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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001458-MR

KENTUCKY HORSE RACING COMMISSION APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 16-CI-01195

H. GRAHAM MOTION AND
GEORGE STRAWBRIDGE, JR. APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND SMALLWOOD,[1] JUDGES.

SMALLWOOD, JUDGE: The Kentucky Horse Racing Commission (hereinafter referred to as the Commission) appeals from an order of the Franklin Circuit Court

[1] Judge Gene Smallwood authored this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

which overturned penalties imposed upon H. Graham Motion and George Strawbridge, Jr. The circuit court held that certain regulations propounded by the Commission were unconstitutional and that the Commission acted arbitrarily when it imposed the sanctions against Appellees. In its appeal, the Commission argues that the regulations were constitutional and properly applied. The Commission also claims that the circuit court was without jurisdiction to hear Appellees' appeal because they failed to perfect said appeal. We find that the circuit court's ruling as to jurisdiction was proper and affirm, but the court's rulings as to the regulations were erroneous and we reverse as to those issues.

On April 24, 2015, Kitten's Point, a thoroughbred filly trained by Motion and owned by Strawbridge, won the Bewitch Stakes at Keeneland. The horse won a purse of $90,000. After the race, all participating horses underwent drug screening. The drug screening on Kitten's Point indicated that the horse had 2.9 nanograms per milliliter (ng/ml) of methocarbamol in its blood. This drug is known to help with muscle cramping. By regulations, the Commission permits no more than 1 ng/ml to be in a horse's blood at the time of a race. It is undisputed that Appellees had given methocarbamol to Kitten's Point for months prior to the race, but had stopped giving the medication to the horse at least seven days prior to the race.

After Kitten's Point's positive test for methocarbamol, the Commission Stewards entered an order finding that Appellees had violated two provisions of the Kentucky Administrative Regulations (KAR): 810 KAR 1:018, Section 2(2)(c) and 810 KAR 1:018, Section 2(3). Both of these sections concern drugs or medications being found in a horse's system during a race. A hearing was held on the violations, and, as herein, Appellees argued that the 1.0 ng/ml threshold was arbitrarily low, there was no scientific basis for having the methocarbamol threshold at that low level, and that it was likely the methocarbamol entered Kitten's Point's blood through environmental contamination. Multiple witnesses testified, including veterinarians and experts knowledgeable of the interaction of medications in horses.

The hearing officer ultimately held that Appellees had violated the regulations set forth by the Stewards and recommended that the Commission suspend Motion's trainer's license for five days, fine Motion $500, disqualify Kitten's Point, and order Strawbridge to forfeit the $90,000 purse. The Commission adopted the hearing officer's recommended findings of fact, conclusions of law and order, but declined to suspend Motion's trainer's license.

Appellees then appealed to the circuit court. The circuit court held that a lack of scientific evidence evincing the propriety of the 1.0 ng/ml threshold made the regulations at issue unconstitutionally arbitrary and that the Commission

acted in an arbitrary and capricious manner in finding Appellees violated the regulations. This appeal followed.

We will first address the Commission's argument that Appellees' appeal to the circuit court should have been dismissed. A party aggrieved by a final order of the Commission "may appeal to the Franklin Circuit Court in accordance with [Kentucky Revised Statute (KRS)] Chapter 13B." KRS 230.330. KRS 13B.140(1) states:

> All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

It is undisputed that Appellees filed their petition for appeal with the circuit court before the 30-day deadline set forth above. It is also undisputed that Appellees served a copy of the petition on Marc Guilfoil, the Commission's Executive Director; the Attorney General of Kentucky; and Steven Loy and Robert Watt, the

Commission's counsel in the administrative proceeding. Summons was also issued in the names of Loy and Watt, but they were never served.

The Commission eventually moved to dismiss the action because they claimed Appellees had failed to perfect their appeal within the 30-day timeframe having failed to have a summons issued in the name of the Attorney General pursuant to Kentucky Rule of Civil Procedure (CR) 4.04(6). Appellees argued that they were not required to issue or serve a summons on anyone because KRS 13B.140(1) sets forth the appeal requirements and does not mention the issuance of a summons. Appellees also served a summons on the Attorney General after the Commission had filed its motion to dismiss. The circuit court denied the Commission's motion, finding that Appellees commenced the action in good faith.

