

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

HOMER J. HOCHSTETLER,)	
)	
Appellant,)	
)	
v.)	C.A. No. 02A-02-005 HDR
)	and 02A-05-001 HDR
)	(Consolidated)
DELAWARE HARNESS)	
RACING COMMISSION,)	
)	
Appellee.)	

Submitted: November 26, 2002

Decided: February 26, 2003

Jeffrey J. Clark, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware, for Appellant.

John A. Eberly, Esq., Deputy Attorney General, Department of Justice, Dover, Delaware, for Appellee.

OPINION

**Upon Hochstetler's Appeal
from Two Decisions of the
Delaware Harness Racing Commission
*AFFIRMED***

RIDGELY, President Judge

Hochstetler v. Delaware Harness Racing Comm'n

C.A. No. 02A-02-005 HDR

February 26, 2003

This is a consolidated appeal from two decisions of the Delaware Harness Racing Commission (“the Commission”). The first decision, dated February 4, 2002, concluded that Homer Hochstetler violated Commission Rule 8.5 and 8.3.6.1.1 when his horse (“Kadabra”) tested positive for phenylbutazone (“bute”) after a November 4, 2001 race. The November 4, 2001 race was an elimination race for the finals of the Matron Series. The Commission imposed a penalty of a \$1,000 fine, disqualified the horse from the race, and ordered that Hochstetler forfeit the purse from the race.

The second decision, dated April 17, 2002, concluded that the horse was properly declared ineligible to race in the Matron Final on November 11, 2001 because the horse was disqualified from the Matron Elimination race on November 4, 2001. Therefore, the Commission ordered that the horse be disqualified as to the Matron Final and the purse money earned be forfeited by Hochstetler and redistributed.

I conclude that the decisions of the Commission were supported by substantial evidence and free from legal error.

I. FACTS AND BACKGROUND

Homer Hochstetler is the driver, trainer, and co-owner of Kadabra, a two-year-old horse which entered the Matron Series at Dover Downs in November 2001. The Matron Series was a high stakes harness race conducted at Dover Downs. The racing conditions for the Matron Series for 2001 provided as follows: “If twelve (12) or more [starters], but less than twenty-three (23) are declared, two (2)

Hochstetler v. Delaware Harness Racing Comm'n

C.A. No. 02A-02-005 HDR

February 26, 2003

elimination events are required. The first four (4) finishers from each division will be eligible for the Final.”

On November 4, 2001, Kadabra won the third race on that day, which was an elimination round for the finals. After that race, blood samples were taken from the horse and sent to a laboratory, although the results of the blood test were not immediately made available. The groom for Kadabra, Moises Acosta, was present when the blood samples were taken, although the samples were sealed by the veterinarian's assistant in the veterinarian's office outside of the groom's presence. On November 6, 2001, Kadabra was declared eligible to race in the Matron Final on November 11, 2001 as a result of the November 4, 2001 race outcome. Kadabra participated in the November 11, 2001 Matron Final and won that race. The Commission did not receive the results of the November 4, 2001 blood test until November 16, 2001, five days after the final race.

On November 23, 2001, the State Steward Harold Frazier contacted Hochstetler and told him that Kadabra had tested positive for a medicine called phenylbutazone (“bute”) at the time of the November 4, 2001 race. At that time, Hochstetler told Frazier that he had given bute to the horse. Frazier told Hochstetler that two-year old horses in Delaware were prohibited from racing with bute in their systems and that the penalty would be a one-thousand-dollar (\$1,000.00) fine and loss of the purse.

The blood sample tested positive for bute with a result of 4.78 micrograms per milliliter of plasma. A split sample was sent to a second independent

Hochstetler v. Delaware Harness Racing Comm'n

C.A. No. 02A-02-005 HDR

February 26, 2003

laboratory. The second sample also tested positive for bute, but with a result of approximately 2.3 micrograms per milliliter of plasma. The Commission accepted the 2.3 micrograms result for purposes of its hearing and decision. The Commission found that the blood sample was properly tested and reported and that the State Steward properly accounted for the chain of custody.

