RENDERED: MAY 14, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000904-MR

DANIEL WAXMAN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 07-CI-00059

KENTUCKY HORSE RACING AUTHORITY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: Daniel Waxman, *pro se,* owner of a standardbred filly named Loyal Opposition, appeals from an order of the Franklin Circuit Court affirming the Kentucky Horse Racing Authority's disqualification of the filly from a race it

[1] Judge William L. Knopf concurred in this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

won after testing positive for the drug flunixin and ordering redistribution of the $80,000.00 purse. Upon considering the briefs, the record and the law, we affirm the circuit court's well-reasoned, thorough opinion, adopt it as if it were our own, and set it out in full:

> This matter is before the Court on Petitioner's Appeal from the Final Order of the Kentucky Horse Racing Authority in case number 06-100, which disqualified the filly Loyal Opposition in the eighth race at The Red Mile on October 8, 2005, and ordered the purse in that race redistributed for violations of 811 KAR 1:090, which prohibited the use of certain drugs within a certain period before a race, and provides for testing after a race to determine whether the regulation has been violated. The court, having considered the arguments and being otherwise sufficiently advised, hereby issues the following Opinion and Order AFFIRMING the final administrative decision of the Racing Authority.
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> **Facts**
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> Petitioner Waxman is the owner of the filly at issue in the case. Loyal Opposition was tended by trainer Ervin Miller and veterinarian Rick Mather. Dr. Mather treated Loyal Opposition with flunixin prior to the race, as is his standard practice. Loyal Opposition won the eighth race, and subsequently had urine and blood samples drawn at the test barn for later testing. The initial sample tested positive for flunixin, and Mr. Waxman requested that the "split-sample," a secondary sample taken for possible use by a referee laboratory in the event that an owner wishes to contest the initial findings, be tested. The initial sample was tested at Iowa State University, with the split-sample being tested at Louisiana State University. The split-sample also tested positive for flunixin. The blood samples drawn were also tested and found to be positive for flunixin.
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> During the Grand Circuit Meet, which spanned ten days, four horses tested positive for flunixin, all on

October 8, 2005. Three of these horses were tended by Dr. Mather. Dr. Mather testified that he treated the filly with banamine and flunixin in accordance with the regulation, 48-53 hours prior to the race. He also testified that the flunixin was administered as part of a normal routine to help the filly relax and rest up for the race, and was not administered in an attempt to mask or care for any injury or pain. According to the record, flunixin is an anti-inflammatory medication similar to human analgesics. It is frequently used in horses to lessen the discomfort and soreness from training. However it can also be used to mask injury or pain in an effort to race an injured horse. This presents a danger to both the horse, the driver, and the other horses and drivers on the track. However, both Dr. Mather and the KHRA veterinarian for the meet, Dr. Miles, agreed that there was no reason to believe that the filly was not healthy on the day of the race.

TOBA[2] testing was performed on two days of the meet, including the relevant day, which has been the regular practice of the KHRA in recent years. TOBA is a protocol developed for thoroughbred horses, but is used randomly in standardbred racing in place of the regular testing protocols. Testimony from experts established that TOBA is a more extensive battery of tests, rather than a more rigorous testing regime. In other words, TOBA tests for more chemicals, but does not do so in a way that is necessarily any more sensitive than the standard testing.

Iowa State University was the contract lab for all KHRA urine testing during 2005. Their initial screening of Loyal Opposition's urine was positive for flunixin, and further testing was conducted to confirm the presence of flunixin. After several tests, the sample was reported as positive. No numerical concentration was reported, but none was required, as the relevant regulation is a "zero-tolerance" policy. The lab issued its finding along with the methodology and equipment used.

[2] Thoroughbred Owners and Breeders Association (footnote added).

Mr. Waxman retained Dr. Scott Stanley of the University of California at Davis as an expert witness. He reviewed the analyses of the blood and urine samples, and testified as to irregularities in the processes used by ISU and LSU. Dr. Stanley's testimony as to the potential problems with the processes used by ISU and LSU were addressed by the KHRA and the laboratory directors for both universities.

