



HORSE RACING APPEAL PANEL

**TORONTO, ONTARIO – OCTOBER 28 and 29, 2019
SB HRAP 05007 2020**

NOTICE OF DECISION

**IN THE MATTER OF THE HORSE RACING LICENCE ACT, S.O. 2015 C. 38 Sched. 9;
AND IN THE MATTER OF AN APPEAL BY DAVID MENARY
OF RULING NUMBER SB ADMIN 19/2019**

Date of Hearing: October 28 and 29, 2019

Horse Racing Appeal Panel (Panel): Sandra Meyrick, Vice-Chair
John Charalambous, Member
Dr. John Hayes, Member

Representative for the Appellant: Larry Todd

Representative for the Registrar: Aviva Harari, Nicole Pace

Decision: The Panel dismisses the appeal but varies the penalty as set out below.

WHEREAS David Menary (“MENARY”) is licensed with the Alcohol and Gaming Commission of Ontario (“Commission”) as a Trainer/Owner/Authorized Agent, Licence Number W60902;

AND WHEREAS MENARY was the trainer of record of the horses “Deetzy”, freeze brand number 1KM34, and “Sintra”, freeze brand number 2LM97;

AND WHEREAS on May 23, 2019, the Commission Deputy Chief Operating Officer issued Ruling Number SB ADMIN 19/2019 (amended on May 27, 2019), wherein MENARY was fully suspended for two (2) years (June 10, 2019 to June 9, 2021, inclusive) and issued a monetary penalty of ten thousand dollars (\$10,000) as a result of positive tests for cobalt above the quantitative limit from “Deetzy”, tested following the 5th race at Woodbine Mohawk Park (“Mohawk”) on February 16, 2019, and the 3rd race at Mohawk on February 23, 2019, and a positive test for cobalt above the quantitative limit from “Sintra”, tested following the 5th race at Mohawk on February 23, 2019, in accordance with Rules 1.09, 6.04, 26.02.01, 26.02.02 and 26.02.03(c) of the Rules of Standardbred Racing (“Rules”) and Policy Directive No. 1-2018;

AND WHEREAS Ruling Number SB ADMIN 19/2019 further directed that “Deetzy” was disqualified from its aforementioned races (with the exception of pari-mutuel wagering) and all purse monies and trainer/driver fees were ordered returned and redistributed in accordance with Rules 9.13 and 18.08.01 of the Rules;

AND WHEREAS Ruling Number SB ADMIN 19/2019 further directed that “Sintra” was disqualified from its aforementioned race (with the exception of pari-mutuel wagering) and all purse monies and trainer/driver fees were ordered returned and redistributed in accordance with

Rules 9.13 and 18.08.01 of the Rules;

AND WHEREAS Ruling Number SB ADMIN 19/2019 also directed that horses owned or trained by MENARY shall not be transferred or sold without the approval of the Racing Officials and the following terms be added to MENARY's licence for two (2) years (June 10, 2021 – June 9, 2023, inclusive), pursuant to Rule 6.01(d) of the Rules and Policy Directive 3-2008:

1. The licensee shall keep the peace and be of good behaviour,
2. The licensee shall allow Commission Inspectors access to his stabling area at any time to conduct unannounced random searches for illegal or non-therapeutic medications or drugs,
3. The licensee shall allow Commission Inspectors to seize any illegal or non-therapeutic medications or drugs found at his stabling area,
4. The licensee shall be subjected to the Commission's Out Of Competition Program, and
5. The licensee may be subject to a Notice of Proposed Order in addition to any penalty imposed by the Commission Racing Officials for any breach of the terms of their license;

AND WHEREAS on May 28, 2019, MENARY filed a Notice of Appeal and a Notice of Motion requesting a stay with the Panel;

AND WHEREAS on May 30, 2019, the Registrar objected to the stay being granted;

AND WHEREAS on June 11, 2019, the Panel convened to consider MENARY's request for a stay;

AND WHEREAS on June 28, 2019, the Panel issued Decision Number SB HRAP 05015 2019, granting the stay;



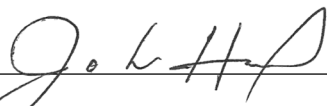
AND WHEREAS on October 28 and 29, 2019, the Panel convened to hear MENARY's appeal and reserved their decision, pending written submissions, which the parties had until December 13th to provide;

TAKE NOTICE that by a majority decision, the Panel dismisses the appeal but varies the penalty to:

- A monetary penalty of \$10,000;
- A suspension of MENARY's trainer licence for eighteen (18) months, less one hundred and three (103) days served, commencing on a date to be agreed between the parties;
- A two (2) year probation commencing one day after the expiry of the suspension; and
- The remainder of the terms of penalty under Amended Ruling Number SB ADMIN 19/2019 remain in force and effect.

The Panel's Reasons for Decision are attached to this Notice.

DATED on this 6th day of February, 2020.