Jurisdictional issues are questions of law and reviewed *de novo*. *Appalachian Reg'l Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 54 (Ky. 2007). We agree with the circuit court as to this issue. Appellees continue to argue that a summons was not required because it is not mentioned in KRS 13B.140; however, we disagree. CR 1(2) states that the civil rules "govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules."

> In *Transportation Cabinet, Department of Highways v. City of Campbellsville*, 740 S.W.2d 162, 164 (Ky.

> App. 1987), the Court of Appeals recognized that "[a]n appeal to the circuit court from an order of an administrative agency is not a true appeal but rather an original action." It logically follows that the procedural steps required to "take" an appeal from an administrative agency action are precisely the same steps required to commence any other original action in the circuit court. The rules that determine when a civil action commences, therefore, determine when an appeal of an administrative action has been taken.
>
> CR 3.01 provides that "[a] civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." Similarly, KRS 413.250 provides that "[a civil] action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action." Furthermore, "[i]f the action is commenced by the filing of the petition and the issuance of summons, and only one time period is specified, it must follow that both actions [that is, the *filing* of the petition or other initial pleading and the *issuance* of the summons] must be taken within the period of time provided in the statute." *Metro Medical Imaging, LLC v. Commonwealth*, 173 S.W.3d 916, 918 (Ky. App. 2005).

Isaacs v. Caldwell, 530 S.W.3d 449, 454 (Ky. 2017) (emphasis in original).

We find that even though KRS 13B.140 does not mention summonses, the summons requirement set forth in the civil rules is not inconsistent with the statutory procedures and is required to commence an action in the circuit court. This Court could find no published case law dealing with summonses and KRS 13B.140; however, we did find a number of unpublished cases that hold as we do in this case. *See Guardian Angel Staffing Agency, Inc. v. Commonwealth*,

No. 2014-CA-001387-MR, 2015 WL 8528344 (Ky. App. Dec. 11, 2015); *Dixon v. Bd. of Educ. of Harlan Cty.*, No. 2009-CA-000941-MR, 2011 WL 43230 (Ky. App. Jan. 7, 2011); *Davenport v. Norsworthy*, No. 2002-CA-000903-MR, 2003 WL 21714085 (Ky. App. July 25, 2003); *Adkins v. Justice Cabinet*, No. 2002-CA-000766-MR, 2003 WL 2004504 (Ky. App. May 2, 2003).

Even though we have rejected Appellees' argument that a summons was not required, we still find that the circuit court correctly allowed the case to proceed because the case was commenced in good faith. The Commission is correct that Appellees should have served a summons upon the Attorney General. CR 4.04(6) requires that "[s]ervice shall be made upon the Commonwealth or any agency thereof by serving the attorney general or any assistant attorney general." However, CR 3.01 does not require a summons be flawlessly issued, only that it be issued in good faith. This means that errors or flaws in the issuance and service of a summons are not fatal to a cause of action. *See Arlinghaus Builders, Inc. v. Kentucky Pub. Serv. Comm'n*, 142 S.W.3d 693 (Ky. App. 2003).

Here, the Commission's final order was entered on October 11, 2016. Appellees filed their appeal with the circuit court on November 4, 2016, and summonses were issued, but never served on the Commission's counsel. A copy of the appeal was sent to the Attorney General and the Commission's Executive Director on November 7, 2016. The Commission then filed its motion to dismiss

on November 23, 2016. Appellees had a summons issued to the Attorney General on December 7, 2016, and it was received on December 14, 2016.

We find that the circumstances of this case indicate that Appellees commenced this action in good faith. Good faith has been described as

> something less than perfection or complete accuracy. Above all, it means not to take advantage of, not to deceive, not to be underhanded. Black's Law Dictionary states on this point: 'Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information, notice, or belief of facts which would render the transaction unconscientious.'

Roehrig v. Merchants & Businessmen's Mut. Ins. Co., 391 S.W.2d 369, 370 (Ky. 1965). There is no evidence that Appellees attempted to deceive the court or the Commission. Appellees gave copies of their appeal to the Attorney General and to agents of the Commission within the 30-day timeframe required by law. They also had summonses issued, but to improper individuals. When the Commission moved to dismiss the appeal due to the summons issue, Appellees corrected this error within 14 days. Finally, and as previously mentioned, there is no published case law detailing the interplay of KRS 13B.140 and CR 3.01. We find that Appellees intended to properly commence this action and that they believed a summons was not necessary. We also find that it was reasonable to believe that a summons was

not required based on the wording of KRS 13B.140 and the lack of published case law on the issue.

