

1 5. On November 7, 2008, Industrial Laboratories reported that the sample of
2 Captain Canaveral's urine was positive for the presence of ethyl glucuronide, a
3 metabolite of ethanol.

4 6. ADOR informed Mr. Evans of Industrial Laboratories' report and, on
5 November 14, 2008, referred the matter to the Turf Paradise Stewards.

6 7. On November 18, 2008, Mr. Evans requested that a split sample of Captain
7 Canaveral's urine to be sent to the Iowa State Laboratory.

8 8. On December 16, 2008, Iowa State University reported that the split sample
9 of Captain Canaveral's urine was positive for ethyl glucuronide.

10 **Barclay Drive (November 8, 2008)**

11 9. On November 8, 2008, the horse Barclay Drive won the seventh race at Turf
12 Paradise.

13 10. Mr. Evans was Barclay Drive's trainer.

14 11. After the race, ADOR took a urine sample from Barclay Drive and sent it to
15 Industrial Laboratories for analysis.

16 12. On November 14, 2008, Industrial Laboratories reported that the sample of
17 Barclay Drive's urine was positive for the presence of ethyl glucuronide, a metabolite of
18 ethanol.

19 13. ADOR informed Mr. Evans of Industrial Laboratories' report and, on
20 November 15, 2008, referred the matter to the Turf Paradise Stewards.

21 14. On November 17, 2008, Mr. Evans requested that a split sample of Barclay
22 Drive's urine to be sent to the Iowa State Laboratory.

23 15. On December 16, 2008, Iowa State University reported that the split sample
24 of Barclay Drive's urine was positive for ethyl glucuronide.

25 **Charlie's M.D. (November 11, 2008)**

26 16. On November 11, 2008, the horse Charlie's M.D. won the fourth race at
27 Turf Paradise.

28 17. Mr. Evans was Charlie M.D.'s trainer.

29 18. After the race, ADOR took a urine sample from Charlie's M.D. and sent it to
30 Industrial Laboratories for analysis.

1 19. On November 20, 2008, Industrial Laboratories reported that the sample of
2 Charlie's M.D.'s urine was positive for the presence of ethyl glucuronide, a metabolite of
3 ethanol.

4 20. ADOR informed Mr. Evans of Industrial Laboratories' report and, on
5 November 22, 2008, referred the matter to the Turf Paradise Stewards.

6 21. On November 25, 2008, Mr. Evans requested that a split sample of
7 Charlie's M.D.'s urine to be sent to the Iowa State Laboratory.

8 22. On December 16, 2008, Iowa State University reported that the split sample
9 of Charlie M.D.'s urine was positive for ethyl glucuronide.

10 **The Steward's Hearing**

11 23. On December 20, 2008, the stewards at Turf Paradise held a hearing, at
12 which Mr. Evans testified. The three stewards unanimously found that Mr. Evans had
13 violated Arizona statute and rule by having ethyl glucuronide, a metabolite of ethanol (a
14 class 2 drug) in his horses Captain Canaveral, Barclay Drive, and Charlie's M.D.

15 24. As a result of these violations, the stewards disqualified Captain Canaveral,
16 Barclay Drive, and Charlie's M.D. from the races that they had won, redistributed the
17 purses, fined Mr. Evans \$1,000.00 plus a \$50.00 surcharge for the Retired Race Horse
18 Adoption Fund for each of the three incidents, for a total of \$3,150.00, and suspended
19 him for a total of 60 days total for all three incidents. The stewards further
20 recommended that ADOR suspend Mr. Evans for six months for each of the three
21 violations, for a total of an eighteen-month suspension.

22 25. Mr. Evans appealed and requested a hearing on the stewards' decisions in
23 the three cases. ADOR referred the matter to the Office of Administrative Hearings, an
24 independent state agency, and issued a Notice of Hearing in due course. ADOR's
25 Notice of Hearing charged Mr. Evans with violations of A.A.C. R19-2-112(12), (15), and
26 (17), which furnished cause to discipline his license under A.R.S. §§ 5-108(A)(1)(g) and
27 5-108.05(A), including imposition of civil penalties.

28 26. A hearing was held on February 19, 2009. ADOR had admitted into
29 evidence 15 exhibits and presented the testimony of Petra Hartmann of Industrial
30 Laboratories, Leslie Salmons, DVM, ADOR's chief veterinarian, and ADOR Investigator

1 David Miller. Mr. Evans testified on his own behalf and had admitted into evidence five
2 exhibits. Two persons who owned horses that Mr. Evans trained also testified.