The presiding administrative judge issued his Notice of Fine on December 27, 2005, and found that Petitioner had violated 811 KAR 1:090 §§ 1-5, 7, and 9, and ordered that the purse be redistributed. The veterinarian and trainer were fined as well under the relevant regulations, and paid their fines and waived their rights to appeal. The Court notes that the fines assessed against these parties were significantly less, and therefore they had less at stake in challenging the finding. The trainer's fine was $250, and the veterinarian was fined $500 per violation for each of his three violations. On the other hand, Mr. Waxman faced forfeiture of the purse for the race his filly won, which was approximately $80,000.

Mr. Waxman appealed the Judge's ruling to the KHRA on January 3, 2006. Discovery was conducted and an evidentiary hearing was held on September 14, 2006. Three laboratory experts, two veterinarians, track personnel, the presiding judge, the owner and trainer of the filly, and the Executive Directory of the KHRA were called as witnesses, among others. On November 16, 2006, the Hearing Officer issued Findings of Fact, Conclusions of Law, and Recommended Order, which recommended upholding the ruling of the administrative judge. He declined to rule on a constitutional challenge to the regulation. On December 18, 2006, the KHRA issued its Final Order upholding the ruling of the presiding judge and ordered the purse be redistributed. Mr. Waxman initiated a timely appeal to this Court on January 10, 2007.

Standard of Review

In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 300-301 (Ky. 1972). If there is substantial evidence in the record to support the agency's findings, this Court must defer to that finding even though there is evidence to the contrary. *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). If the court finds the correct rule of law was applied to the facts supported by substantial evidence, the final order of the agency must be affirmed. *Brown Hotel Company v. Edwards*, 365 S.W.2d 299, 302 (Ky. 1963). The function of the Court in administrative matters "is one of review, not of reinterpretation." *Kentucky Unemployment Ins. Comm'n v. King*, 657 S.W.2d 250, 251 (Ky. App. 1983).

Discussion

I. Petitioner's Claim on Judicial Review of the Final Administrative Decision of KHRA.

The Petitioner presented a wide range of evidence at the administrative level which he reasserts here at length. The Petitioner presented a well qualified expert witness to challenge the procedures followed by the ISU and LSU laboratories and their analyses of the blood and urine samples, the procedures followed by the presiding judge and the KHRA at the meet, and the chain of custody of the samples during the analyses. This information was presented in full to the administrative hearing officer, who considered all evidence. The evidence was in sharp conflict. The Petitioner's expert testified that the laboratories relied on by the KHRA conducted the testing improperly. The testimony from KHRA witnesses and the laboratory personnel asserted that all correct procedures and protocols were followed.

This Court does not weigh the factual basis of an agency's finding *de novo*, and may only reverse the agency on its findings of fact where there is a lack of

substantial evidence to support the agency's findings. KRS 13B.150(2). Here there is an abundance of evidence presented by both Petitioner and Respondent. While this evidence, on a *de novo* review, could potentially lead the Court to find in favor of either Petitioner or Respondent, the Court is not at liberty to perform such an analysis. The hearing officer was in the best position to weigh the evidence and the credibility of witnesses, and it appears that he did so in a manner that is consistent with the law. He obviously found the evidence and witnesses presented by the KHRA to be more credible than that presented by Respondent (sic), and therefore found that a preponderance of the evidence supported the judge's initial decision to fine Mr. Waxman. KRS 13B.090(7). The evidence Mr. Waxman presents to this Court is not sufficiently compelling to find a lack of substantial evidence for the agency's conclusion and therefore the Court finds that the agency acted within its authority in issuing its findings of fact, which held Mr. Waxman in violation of 811 KAR 1:090.