An additional reason to affirm the circuit court as to this issue is the circuit court's utilization of CR 4.16 which states:

> The court in its sound discretion and on such terms as it deems just may at any time allow any summons or other process or proof of service thereof to be amended, unless it clearly appears that the substantial rights of the party against whom it was issued would thereby be prejudiced.

The circuit court, after finding Appellees made a good faith effort to file the appeal and serve a summons on the proper party, also allowed Appellees to amend their summons pursuant to this rule. This civil rule is governed by the broad discretion of the circuit court and we find it reasonable for the court to allow the amendment in this case.

We will next discuss the Commission's argument that the circuit court erred by finding 810 KAR 1:018, Section 2(3) unconstitutional. Regulation 810 KAR 1:018, Section 2(3) states in pertinent part that "[t]herapeutic medications shall not be present in excess of established threshold concentrations set forth in this administrative regulation or in 810 KAR 1:040." The threshold concentration for methocarbamol was 1.0 ng/ml and Kitten's Point had 2.9 ng/ml in its system when it ran the race. The circuit court found this regulation unconstitutionally

arbitrary because there was no scientific evidence that such a small amount of methocarbamol would endanger the horse.

Constitutional issues are reviewed *de novo*. *Jamgotchian v. Kentucky Horse Racing Comm'n*, 488 S.W.3d 594, 602-03 (Ky. 2016).

> "The test of the constitutionality of a statute is whether it is unreasonable or arbitrary." "The statute will be determined to be constitutionally valid if a reasonable, legitimate public purpose for it exists, whether or not we agree with its 'wisdom or expediency.'"

Allen v. Kentucky Horse Racing Auth., 136 S.W.3d 54, 61 (Ky. App. 2004) (citations omitted). The same principles concerning constitutionality of statutes also apply to administrative regulations. *Id.*

Here, the circuit court believed that because there was no scientific evidence to support regulation at such a low threshold that it was therefore arbitrary and unconstitutional. The court cited to *Stewart v. Kentucky Horse Racing Comm'n*, No. 2010-CA-001929-MR, 2013 WL 1003534 (Ky. App. Mar. 15, 2013), and *Daniel Werre v. Kentucky Horse Racing Commission*, Franklin Circuit Court Action No. 14-CI-00418 (June 15, 2015), to support its decision. We find these cases distinguishable. Those cases did not deal with whether a regulation was so arbitrary as to offend the Constitution. *Stewart* and *Werre* only discussed the issue of arbitrariness in the context of whether the Commission's actions were arbitrary in that it did not provide substantial evidence to support the

penalties imposed. The penalties imposed upon Stewart and Werre were also vacated due to the language of the regulations supposedly violated and the lack of evidence to show a violation. We must disagree with Appellees that a rational basis for a statute or regulation devolves to only a consideration of whether there is supporting scientific evidence.

Here, the issue of arbitrariness for constitutional purposes only requires that there be a legitimate public purpose.

> Legislative classification is not subject to a court-room fact-finding process and "may be based on rational speculation unsupported by evidence or empirical data." Merely because the statute may result in some practical inequity does not cause it to fail the rational basis test for review.
>
> So long as the statute's generalization is rationally related to the achievement of a legitimate purpose; the statute is constitutional.

Commonwealth v. Howard, 969 S.W.2d 700, 703 (Ky. 1998) (citation omitted).

We find that the 1.0 ng/ml threshold is not unconstitutional nor arbitrary. The Commission's expert witness, Dr. Richard Sams, testified that the pharmacological effects of methocarbamol were not fully understood. Dr. Sams and other experts testified that when given large doses of methocarbamol, a horse's

impairment can be seen by the naked eye.[2] Dr. Sams also testified that it is unknown what subtle effects smaller doses have on the cellular level because there has been no scientific testing to determine such and it cannot be readily observable. Limiting the amount of a drug in a horse's system that is not fully understood is a rational reason for the low threshold. This is especially true in light of the broad powers given to the Commission.