On November 28, 2001, Frazier signed his order for the violation and penalties. That evening, Presiding Judge Harmon at Dover Downs learned of the ruling and the Judges commenced an investigation. On the morning of November 29, 2001, Harmon contacted Hochstetler to inform him that the Judges were going to look into the matter of Kadabra's eligibility for the Matron Final. After speaking with Harmon, Hochstetler filed an appeal to the Commission from Frazier's ruling. The Judges stayed their inquiry pending resolution of that appeal. A hearing was commenced on January 3, 2002. On February 4, 2002, the Commission announced its decision to uphold Frazier's order as to the November 4, 2001 race.

The Judges held a hearing on January 15, 2002. Because Kadabra had been disqualified and unplaced by virtue of the Commission's ruling on the appeal from the November 4, 2001 elimination race, the Judges unanimously ruled that the horse was no longer eligible to stand in the Matron Final. That ruling was based solely on the positive test result and disqualification from the Matron Elimination race. By letter dated January 17, 2002, Harmon informed Hochstetler that the Judges found Kadabra to be disqualified from the Matron Final on November 11, 2001. Hochstetler appealed the Judges' ruling to the Commission. The Commission held

Hochstetler v. Delaware Harness Racing Comm'n
C.A. No. 02A-02-005 HDR
February 26, 2003

a hearing on March 12, 2002. On April 17, 2002, the Commission entered its order upholding the findings of the Judges.

Hochstetler has appealed to this Court both of the Commission's orders.

II. STANDARD OF REVIEW

When reviewing decisions on appeal from the Delaware Harness Racing Commission, this Court determines whether the Commission's factual findings are supported by substantial evidence and are free from legal error.¹ Absent an abuse of discretion, the decision of the Commission must be affirmed.² When reviewing an administrative agency's interpretation of regulatory provisions, this Court will defer to the construction placed by the administrative agency on regulations promulgated and enforced by it, unless shown to be clearly erroneous.³

¹ *Baxter v. Delaware Harness Racing Comm'n*, 2001 WL 167849 (Del. Super. Ct.), citing *General Motors v. Freeman*, 164 A.2d 686, 689 (Del. 1960) and *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

² *State Dep't of Labor v. Medical Placement Services, Inc.*, 457 A.2d 382, 383 (Del. Super. Ct. 1982); *aff'd* at 467 A.2d 454 (Del. 1983).

³ *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 fn 9 *Cf. Nationwide Mutual Ins. Co. v. Krongold*, 318 A.2d 606, 609 (Del. 1974), citing *Connell v. Delaware Aircraft Indus.*, 55 A.2d 637 (Del. Super. Ct. 1947).

III. DISCUSSION

The Appellee has raised the issue of this Court's jurisdiction to hear this case on appeal. 3 *Del. C.* § 10026 provides as follows:

Any license issued by the Commission shall be subject to suspension or revocation by the Commission for any cause whatsoever which the Commission deems sufficient. If any license is suspended or revoked, the Commission shall state publicly its reasons for so doing and cause an entry of the reasons to be made on the minute book of the Commission and its action shall be final. The propriety of such action shall be subject to review, upon questions of law only, by the Superior Court of the county within which the license was granted. The action of the Commission shall stand unless and until reversed by the Court.

In this consolidated action, Hochstetler was fined one-thousand dollars (\$1,000.00). Under 3 *Del. C.* § 10027, the rules and regulations of the United States Trotting Association ("USTA") are incorporated as a matter of law into Delaware Harness Racing rules, unless changed upon notice to the USTA. USTA Rule 22, which has no superseding state rule, provides that "all persons who shall have been fined under these rules shall be suspended until said fine shall be paid in full." Therefore, the fine imposed by the Commission has the effect of a suspension of Hochstetler's license under USTA Rule 22, and thus falls within the purview of 3 *Del. C.* § 10026.

Hochstetler v. Delaware Harness Racing Comm'n
C.A. No. 02A-02-005 HDR
February 26, 2003

In *Trivits v. Paintin*,⁴ the Court noted that “where serious penalties are imposed, such as the revocation or suspension of a license, a statutory right of appeal to the Superior Court for questions of law is provided. We do not, however, read that section as limiting the usual right of appeal (pursuant to Superior Court Civil Rule 72) in other instances.” This proposition is supported by *Baxter v. Delaware Harness Racing Commission*,⁵ where this Court heard and decided an appeal from a decision of the Commission involving only a loss of purse, even absent a fine. This Court may review the decisions of the Commission as a tribunal by grant of certiorari in any event.⁶ Appellee’s argument that the Court does not have jurisdiction is without merit.