II. Petitioner's Argument that 811 KAR 1:090 is Unconstitutional [.]

Mr. Waxman additionally argues that 811 KAR 1:090 as it existed at the relevant time is unconstitutional in that it violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and violates Sections 1, 2, and 59 of the Kentucky Constitution, also on equal protection grounds. The essence of [his] claim is that the regulations governing the permissible post-race blood and/or urine concentrations of flunixin differ between thoroughbred and standardbred horses, and that there is no rational basis for this difference. Thoroughbred horses are held to a quantitative 20ng/ml maximum concentration of flunixin, while standardbred horses are held to a "zero-tolerance" standard, meaning that there cannot be detectable levels of flunixin in the blood or urine of the horse after a race.

This case does not involve a suspect class or a fundamental right, and accordingly, equal protection

analysis is limited to determining whether the difference in treatment between the owners of different classes of horses "rationally furthers a legitimate state interest." *Commonwealth v. Meyers*, 8 S.W.3d 58, 61 (Ky. App. 1999); *see Mobley v. Armstrong*, 978 S.W.2d 307 (Ky. 1998). The *Meyers* Court further articulated [its] definition by stating that "the equal protection clause is satisfied so long as there is a plausible policy reason for the classification [. . .] and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational [. . . .]" *Id.* at 61. Despite this low standard for the state to overcome, Petitioner alleges that the regulation at issue fails to satisfy the rational basis test.

Petitioner also asserts that the regulation at issue is a prohibited "special law" which is unconstitutional under Section 59 of the Kentucky Constitution. That section provides that "the General Assembly shall not pass local or special acts." The provision has been interpreted to apply to lesser legislative bodies, including administrative agencies. *See Parker v. Rash*, 236 S.W.2d 687 (Ky. 1951). The Courts have defined the difference between a general law and a special law as follows: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820 (Ky. 1942) (internal citations omitted, emphasis in original). As cited by Petitioner, "special laws" are those:

> Made to depend, not on any natural, real or substantial distinction, inhering in the subject matter, such as suggests the necessity or propriety of different legislation in regard to the class specified, but upon purely artificial, arbitrary, illusory, or fictitious conditions, so as to make the classification unreasonable, and unjust. . . . It is well established that in order for a law to be constitutionally general and not special legislation, the classification must be based upon a reasonable and natural distinction

> which relates to the purpose of the act and the legislation must apply equally to all in a class.

St. Luke Hospital, Inc. v. Health Policy Board, 913 S.W.2d 1, 3 (Ky. App. 1996) (quoting *Reid v. Robertson*, 200 S.W.2d 900, 903 (Ky. 1947)).

The Court, however, fails to see the reasons why 811 KAR 1:090 would be considered a special law. It does, indeed, differ from the regulations set forth for thoroughbred horses, but this distinction is not "artificial, arbitrary, illusory, or fictitious." *St. Luke Hospital, Inc.,* 913 S.W.2d at 3. The regulation differentiates based on breeds of horses which are vastly different. Petitioner's own brief cites the differences between these horses, and notes that thoroughbreds are more high strung and more prone to injury. The Court would also note that the breeds compete in entirely different circuits, and that the racing conditions themselves differ greatly between the breeds. Thoroughbreds are raced with a jockey riding atop the horse, while standardbred horses such as the ones Petitioner races are driven by a person riding in a two-wheeled cart behind the horse. The different regulations are based on distinctions which actually exist between the breeds. These distinctions are "substantial and real," and therefore Section 59 does not apply to invalidate the regulation. *Id.*

The Court is left to determine whether a rational basis exists for the difference in treatment of thoroughbred owners versus standardbred owners, and finds that such a basis has been articulated by the KHRA. On this point, the Court finds that *Allen v. Commonwealth*, cited by the KHRA, is controlling. 136 S.W.3d 54 (Ky. App. 2004). That Court dealt with exactly the same equal protection argument regarding the differing flunixin regulations between thoroughbred and standardbred horses (in particular, 811 KAR 1:090), and found that there was a rational basis for the distinction between the regulations. The KHRA's expert testified that harness racing horses are subject to increased risk from the use of flunixin to mask injuries, because they

lack the agility of a thoroughbred horse to avoid a downed horse, as they are attached to a racing bike. Thus, they are unable to step sideways or jump in order to avoid a horse, which creates risks both to the other horses in the field as well as their drivers. The *Allen* Court also cited a U.S. Supreme Court case dealing with the same issues, and finding that the difference in regulations between thoroughbred horses and harness racing standardbred horses satisfied the rational basis test. *Barry v. Barchi*, 443 U.S. 55 (1979).