> Horse racing as we know it "exists only because it is financed by the receipts from controlled legalized gambling which must be kept as far above suspicion as possible." Indeed, in its unusually expansive statement of legislative purpose for KRS Chapter 230, the chapter devoted to Horse Racing and Showing, the Kentucky General Assembly acknowledges as much and more.
>
> > It is hereby declared the purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth so as to encourage the improvement of the breeds of horses in the Commonwealth, to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and

[2] The medication seems to have a depressive effect on horses in large doses, observable by a drooping head, drooping eyelids, and horse's legs being in the sawhorse position, the legs out like a sawhorse and not moving.

> to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth. In addition to the general powers and duties vested in the racing commission by this chapter, it is the intent hereby to vest in the racing commission the power to eject or exclude from association grounds or any part thereof any person, licensed or unlicensed, whose conduct or reputation is such that his presence on association grounds may, in the opinion of the racing commission, reflect on the honesty and integrity of horse racing or interfere with the orderly conduct of horse racing.

KRS 230.215(2).

Jamgotchian, 488 S.W.3d at 611 (citation omitted). By limiting the amount of medications and drugs given to horses, the Commission is protecting the health of horses and ensuring the integrity of racing itself. These are significant rational reasons to uphold the regulation as constitutional; therefore, we reverse the circuit court as to this issue.

The next issue for our consideration is whether the circuit court erred in finding that the action taken by the Commission as it relates to 810 KAR 1:018, Section 2(3), was arbitrary. This is not the same review for arbitrariness discussed above. Rather, an administrative agency's actions can be deemed arbitrary if it

acted outside the scope of their granted powers, acted without proper due process, or lacked substantial evidence to support its decision. *Am. Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning & Zoning Comm'n*, 379 S.W.2d 450, 456-57 (Ky. 1964). The circuit court found that the Commission violated all three of these factors.

As to whether the Commission acted outside the scope of its enabling act, the circuit court found as such because it believed the low methocarbamol threshold lacked scientific support. The court recognized that the Commission can regulate horse racing to preserve its integrity, but it again cited *Stewart* and *Werre* for the proposition that scientific evidence is required for the imposition of drug limitations. We disagree with the court's holding.

As previously stated, the statutes that give the Commission its powers are broad. These statutes state

> that it is in the interest of the public health and safety to vest in the Commission forceful control of thoroughbred racing. Inherent in such control is the right to enact and enforce rules which are necessary to fulfill that mission. Moreover, the statutes permit rules which condemn the presence of prohibited substances which affect the speed or health of a race horse.

Jacobs v. Kentucky State Racing Comm'n, 562 S.W.2d 641, 642-43 (Ky. App. 1977). *See also* KRS 230.260(11) which states:

> The racing commission may refuse to issue or renew a license, revoke or suspend a license, impose probationary

> conditions on a license, issue a written reprimand or admonishment, impose fines or penalties, deny purse money, require the forfeiture of purse money, or any combination thereof with regard to a licensee or other person participating in Kentucky horse racing for violation of any federal or state statute, regulation, or steward's or racing commission's directive, ruling, or order to preserve the integrity of Kentucky horse racing or to protect the racing public. The racing commission shall, by administrative regulation, establish the criteria for taking the actions described in this subsection[.]

Since we have previously found a rational basis for the methocarbamol threshold to be low and that the Commission is vested with expansive powers, it is axiomatic that this threshold does not exceed the scope of its enabling act. We believe a citation to the hearing officer who heard the evidence in this case is appropriate.

> If the agency's statutory mandate were interpreted to create a right to run horses carrying drugs unless an effect of the drug could be proven, every drug violation would turn into a science contest. There are scores (or more) of other drugs for which there are no studies on how the drug affects a horse. There would be no predictability and consistency in decisions. Abandoning zero-tolerance would transfer to the courts a task the legislature has delegated to an agency's expertise, and would make all drug regulations perpetually subject to change, thereby crippling the agency's ability to perform its statutory mandate.

We find that the circuit court erred in holding that the Commission acted outside the scope of its powers and reverse as to this issue.

We will next address the issue of due process. The circuit court found that the hearing officer in this case violated due process by limiting evidence regarding why the Commission chose the low methocarbamol threshold. The Commission claims that they provided sufficient due process. Appellees claim the circuit court was correct and that they should have been allowed to present additional evidence.

As a preliminary matter, we must address Appellees' argument that the Commission did not preserve this issue on appeal. Appellees claim that the issue is not preserved because the Commission did not specifically raise an argument in its brief regarding the hearing officer's limiting of evidence. While this is true, we find that the Commission preserved this issue for our review because it did briefly raise the issue of general due process in its brief, albeit in a short footnote.