3 **HEARING EVIDENCE**

4 **Dr. Salmons**

5 27. After a race, the winners are sent to the test barn to have urine and/or blood
6 samples taken. Dr. Salmons or another ADOR veterinarian supervises or takes the
7 sample and verifies the horse's identity.

8 28. Dr. Salmons testified that he had personally supervised the taking of urine
9 samples from Captain Canaveral and Charlie's M.D.

10 29. Dr. Salmons testified that he did not work at Turf Paradise on November 8,
11 2008, when Barclay Drive had won a race. However, he trained Dr. Alonso, who
12 supervised the taking of urine from Barclay Drive. ADOR had admitted into evidence a
13 copy of the multipart tag that was attached to the blood and urine samples from Barclay
14 Drive.

15 30. Dr. Salmons testified at length about the procedures used to take blood and
16 urine samples from race horses. He testified that, because FedEx does not make
17 pickups over the weekend, he personally delivers samples that are taken on the
18 weekend to FedEx rather than leaving the samples in the barn.¹

19 31. With the exception of the tag for Barclay Drive's samples, none of the
20 documents evidencing chain of custody were offered into evidence.

21 32. Dr. Salmons testified that horses may not be administered foreign
22 substances, even those having a potentially medicinal purpose, within 24 hours of a
23 race, with certain limited exceptions. One such exception is Lasix, which may be
24 administered to horses that ADOR has determined "bleeders" no more than four hours
25 before a race. After the Lasix is administered, stewards must arrange for someone to
26 watch the horse.

27 33. Dr. Salmons admitted that, if the horses had been administered ethanol five
28 days before the race, there would have been no violation. Dr. Salmons admitted to

29 _____
30 ¹ The Administrative Law Judge takes administrative notice that October 31, 2008 was a Friday,
November 8, 2008 was a Saturday, and November 11, 2008 was a Tuesday and the federal and state
holiday of Veterans' Day.

1 hearing Thomas Tobin testify in Mark Welsh's case that ethyl glucuronide would be
2 detectable in a horse's urine five days after administration of ethanol. But Dr. Salmons
3 "has questions about that statement." The ethyl glucuronide might be present in the
4 horse, but below the level detectable by Industrial Laboratories' test.

5 34. Dr. Salmons testified that usually isopropyl alcohol is used for topical
6 purposes. But, if ethanol were rubbed on a horse's legs, approximately 1-2% might be
7 absorbed. This would not be enough to produce a positive result for ethyl glucuronide
8 in Industrial Laboratories' test.

9 35. Dr. Salmons testified that ethanol may be used to calm down nervous
10 horses before a race, so they do not "lose the race before it is begun." To serve this
11 purpose, ethanol may be administered orally or intravenously four or five hours before a
12 race.

13 36. Because ethanol is a foreign substance that does not occur naturally in
14 horses and has a high potential to affect a race, the Association of Racing
15 Commissioners International, Inc. ("ARCI") classifies ethanol as a class 2 substance.

16 37. ARCI has not set any threshold amount for ethanol. Ethyl glucuronide is
17 not on ARCI's list of prohibited foreign substances.

18 38. Dr. Salmons testified that ethanol is very quickly metabolized by the horse.
19 Until 2005 or 2006, when the University of Pennsylvania published a study regarding a
20 new way to detect the presence ethanol by measuring metabolites that remain, there
21 were no reliable tests for ethanol.

22 39. As chief veterinarian, Dr. Salmons modifies the menu of substances that
23 horses are tested for as he becomes aware that owners or trainers may be using the
24 substances to enhance the animals' race performance. Since the end of October 2008,
25 he has ordered that winning horses be tested for ethyl glucuronide, the metabolite left
26 after ethanol has been metabolized.

27 40. Dr. Salmons testified that, a day or two after the stewards' hearing, Mr.
28 Evans had come to the barn, wondering what ethyl glucuronide was and how it could
29 have gotten into the horses. Dr. Salmons explained that ethanol is the alcohol that is in
30 beer, wine, and other liquor. Ethanol may be used for alcohol consumption. Mr. Evans

1 had explained that he usually kept a quantity of the “cheapest alcohol available” to put a
2 “jigger” on the horse’s feet.