The argument by Petitioner that this Court should disregard *Allen* is without merit. This case is a binding precedent. The fact that it arose from a different administrative proceeding before the KHRA does not impair its precedential value, nor does it in any way diminish this Court's duty to follow the binding precedent of the state's appellate courts. Once there has been a rational basis established for the regulation, and that basis has been upheld in a reported decision of the appellate courts, the state need not present the same evidence again in a different administrative tribunal. The issue of whether the regulation complies with equal protection requirements has been decided. While Petitioner presents strong arguments why this regulation can be considered arbitrary, this Court is not at liberty to disregard the appellate precedent that has already been established rejecting those arguments. There is simply no legal authority that would allow this Court to ignore the holding of the *Allen* Court on the identical issue presented.

The Court also notes that it finds no basis on which to consider the regulation void for vagueness or any evidence to support a selective enforcement claim. The language of the regulation is sufficiently clear to provide notice to the parties regulated, and there is nothing to indicate that the regulation was being selectively enforced. Winning horses are uniformly tested to ensure compliance with the regulation, and the fact that the KHRA used a more extensive testing battery on certain random days of the meet, as was its practice, does not amount to selective enforcement. According to the

testimony of record, the TOBA testing was not more strenuous, but rather tested for more conditions and chemicals, and all horses who were found to be in violation of the rules regarding flunixin were fined equally as provided for by the relevant regulations, as were the persons responsible for their care.

Finally, Petitioner argues that the subsequent amendments to 811 KAR 1:090, which adjust the permissible post-race flunixin levels to those acceptable for thoroughbred horses amount to an admission that the previous regulation in effect at the time of the race was unconstitutional. The Court disagrees. An amendment to a regulation which was found to pass scrutiny under the equal protection clause does not amount to an admission that the prior version of the regulation was unconstitutional. Indeed, a court of competent jurisdiction has found that the prior version had a rational basis and was therefore constitutional under the equal protection clause. The Supreme Court of the United States has held that amendments to laws previously found to pass equal protection analysis does not amount to an admission that the previous version was unconstitutional. *See Califano v. Webster*, 430 U.S. 313, 320 (1977).

Conclusion

While there clearly is conflicting evidence in the administrative record, there can be no question that there is substantial evidence that supports the decision of the KHRA. The decision of the KHRA was not arbitrary or capricious. Moreover, the evidence fails to establish that 811 KAR 1:090, as it existed at the relevant time, was unconstitutional for any reason. Accordingly, for the foregoing reasons, Petitioner's appeal is DENIED. The ruling of the KHRA in case 06-100 is AFFIRMED. There being no just cause for delay, this is a final and appealable order.

It is clear from Waxman's brief that he disagrees with the circuit court's opinion. However, mere disagreement will not justify reversal. In

reviewing a "circuit court's affirmance of an administrative decision [we] determine whether the circuit court's findings upholding the [agency's] decision are clearly erroneous." *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet,* 204 S.W.3d 121, 131-32 (Ky. App. 2006) (internal citations omitted). Based upon a review of the appellate record, we discern no error, and therefore no clear error in the circuit court's opinion affirming the KHRA's disqualification of Loyal Opposition and its redistribution of the purse. The circuit court eloquently rejected each of Waxman's arguments and we do the same.

For the reasons expressed in the circuit court's opinion, which we adopt as our own, the opinion of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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