We also find that Appellees were provided with sufficient due process in this case. Appellees wished to introduce evidence that the Commission arbitrarily adopted the 1.0 ng/ml threshold without scientific evidence. Luckily, Appellees included avowal evidence in the record to indicate the evidence they wished to introduce.[3] That evidence would have included testimony from experts

[3] We wish to applaud Appellees and their counsel for introducing avowal evidence. Too many times has this Court been asked to rule on evidentiary issues without the benefit of avowal evidence.

that the 1.0 ng/ml threshold was too low and had no scientific basis that it endangered the horse. Additionally, Appellees would have introduced evidence that the low threshold was adopted due to political machinations of the Racing and Medication Testing Consortium. Appellees included more evidence in its avowal evidence, but it all revolves around the alleged arbitrarily low number and experts indicating it should be higher.

The hearing officer explained his reasoning in excluding the evidence at issue. In an order filed on March 15, 2016, the hearing officer stated that evidence regarding the constitutionality of the regulations was irrelevant because an administrative body cannot decide such issues. After reviewing the avowal evidence, it appears as though the hearing officer was correct as to the evidence he excluded being introduced for a constitutional challenge. The hearing officer was also correct that an administrative agency cannot decide a constitutional issue. *W.B. v. Commonwealth, Cabinet for Health & Family Servs.*, 388 S.W.3d 108, 112 (Ky. 2012). The proper remedy for Appellees would have been to move to introduce this evidence at the circuit level, *Am. Beauty Homes Corp.*, 379 S.W.2d at 457-58, or to bring a declaratory judgment action challenging the constitutionality of the regulations. *W.B.*, 388 S.W.3d at 112-13.

The primary purpose of due process is that a person has a meaningful opportunity to be heard. *Shaw v. Seward*, 689 S.W.2d 37, 40 (Ky. App. 1985).

Appellees were allowed to introduce substantial evidence at the administrative level that the threshold was too low. In fact, this was their primary argument. It is also clear that the circuit court considered Appellees' avowal evidence based on statements it made in its final order. In addition, the record in this case is voluminous, showing that Appellees had ample opportunity to defend their position. Finally, Appellees presented their evidence to a hearing officer, the Commission, and the circuit court. Due process was satisfied in this case; therefore, we reverse the circuit court.

Next, we look to see if the Commission's decision was based on substantial evidence. The circuit court held that the Commission's decision was not based on substantial evidence because all the experts agreed that 1.0 ng/ml or 2.9 ng/ml of methocarbamol would have no effect on horses. We disagree.

> Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court's function in administrative matters is one of review, not reinterpretation.

Thompson v. Kentucky Unemployment Ins. Comm'n, 85 S.W.3d 621, 624 (Ky. App. 2002) (footnotes omitted). "[A] reviewing court, whether it be one of the

circuit courts, the Court of Appeals, or [the Kentucky Supreme Court], should refrain from reversing or overturning an administrative agency's decision simply because it does not agree with the agency's wisdom." *Kentucky Unemployment Ins. Comm'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002) (citation omitted).

Here, only Appellees' experts indicated that a low amount of methocarbamol would have no gross observable effect on a horse. The hearing officer found that their testimony "about the pharmacological effect of the drug was, at best, rank speculation.[4] Dr. Sams indicated that it is unknown what effect a low dose of the drug would have. The hearing officer specifically found Dr. Sams the most credible expert witness. He testified that the drug likely has unobservable subtle effects in horses at lower levels.

In addition, because we have held that the low threshold was reasonable and constitutional, our review must concern whether the Commission was able to prove the violation. It is undisputed that Kitten's Point had an illegal amount of methocarbamol in its system when it ran the race at Keeneland. Appellees were allowed to introduce evidence that the methocarbamol could have been picked up by the horse due to environmental factors, but the hearing officer

[4] Recommended Findings of Fact 52.

found this claim unlikely and not credible. We find that substantial evidence supported the Commission's decision and reverse the circuit court as to this issue.

We will now consider the violation of 810 KAR 1:018, Section 2(2)(c). 810 KAR 1:018, Section 2(2)(c) states:

> (2) Except as otherwise provided in Sections 4, 5, 6, and 8 of this administrative regulation, while participating in a race, a horse shall not carry in its body any drug, medication, substance, or metabolic derivative, that: . . .
>
> (c) Could stimulate, depress, or affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse[.]