The first part of Hochstetler’s consolidated appeal deals with the results of the Commission’s order dated February 4, 2002, in which the Commission concluded that Hochstetler violated Commission Rules when his horse, Kadabra, tested positive for phenylbutazone after the November 4, 2001 race and imposed a penalty of a one-thousand dollar (\$1,000.00) fine, disqualification of Kadabra from the race, and forfeiture of the purse for that race.

⁴ 1980 WL 333045 (Del. Super. Ct.).

⁵ 2001 WL 167849 (Del. Super. Ct.)

⁶ *Lineweaver v. Delaware Harness Racing Comm'n*, 1998 Del. Super. LEXIS 366 (Del. Super. Ct.).

Hochstetler v. Delaware Harness Racing Comm'n
C.A. No. 02A-02-005 HDR
February 26, 2003

Hochstetler first argues that the two-year-old horse Kadabra was wrongly penalized for violating Commission Rule 8.3.6,⁷ which the Commission found prohibited phenylbutazone for two-year-old horses. 29 Del. C. § 10141(e) states that “[u]pon review of regulatory action, the agency action shall be presumed to be valid and the complaining party shall have the burden of proving either that the action was taken in a substantially unlawful manner and that the complainant suffered prejudice thereby, or that the regulation, where required, was adopted without a reasonable basis on the record or is otherwise unlawful.” Commission Rule 8.3.6.1.1 provides that “phenylbutazone may be administered to horses three years of age and older in such dosage amount that the official test sample contain not more than 2.0 micrograms per milliliter of blood plasma.” Appellant asserts that Rule 8.3.6 merely provides limits for bute as applied to three-year-old horses and does not state that two-year-old horses cannot be administered bute. Based on this narrow reading of that rule, Hochstetler argues that the rule does not prohibit administering bute to two-year-olds. Administrative regulations, however, must be read as an inter-related whole. Rule 8.3⁸ provides:

Foreign substances shall mean all substances, except those, which exist naturally in the untreated horse at normal physiological concentration, and shall include all narcotics, stimulants, depressants or other drugs or medications of any type. Except as specifically permitted by these rules, no foreign

⁷ Commission Rule 8.3.6 Phenylbutazone (“Bute”).

⁸ Commission rule 8.3 Medications and Foreign Substances.

Hochstetler v. Delaware Harness Racing Comm'n

C.A. No. 02A-02-005 HDR

February 26, 2003

*substance shall be carried in the body of the horse at the time of the running of the race. Upon a finding of a violation of these medication and prohibited substances rules, the State Steward or other designee of the commission shall consider the classification level of the violation as listed at the time of the violation by the Uniform Classification Guidelines of foreign Substances as promulgated by the Association of Racing Commissioners International and may impose penalties and disciplinary measures consistent with the recommendations contained in subsection 8.3.2 [Penalty Recommendations] of this section.*⁹

When the general Rule 8.3 is read in conjunction with Rule 8.3.6, an exception to the general rule, bute is prohibited for horses that have not yet attained three-year-old status. Rule 8.3 provides a general prohibition for “medications of any type” to be in the blood of any horse at the time a race is run “except as specifically permitted by these rules.” Rule 8.3.6 is the only rule to provide an exception for phenylbutazone to that general rule and only applies the exception to horses three years of age and older. Therefore, these rules do prohibit the administration of bute to two-year-old horses.

Rule 8.3.3 provides that medications in horses are permissible, provided the maximum permissible blood concentration of the “medication does not exceed the limit established in the Rules or otherwise approved and published by the

⁹ *Id.* (emphasis added).

Hochstetler v. Delaware Harness Racing Comm'n
C.A. No. 02A-02-005 HDR
February 26, 2003

Commission.”¹⁰ Rule 8.3.3.3.1 provides that “prohibited substances include: drugs or medications for which no acceptable levels have been established in these Rules or otherwise approved and published by the Commission.” In the case of two-year-old horses, the Commission Rules do not establish “acceptable levels” of bute, so for two-year-old horses, bute would be a “prohibited substance” in the horse’s blood at the time of the race.

