

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JOHN BAXTER,)
)
 Appellant,)
)
 5.) C.A. No. 00A-07-002 HDR
)
DELAWARE HARNESS)
RACING COMMISSION,)
)
 Appellee.)

Submitted: November 13, 2000

Decided: January 19, 2001

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

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

**Upon Appeal from a Decision
of the Delaware Harness Racing Commission
*REVERSED***

RIDGELY, President Judge

ORDER

This 19th day of January, 2001, upon consideration of the parties' briefs and

Baxter v. Delaware Harness Racing Commission

C.A. No. 00A-07-002 HDR

January 19, 2001

the record below, it appears that:

(1) John Baxter (“Baxter”) appeals from the decision of the Delaware Harness Racing Commission (“DHRC”) finding that Baxter violated DHRC rules when his horses, Big Apple Mac and Mr. Dance Time, tested positive for the dewormer Tetramisole in post-race tests. For this offense, the Commission imposed upon Baxter the loss of purse winnings totaling \$11,000.

(2) Baxter is the owner and trainer of Big Apple Mac which finished first at the sixth race at Dover Downs on December 29, 1999 winning \$5,500. Baxter is also the owner and trainer of Mr. Dance Time, which finished first at the eleventh race at Dover Downs on January 3, 2000 winning \$5,500. The State Steward held a joint hearing for Big Apple Mac and Mr. Dance Time on February 6, 2000. The Steward determined that pursuant to a battery of blood and urine tests taken post-race, both horses had Tetramisole present in their system at the time of their respective races. The Steward further found that Tetramisole was a “prohibited” substance pursuant to DHRC rules and imposed loss of purse winnings. Baxter appealed this decision to the DHRC, which affirmed the Steward’s decision upon a *de novo* hearing. The plaintiff now appeals from June 28, 2000 decision of the DHRC imposing upon plaintiff the loss of purse winnings from the two races at Dover Downs.

(3) The parties agree that Tetramisole is not a performance enhancing drug. However, the parties dispute whether Tetramisole is a “prohibited substance” within the DHRC rules. Plaintiff submits that the Uniform Classification Guidelines for Foreign Substances adopted by the DHRC (“Guidelines”) indicates that Tetramisole,

Baxter v. Delaware Harness Racing Commission

C.A. No. 00A-07-002 HDR

January 19, 2001

which is an anthelmintic, has absolutely “no effect on the performance of the horse or drug detectability.”¹ In response, the defendant argues that DHRC was justified in relying on the state chemist’s testimony that Tetramisole interferes with drug detectability, and in fact, high enough levels of Tetramisole were present in both horses to “prevent the proper testing of post-race samples for foreign substances.”².

¹ **Uniform Classification Guidelines for Foreign Substances, p. iii.**

² ***In the matter of John Baxter, (June 28, 2000) (ORDER) at 7.***

Baxter v. Delaware Harness Racing Commission
C.A. No. 00A-07-002 HDR
January 19, 2001

(4) The function of this Court is to determine whether the agency’s decision is supported by substantial evidence and free from legal error.³ Generally, this Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.⁴ It merely determines if the evidence is legally adequate to support the agency’s factual findings.⁵ Even so, “where, as here, the issue is one of construction of statutory law and the application of the law to undisputed facts, the court’s review is plenary.”⁶ A review of the DHRC’s decision in this regard is made

³ *General Motors v. Freeman*, Del. Supr., 164 A.2d 686, 689 (1960); *Johnson v. Chrysler Corporation*, Del. Supr., 213 A.2d 64, 66-67 (1965); *See, Delaware Harness Racing Commission v. Mitchell*, Del. Supr., 442 A.2d 77 (1982).

⁴ *Johnson v. Chrysler*, 213 A.2d at 66.

⁵ 29 Del. C. § 10142(d).

⁶ *Public Water Supply Company v. DiPasquale*, Del. Supr., 735 A.2d 378, 381 (1999).

Baxter v. Delaware Harness Racing Commission
C.A. No. 00A-07-002 HDR
January 19, 2001

pursuant to 3 *Del. C.* §10026.⁷

(5) Under DHRC Rule 8.3.3.3.4, “[p]rohibited substances include ... substances foreign to a horse at levels that cause interference with testing procedures.”⁸ DHRC Rule 8.5.1 further states that a positive test for a prohibited substance is prima facie evidence of a rule violation, for which the trainer shall be responsible absent substantial evidence to the contrary.⁹ It is undisputed that both horses tested positive for Tetramisole. The issue before this Court is whether Tetramisole is a “prohibited substance.”

⁷ *Delaware Harness Racing Commission v. Marsh*, Del. Supr., 608 A.2d 726 (1992).

⁸ **Delaware Harness Racing Commission Rule 8.3.3.3.4.**

⁹ **Delaware Harness Racing Commission Rule 8.5.1.**

Baxter v. Delaware Harness Racing Commission

C.A. No. 00A-07-002 HDR

January 19, 2001

(6) The Guidelines, adopted by the DHRC, lists various drugs relevant to the horse racing community, and discusses the classification criteria of such drugs (Category I-V) according to their effect on a horse's physiology. The Guidelines establishes that "substances that are considered to have no effect on the physiology of a racing animal except to improve nutrition or treat or prevent infections or parasite infestations are not classified."¹⁰ The Guidelines further specifically identifies Tetramisole (an anthelmintic drug) as an example of such an unclassified drug.¹¹ Further, the Guidelines denotes that such drugs as anthelmintics, "have no effect on the performance of the horse or drug detectability."¹² Based on the language of the Guidelines, Baxter was not placed on notice that Tetramisole was a prohibited substance within the meaning of the DHRC rules. In fact, Baxter and all other licensees were on notice from the DHRC's adoption of the Guidelines that Tetramisole was not a prohibited substance, and that it did not effect the "performance of the horse or drug detectability."¹³ The post-race statements of the state chemist in

¹⁰ **Uniform Classification Guidelines for Foreign Substances, p. 36.**

¹¹ **Uniform Classification Guidelines for Foreign Substances, p. 36.**

¹² **Uniform Classification Guidelines for Foreign Substances, p. iii.**

¹³ **Id.**

Baxter v. Delaware Harness Racing Commission

C.A. No. 00A-07-002 HDR

January 19, 2001

this case are directly contradicted by the published Guidelines accepted by the Commission and relied upon by its licensees in adopting their conduct prior to the races.

If an agency rule is designed to afford “due process of law by providing safeguards against essentially unfair procedures, the action which results from the violation of that rule is invalid.”¹⁴ Because the Guidelines in effect at the time of the race establish anthelmintic drugs (including Tetramisole) as drugs which do not interfere with performance of a horse or drug detectability, the DHRC erred when it sanctioned Baxter in this case.

Accordingly, the Commission’s decision is ***REVERSED***.

IT IS SO ORDERED.

/s/ Henry duPont Ridgely
President Judge

dk

oc: Prothonotary

xc: Order distribution

¹⁴ *Dugan v. Delaware Harness Racing Commission*, Del. Supr., 752 A.2d 529, 531 (2000).