fine	1 year or more plus \$8,000 fine
Class V	15 – 75 days plus \$1,000 fine	30 – 150 days plus \$2,000 fine	60 – 300 days plus \$4,000 fine	1 year or more plus \$8,000 fine
Non- Therapeutic	10 years plus \$40,000 fine	25 years plus \$100,000 fine		

Application of the Guidelines will take into consideration the following:



1. The Commission and/or its representatives will consider all offences for the purposes of assessing a penalty as a second or subsequent offence under these Guidelines.
2. The suggested penalties (suspension and fines) are guidelines only.
3. The Commission and/or its representatives may take into consideration any mitigating circumstances surrounding a positive test case, and may do any of the following:
 - i. Impose a penalty that is lower than suggested in these guidelines.
 - ii. Subject to due process, find other licensed individuals responsible and impose penalties upon such licensee as deemed appropriate.
4. The Commission and/or its representatives may exercise discretion in interpreting these Guidelines and assessing penalties, and may consider all prior offences, in and outside of Ontario, involving any drug, medication, bicarbonate (TCO₂) or any other substance prohibited by rule or law. Although all prior offences may be considered in determining the appropriate penalty, the penalties for second and subsequent offences suggested in these Guidelines are based on:
 - i. The assumption that the previous offence(s) being considered were in the same class of drug, and
 - ii. The date of conviction or ruling for the previous offence(s) occurred within 3 years of the first offence.
5. For second or subsequent offences which occurred within 3 years of the first offence but in a different class of drug, the Commission and/or its representative will exercise discretion in assessing the penalty by considering the following:
 - i. The number and class(es) of all previous offences;
 - ii. The time frame between offences; and
 - iii. Any mitigating circumstances.
6. For the purposes of these Guidelines, a TCO₂ offence is considered a Class III drug.
7. On a first offence, the Commission and/or its representatives may impose a penalty beyond or below the range in appropriate circumstances.
8. Multiple offences occurring on the same race day to different horses of the same trainer may be considered as individual offences in appropriate circumstances.
9. Suspension periods are full suspensions as described in the Rules of Racing.
10. Regardless of the penalty imposed, the horse in question will be disqualified and the purse will be redistributed.
11. Class I through V drugs are based on the *Uniform Classification Guidelines for Foreign Substances*, published by the Association of Racing Commissioners International.
12. Non-Therapeutic will include any drug, substance or medication that is determined to be in the system of a horse that has no therapeutic value to the horse.

BY ORDER OF THE COMMISSION

John L. Blakney
Executive Director