Hochstetler asserts that the Commission cannot impose the fine and penalties on him because Rules 8.3 and 8.3.6 do not provide specific penalties to be imposed for violation by a two-year-old horse. However, Rule 3.2.3 provides broad powers for the State Steward and judges to impose sanctions for rule violations with penalty suggestions which are expressly not limited. That rule also states that “[a] State Steward’s or Judge’s ruling shall not prevent the Commission from imposing a more or less severe penalty”¹¹ Furthermore, Rule 5.1.27.10 provides in pertinent part that “[t]he Commission may impose a fine or suspension on, or may refuse to license any person subject to the jurisdiction of the Commission if the

¹⁰ Commission Rule 8.3.3 Medication Restrictions
8.3.3.1 Drugs or medications in horses are permissible, provided:
8.3.3.1.1 the drug or medication is listed by the Association of Racing Commissioners International’s Drug Testing and Quality Assurance Program; and
8.3.3.1.2 the maximum permissible urine or blood concentration of the drug or medication does not exceed the limit established in these Rules or otherwise approved and published by the Commission.

¹¹ Commission Rule 3.2.3.10.

Hochstetler v. Delaware Harness Racing Comm'n
C.A. No. 02A-02-005 HDR
February 26, 2003

Commission finds that such person . . . has violated any rule, regulation or order of the Commission”¹² Under these rules, the Commission does have the power to impose a sanction for Hochstetler’s violation of its rules and has the discretion to impose the sanctions that it did. I find no reversible error in the imposition of the sanctions in this case.

Hochstetler next argues that, if the rules do prohibit the administration of bute to two-year-old horses and provide penalties for violation of that prohibition, that the rule is illegal because there was no reasonable basis for adopting it, thus violating Hochstetler’s due process rights. This issue was not raised below, so there has been no orderly administration of the appellate process and no opportunity for the Commission to decide this issue. Nor is there any record for this Court to consider as to this issue. As a result, the argument has been waived.

Hochstetler next argues that the Commission erred by ignoring guidelines as to the presence of a horse’s owner or owner’s representative when a blood sample is taken and sealed. He argues that the rules require that the owner’s representative has the right to be present when the specimen is taken¹³ and when the samples are sealed.¹⁴

¹² Commission Rule 5.1.27.10 and sub-section 5.1.27.10.5.

¹³ Commission Rule 8.4.3.3.

¹⁴ Commission Rule 8.4.3.5.1.

Hochstetler v. Delaware Harness Racing Comm'n
C.A. No. 02A-02-005 HDR
February 26, 2003

It is correct that Commission Rule 8.4.3.3 requires the presence of a horse's owner or owner's representative to witness when a blood sample is taken. The requirement that an owner or owner's representative be present when a blood sample is taken is to ensure that samples are identified to the proper horse. The Commission also presented a chain of custody to further ensure that there is no misidentification of a sample. In this case, there is no dispute that Hochstetler's representative, Moises Acosta,¹⁵ was present and witnessed the veterinarian take the blood sample from Kadabra. Mr. Acosta was not present, however, for the sealing of the sample, which was done in the veterinarian's office by the veterinarian's assistant. Because of this, Hochstetler argues that the Commission committed reversible error.

Rule 8.4.3.5.1 requires that "samples shall be sealed with tamper-proof tape and bear a portion of the multiple part identification tag that has identical printed numbers only. The other portion of the tag bearing the same printed identification number shall be detached in the presence of the witness." That rule clearly requires that the witness be present when the portion of the tag bearing the printed identification number is detached.¹⁶ However, nowhere does that rule state that the witness be present when the sample is sealed, as asserted by Hochstetler. Also, that

¹⁵ As stated above, Moises Acosta is the horse's groom. In that capacity, he is a valid representative for Hochstetler.

¹⁶ Whether Hochstetler's representative was present when that tag was detached has not been raised as an issue on this appeal.

Hochstetler v. Delaware Harness Racing Comm'n

C.A. No. 02A-02-005 HDR

February 26, 2003

rule does not require that the tag be detached after the sample is sealed. Therefore, it is reasonable to infer that the tag may be detached in the presence of the witness after the sample is taken, also in the presence of the witness, and that the sample may then be sealed in the veterinarian's office, as was the case here.

The Commission properly interpreted its rules and regulations to require the owner or owner's representative to be present when a blood sample is taken, but to **not** require the owner or owner's representative to be present when the sample is sealed. Because, the Commission's determination as to this issue is not clearly erroneous it must be affirmed.