The circuit court held that the Commission failed to show Appellees violated this regulation because there was no evidence that methocarbamol could affect a horse at 2.9 ng/ml. The Commission argues that it proved methocarbamol affects a horse and that the regulation only requires that the medication could affect a horse, not that it actually did.

We agree with the Commission. The experts in this case agreed that methocarbamol affects a horse's central nervous system and has an effect on a horse's performance, especially in large doses. Together with Dr. Sams' testimony as aforestated, this meets the requirements of the regulation and the circuit court erred in finding otherwise.

The final argument on appeal concerns 810 KAR 1:018, Section 15. This is referred to as the absolute insurer rule and states in pertinent part:

> (1) A trainer shall be responsible for the condition of a horse in his or her care.
>
> (2) A trainer shall be responsible for the presence of a prohibited drug, medication, substance, or metabolic derivative, including permitted medication in excess of the maximum-allowable concentration, in horses in his or her care.
>
> (3) A trainer shall prevent the administration of a drug, medication, substance, or metabolic derivative that may constitute a violation of this administrative regulation.
>
> (4) A trainer whose horse has been claimed shall remain responsible for a violation of this administrative regulation regarding that horse's participation in the race in which the horse is claimed.

810 KAR 1:018, Section 15. This regulation makes a trainer strictly liable for any drug or medication violation, such as the two violations at issue here. The circuit court held that this regulation was unconstitutional because it deprived a trainer of due process. In other words, the circuit court found that a trainer should be allowed to defend himself or herself. The Commission argues that the rule does not violate due process because it must still prove a violation occurred before the trainer is penalized. Again, we agree with the Commission.

Constitutional issues are reviewed *de novo*. *Jamgotchian*, 488 S.W.3d at 602-03. A number of horse racing states use the absolute insurer rule. *Berry v. Michigan Racing Comm'r*, 116 Mich. App. 164, 321 N.W.2d 880, (1982), *Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation v. Caple*, 362 So. 2d 1350 (Fla.

1978), and *Sandstrom v. California Horse Racing Bd.*, 31 Cal. 2d 401, 189 P.2d 17 (1948), all discuss the issue and describe the rule in various other jurisdictions. We find that this rule is constitutional and adopt the reasoning set forth by other jurisdictions.

> To protect the integrity of this unique industry, it is really immaterial whether "guilt" should be ascribed either directly or indirectly to the trainer. The rules were designed, and reasonably so, to condition the grant of a trainer's license on the trainer's acceptance of an absolute duty to ensure compliance with reasonable regulation governing the areas over which the trainer has responsibility. Whether a violation occurs as a result of the personal acts of the trainer, of persons under his supervision, or even of unknown third parties, the condition of licensure has been violated by the failure to provide adequate control, and the consequence of the default is possible suspension of the trainer's license or a fine. We have no doubt that a rule which both conditions a license and establishes with specificity reasonable precautionary duties within the competence of the licensee to perform is both reasonable and constitutional.
>
> As regards the proposition that due process invariably requires proof of guilty knowledge before punishment can be inflicted, that notion was long ago put to rest by the United States Supreme Court. See, e. g., *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930 (1910). It is now well established that in areas of activity requiring strong police regulation to protect public interests, strict liability may be imposed upon persons "otherwise innocent but standing in responsible relation to a public danger." *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943). Horse racing is such an area of

> activity. *Western Turf Association v. Greenberg*, 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520 (1907).

Caple, 362 So. 2d at 1354-55.

Furthermore, we note that, as the Commission points out, a violation of the drug and medication regulations must be proven before a penalty can be imposed. Also, the Commission must consider any mitigating circumstances presented by the trainer. 810 KAR 1:028, Section 2(3) states that "[t]he stewards and the commission shall consider any mitigating or aggravating circumstances properly presented when assessing penalties pursuant to this administrative regulation. A licensee may provide evidence to the stewards or the commission that the licensee complied fully with the withdrawal guidelines as a mitigating factor." Mitigating factors were in fact considered and discussed by the hearing officer in this case. These facts also underscore the reason for our finding that the absolute insurer rule does not violate due process.

Based on the foregoing, we affirm the circuit court as to the issue of jurisdiction, but reverse and remand as to all other issues. The penalties imposed on Appellees by the Commission should be reinstated.

ALL CONCUR.

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