3 **Ms. Hartmann**

4 41. Ms. Hartmann has been the Director of Direct Testing Services at Industrial
5 Laboratories for eight years, overseeing drug testing of bodily fluid samples from racing
6 animals, such as horses and greyhounds. She has a Bachelors of Science degree in
7 Chemistry and a Master of Sciences degree in Pharmaceutical Sciences.

8 42. Industrial Laboratories started offering testing for ethanol within the past
9 year, approximately seven months before the hearing. The test for ethanol detects the
10 metabolite ethyl glucuronide. Although the test was first developed in a study published
11 by the University of Pennsylvania in 2005, it has not been widely available.

12 43. Ms. Hartmann did not know the horses’ names when she tested the
13 samples taken from them. Her testimony identified the sample number assigned as
14 follows: E82979 for Captain Canaveral; E83038 for Barclay Drive; and E83062 for
15 Charlie’s M.D.

16 44. Ms. Hartmann testified, and her reports reflected, that all three urine
17 samples arrived at Industrial Laboratories in locked, sealed coolers that showed no
18 evidence of tampering. The samples were in good condition.

19 45. Ms. Hartmann testified that Industrial Laboratories conducted routine testing
20 first. Because the jurisdiction had requested testing for ethanol, she had added that
21 test to the menu.

22 46. Ms. Hartmann testified that, when a horse ingests or is administered
23 ethanol, only a small amount of the ethanol, 0.2 or 0.1%, is metabolized as ethyl
24 glucuronide.

25 47. Ms. Hartmann did not provide a quantification of the amount of ethyl
26 glucuronide found in the three horses because Arizona does not have a threshold for
27 the substance. She admitted that she was not an expert on “retrograde analysis,”
28 which Mr. Evans’ counsel called an analysis by which an expert could render an opinion
29 on the amount of a substance that had been administered to an animal and/or when the
30 substance had been administered.

1 48. Ms. Hartmann testified that, if Industrial Laboratories had detected ethyl
2 glucuronide, it must have been present in at least 1 microgram/milliliter of urine
3 because the test would not have detected a lesser amount.

4 49. Ms. Hartmann testified that ethanol may be administered to an animal
5 intravenously or orally. In the peer-reviewed study by the University of Pennsylvania, in
6 which a horse was intravenously administered 30 milliliters of ethanol, ethyl glucuronide
7 was detected in the amount of 1.08 microgram/milliliter in urine samples taken eight
8 hours later. Based on this test, Ms. Hartmann believed that the three horses had been
9 administered ethanol within 24 hours of their races. After 24 hours, no amount of
10 ethanol or ethyl glucuronide would be detectible.

11 50. Ms. Hartmann admitted that the method of administration of ethanol could
12 affect test results "to a certain degree." The weight of the horse also could play a part
13 in the time required for distribution and elimination of a substance.

14 51. Ms. Hartmann testified that ethanol is alcohol fermented from grain. But
15 tainted grain would not have caused a positive result in a test for ethyl glucuronide
16 because the amount of ethanol produced would have been so small.

17 **Special Investigator Miller**

18 52. Mr. Miller testified that he searched Mr. Evans' barn on November 14, 2008.
19 He found in a file cabinet in plain sight six or seven large 7.5 liter bottles of vodka that
20 were about 12" high and 5-6" wide with a handle. One of the bottles was open and had
21 only 3-4" of vodka left at the bottom.

22 53. Before Mr. Miller became a special investigator for ADOR, he worked for 24
23 years for the Phoenix Police Department and the Douglas Police Department. He
24 admitted that, in humans, alcohol is eliminated at a rate of .025/hour. He had no idea
25 of the elimination rate for a horse.

26 **Mr. Evans**

27 54. Mr. Evans testified that he has been licensed by ADOR as a trainer for 10
28 years. At the time of the hearing, he was only 28 years old.

29 55. Mr. Evans testified that in 2008, his horses won 65 races. Although some
30 of his other horses were tested for ethanol, there were no other positive results. He
had not changed his feeding or training regimen before the positive test results at issue.

1 56. Mr. Evans testified that he had administered Lasix to Captain Canaveral,
2 Barclay Drive, and Charlie's M.D. before the races because all were "bleeders." This
3 meant that an ADOR employee would have been present to monitor all three horses
4 from at least four hours before their races.

5 57. Mr. Evans testified that, the day after the race, Captain Canaveral suffered
6 a bout, ran a 104° fever, and was treated by a veterinarian for a week. Four of his other
7 horses also had stomach problems.