The second part of Hochstetler's consolidated appeal deals with the results of the Commission's order dated April 17, 2002, in which the Commission concluded that the Presiding Judge below properly ruled that Kadabra was ineligible to race in the Matron Final on November 11, 2001 because the horse was disqualified from the Matron Elimination race on November 4, 2001. The Commission ordered that Kadabra be disqualified from the November 11, 2001 Matron Final race and the purse redistributed.

The Commission's sole basis for sanctioning Hochstetler and his horse in the November 11, 2001 Matron Final race was the horse's disqualification from the Matron Elimination race of November 4, 2001. The Commission concluded that, because the horse was ineligible to race in the Matron Elimination event, the horse did not meet the conditions of the Matron Stake to be eligible for the Matron Final race.

Hochstetler v. Delaware Harness Racing Comm'n

C.A. No. 02A-02-005 HDR

February 26, 2003

The racing conditions for the Matron Series of 2001 provided in pertinent part: “If twelve (12) or more [starters], but less than twenty-three (23) are declared, two (2) elimination events are required. The first four (4) finishers from each division will be eligible for the Final.” Because Hochstetler’s horse had been disqualified and unplaced by virtue of the Commission’s ruling on February 4, 2002 as to the November 4, 2001 race, the judges unanimously ruled that the horse was no longer eligible to race in the Matron Final. Since the horse was found to have not finished in the top four places in the elimination race, per the Commission’s February 4, 2002 decision, the horse could not be eligible to race in the Matron Final. That ruling ordered a change in the official order of finish of the November 4, 2001 elimination race which further required the Presiding Judge to order a change in the official order of finish in the Matron Final and a redistribution of the purse for the November 11, 2001 Matron Final.

Hochstetler argues that the horse was eligible at the time of declaration for the Matron Final race and was entitled to the purse because the Commission allegedly cannot disqualify the horse from the Matron Final once the race has been run. Hochstetler quotes Commission Rule 7.4.1.5 to state that a horse such as Kadabra “shall be eligible . . . for added money events, [if] the horse has qualified at an extended meeting in accordance with the rules prior to the time of closing of declarations.” He also relies on the Matron Series Conditions provision that “[a]ll horses qualifying for the Finals must be properly declared with the Race Secretary by the time of closing.” Through these, Hochstetler argues that the Commission

Hochstetler v. Delaware Harness Racing Comm'n
C.A. No. 02A-02-005 HDR
February 26, 2003

cannot retroactively disqualify the horse after the race and redistribute the purse.

The Commission's Rules, however, expressly permit redistribution retroactively. Rule 3.2.3.12 states that "[p]urses, prizes, awards, and trophies shall be redistributed if the State Steward or judges or Commission order a change in the official order of finish."¹⁷ Furthermore, Commission Rule 3.2.2.1 provides that "the judges are responsible for the conduct of the race meeting in accordance with the laws of this jurisdiction and these rules." Rule 3.2.2 states that "[t]he State Steward's and judges' period of authority shall commence five (5) business days prior to the beginning of each race meeting and shall terminate with completion of their official business pertaining to the meeting."

The Commission has a statutory duty to regulate and oversee the sport of harness racing in the public interest under 3 *Del. C.* § 10005. If Hochstetler's argument is accepted, then the Commission would be powerless to take action against an ineligible horse for any reason once that horse has raced, even if conditions of ineligibility are discovered after the race, thereby requiring the Commission to find any defect or impediment disqualifying the horse before it leaves the gate. It is in the public interest for the Commission to have the ability to retroactively disqualify a horse for cause and redistribute the purse.

I am satisfied that the Commission's determination that Kadabra did not meet the conditions of eligibility for the Matron Final and, therefore, was not eligible to

¹⁷ Commission Rule 3.2.3.12 under Rule 3.2.3 Disciplinary Action.

Hochstetler v. Delaware Harness Racing Comm'n
C.A. No. 02A-02-005 HDR
February 26, 2003

receive the purse money, was based on substantial evidence and is free from legal error. Furthermore, the Commission's interpretation and construction of the rules and regulations in this case, as well as the conditions of the Matron Series of 2001, were not clearly erroneous.

IV. CONCLUSION

Because the decisions of the Commission are based on substantial evidence and are free from legal error, I conclude that the Commission's decisions of February 4, 2002 and April 17, 2002 must be *AFFIRMED*.

IT IS SO ORDERED.

/s/ Henry duPont Ridgely
President Judge

cmh

oc: Prothonotary

xc: Order distribution