8 58. Mr. Evans denied administering ethanol to Captain Canaveral, Barclay
9 Drive, or Charlie's M.D. before their races. He testified that the vodka that Mr. Miller
10 found was for an "old trainer's remedy" that he used on all of his horses. Every horse
11 gets a bandage every day on its legs that consists of a pad soaked in grain alcohol and
12 other ingredients.

13 59. The day before the hearing, Mr. Evans had completed the 60-day
14 suspension that the stewards had imposed. The suspension had caused a hardship on
15 some of the owners, who had to transfer their horses other trainers. At least one horse
16 was not allowed to run in a race in which it had previously been entered due to Mr.
17 Evans' suspension.

18 60. Mr. Evans had admitted into evidence the notices of stewards' hearings,
19 which charged violations of A.A.C. R19-2-112(15)(a) and allows ADOR to test the
20 saliva, urine, or blood of animals that have been entered into races, but not A.A.C. R19-
21 2-112(12), the so-called "24-hour rule," which prohibits most foreign substances from
22 being administered to an animal on the calendar day of the race.

23 61. The original notices of the stewards' hearing stated that the reason for the
24 hearing was, "[u]pon Receipt of Affidavit from Industrial Laboratories indicating the
25 presence of 'Ethyl glucuronide' (metabolite of ethanol) (class 2) found in" samples taken
26 from Captain Canaveral, Barclay Drive, and Charlie's M.D. The notice further informed
27 Mr. Evans that "[t]he maximum penalty you may receive from this hearing is One
28 Thousand Dollars (\$1,000) fine and/or a sixty (60) day license suspension."

29 62. The Notices of Hearing for the positive test results from Barclay Drive and
30 Charlie's M.D. informed Mr. Evans that the charged offenses were, respectively, for the
"2nd offense within a calendar year" and the "3rd offense within a calendar year."

1 administration of ethanol to a horse more than 24 hours before the race or from topical
2 application of ethanol to a horse's legs.

3 5. Mr. Evans had requested and had received split samples of all three horses'
4 urine, analysis of which by Iowa State University confirmed the presence of ethyl
5 glucuronide. Had Mr. Evans desired additional analysis of the sample, he could have
6 requested that Iowa State University perform it.

7 6. Similarly, Mr. Evans could have presented scientific evidence or testimony that
8 the ethyl glucuronide found by Industrial Laboratories and Iowa State University could
9 have resulted from the administration of ethanol as long as five days before the race or
10 the topical application of ethanol to the animal's legs. He did not present such evidence.

11 7. Previous lack of enforcement does not bar or estop ADOR from enforcing a
12 prohibition that Mr. Evans is deemed to be aware of.⁷

13 8. ADOR, through Dr. Salmons' and Ms. Hartmann's testimony, established that
14 that it is more likely than not that the urine samples taken from Captain Canaveral and
15 Charlie's M.D. under Dr. Salmon's supervision and the urine sample taken from Barclay
16 Drive under Dr. Alonso's supervision arrived untainted at Industrial Laboratories.⁸

17 9. ADOR, through Dr. Salmons' and Ms. Hartmann's testimony, also established
18 that the ethyl glucuronide found in Captain Canaveral, Barclay Drive, and Charlie's M.D.
19 more likely than not resulted from the administration of ethanol at least four hours but no
20 more than 24 hours before their races.

21 10. With respect to the issue of notice, Mr. Evans did not challenge the sufficiency
22 of ADOR's Notice of Hearing, which set forth the factual and legal grounds for ADOR's
23 decision to impose civil penalties upon and to suspend Mr. Evans' license. Due process
24

25 ⁷ See *Carlson v. Arizona Department of Economic Security*, 184 Ariz. 4, 6, 906 P.2d 61, 63 (App. 1995)
26 ("In cases where the state's actions involved mere negligence or oversight, the courts have refused to
27 apply equitable estoppel," citing *Outdoor Systems, Inc. v. Arizona Dept. of Transp.*, 171 Ariz. 263, 830
28 P.2d 475 (App. 1992) (finding that the state agency's inadvertent issuance of three nonconforming sign
29 permits and failure to notice the error for two years did not amount to wrongful conduct which would give
30 rise to equitable estoppel); *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 586 P.2d
978 (1978) (county's failure to immediately enforce the terms of a land sale contract upon the
purchaser's breach did not equitably estop it from later suing the purchaser); *Graham v. Asbury*, 112 Ariz.
184, 540 P.2d 656 (1975) (state was not estopped from seeking overpayment of salary to an employee
because more than one year delay in suing was not intentional and did not constitute culpable
negligence))).

1 requires only a reasonably definite statement of charges and the right to produce
2 witnesses and examine adverse witnesses.⁹ The hearing before the Office of
3 Administrative Hearings satisfied these requirements.

4 11. To the extent that the same due process notice requirements applied to the
5 steward's hearing, they were satisfied. Although A.A.C. R19-2-112(12) was not cited in
6 the notice of the stewards' hearing, the notice made clear that the subject of the hearing
7 would be the presence of the foreign substance ethyl glucuronide, a metabolite of the
8 prohibited substance ethanol, in the urine of horses that Mr. Evans had trained. Due
9 process does not "entail one set 'of inflexible procedures universally applicable to every
10 imaginable situation,'" but merely requires notice and an opportunity to be heard in a
11 meaningful manner and at a meaningful time.¹⁰ The notice of stewards' meeting provided
12 the requisite notice.

13 12. A.A.C. R19-2-112(16) includes as a prohibited act:

14 The trainer . . . is required to protect and guard the horse
15 against the administration, either internally or externally, of
16 any foreign substance. A positive test indicating the presence
17 of a foreign substance . . . creates the presumption of failure
18 to meet the duty imposed by this rule.

19 There is no requirement in the regulation that the foreign substance must potentially or
20 actually enhance performance.

21 13. ADOR has borne its burden to establish that Mr. Evans violated A.A.C. R19-2-
22 112(12), (15), and (17).

23 14. "[A]n administrative penalty is excessive only if it is so 'disproportionate to the
24 offense as to shock one's sense of fairness.'"¹¹ Under this standard, the cumulative
25 \$3,150.00 civil penalty and 60-day total suspension that the stewards imposed, which Mr.
26 Evans has already paid and served, is well within the range of permissible sanctions.¹²

26 ⁸ The standard of proof of "beyond a reasonable doubt," which applies in most criminal prosecutions, is a
27 much higher evidentiary standard than what applies in an administrative hearing.

28 ⁹ See *Webb v. State ex rel. Arizona Bd. of Medical Examiners*, 202 Ariz. 555, 558, 48 P.3d 505, 508 (App.
29 2002) (citations omitted).

30 ¹⁰ *Id.* (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961)).

¹¹ *Culpepper v. State*, 187 Ariz. 431, 438, 930 P.2d 508, 515 (App. 1997) (quoting *Schillerstrom v. State*,
180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994); see also *Arizona Department of Corrections v. State
Personnel Bd.*, 202 Ariz. 598, 600, 48 P.3d 1208, 1210 (App. 2002) (citations omitted).

¹² See A.A.C. R19-2-121(E)(3)(f).

1 15. ADOR's proposed 180-day additional suspension is excessive. Although this
2 case involves three distinct violations, the timing of the races, test results, and notice in
3 effect combines the three violations into a single one, which is apparently Mr. Evans' first
4 and only violation in 10 years of having been licensed in Arizona. Ethanol is not a
5 performance-enhancing drug, even though it may affect the outcome of races.

6 **RECOMMENDED ORDER**

7 Based on the foregoing, it is recommended that the Director of ADOR affirm the
8 stewards' disqualifications of Captain Canaveral from the third race at Turf Paradise on
9 October 31, 2008, Barclay Drive from the seventh race at Turf Paradise on November
10 8, 2008, and Charlie's M.D. from the fourth race at Turf Paradise on November 11,
11 2008.

12 It is further recommended that the Director of ADOR affirm the stewards'
13 imposition of a civil penalty and surcharge in the total amount of \$3,150.00 against Mr.
14 Evans.

15 It is further recommended that the Director of ADOR affirm the stewards'
16 suspension of Mr. Evans license for 60 days.

17 It is further recommended that, as an additional penalty, as a result of the
18 violations found in this matter, the Director of ADOR suspend Mr. Evans' license for an
19 additional 60 days.

20 Done this day, March 3, 2009.

21 _____
22 Diane Mihalsky
23 Administrative Law Judge

24 Original transmitted by mail this
25 _____ day of March, 2009, to:

26 Department of Racing
27 Luis A. Marquez, Director
28 1110 W. Washington, Suite 260
29 Phoenix, AZ 85007

30 By _____