Sandra Meyrick, Vice-Chair
Horse Racing Appeal Panel

John Charalambous, Member
Horse Racing Appeal Panel

Dr. John Hayes, Member
Horse Racing Appeal Panel

REASONS FOR DECISION

The Appeal

This was a two-day hearing in which David Menary ("MENARY") appealed Standardbred Ruling Number SB ADMIN 19/2019, as amended. Amended SB ADMIN 19/2019 issues MENARY a monetary penalty of \$10,000 together with a full two (2) year suspension (June 10, 2019 – June 9, 2021, inclusive) in accordance with Rules 1.09, 6.04, 26.02.01, 26.02.02 and 26.02.03 (c) of the Rules of Standardbred Racing and Policy Directive No. 1-2018.¹

Amended SB ADMIN 19/2019 was stayed by the Vice-Chair of the Panel on June 11, 2019.

While on probation from a previous cobalt violation, Ruling Number SB 49580, dated September 11, 2018, MENARY incurred three (3) additional Certificates of Positive Analysis on two consecutive Saturday night races at Woodbine Mohawk Park ("Mohawk") in 2019 (February 16 and February 23), confirming positive tests for cobalt at a higher than permitted limit.

The quantitative limit for cobalt in an official sample is 100 nanograms per milliliter (ng/mL) in urine and 25 ng/mL in blood, as prescribed by the Criminal Code of Canada Pari-Mutuel Betting Supervision Regulations. A cobalt overage is considered a Class III positive.

MENARY was notified of the February 16, 2019 overage on March 1, 2019. He was not notified in time to scratch his horses from the February 23, 2019 races, which led to the two of the three further positives. Had the positive of "Deetzy" on February 16, 2019 been reported before February 23, 2019, "Deetzy", one of the two horses MENARY raced on February 23, 2019, would not have been permitted to race. Further, had the parties been notified of the February 16th positive before the races on February 23rd, it is likely that MENARY would have been suspended from racing altogether and the two subsequent positives would have been averted.

MENARY conducted an independent analysis of the samples. He does not dispute the Certificates of Positive Analysis or the quantification of cobalt in the samples. MENARY appeals the penalty.

The Decision

The appeal of Amended SB ADMIN 19/2019 is dismissed, but the penalty shall be varied as follows:

1. Monetary Penalty of \$10,000;
2. Suspension of his licence as Trainer for eighteen (18) months commencing on a date to be agreed between the parties;
3. Time served of suspension being 103 days shall be subtracted from the eighteen (18) month suspension;
4. Two (2) year probation commencing one day after the expiry of the suspension;
5. The remainder of the terms of penalty under Amended SB ADMIN 19/2019 remain in force and effect.

The Agreed Facts

Ms. Nicole Pace and Ms. Aviva Harari appeared for the Commission. Mr. Larry Todd appeared for the Appellant, Mr. David L Menary.

¹ Exhibit "1", Tab 16

The Panel reviewed various exhibits and had the benefit of viva voce evidence provided by Bradley Capes, Tyler Durand, Lydia Brooks and Mike Wilson called by the Registrar, and Dr. Joseph Malone, Dr. Clara Fenger and MENARY, called by the Appellant.

MENARY has been licensed since 1999 by the former ORC, now AGCO, as an Owner/Trainer/Authorized Agent.

On August 9, 2018, "Across Hanover" raced at Mohawk and finished in second place. Thereafter, the horse tested positive for cobalt at a level of 130 ng/mL in urine in abrogation of the Canadian Pari-Mutuel Agency (CPMA) Betting Supervision Regulations. MENARY was issued Ruling Number SB 49580, dated September 11, 2018, which ordered a monetary penalty of \$1,000 and fully suspended him for 15 days. In addition, his licence was subject to the usual terms and conditions with a two-year probation (October 8, 2018 – October 7, 2020). MENARY did not appeal this Ruling.

On February 16, 2019, "Deetzy", trained by MENARY, raced at Mohawk and finished 4th. The horse provided a post-race urine sample which later showed a cobalt overage. A Certificate of Positive Analysis, dated February 28, 2019, was issued confirming the quantification of cobalt in the sample at 479 ng/mL. A test of the residue sample confirmed cobalt in the sample at 497+/- 53 ng/mL.

On February 23, 2019, "Deetzy" and "Sintra", both horses trained by MENARY, raced at Mohawk. Both provided urine samples post-race. Both tested positive for cobalt. The Certificate of Positive Analysis for "Deetzy" confirmed cobalt in the sample at 161 ng/mL. The Certificate of Positive Analysis for "Sintra" confirmed cobalt in the sample at 156 ng/mL.

On March 1, 2019, MENARY was advised of the positive tests and was placed on indefinite full suspension for breach of probation, Ruling Number SB 50727. The same day a stable inspection was conducted at Stevenson's Training Centre where MENARY stables the horses he trains. Commission Inspectors Brad Capes and Tyler Durand attended. Ultra Ferron (which contains cobalt) was found as was Vitamaster, both legal supplements.

The inspection revealed no improper, illegal or improperly labelled medications. The report of Inspector Brad Capes formed part of the Record.²

On March 13, 2019, MENARY attended a meeting with Racing Officials to discuss the positive findings. The interview forms part of the Record.³

On May 27, 2019, the Ruling under appeal was issued. On June 11, 2019, the Ruling was stayed.

After the stay was granted on June 11, 2019, Woodbine Entertainment Group ("WEG") restricted MENARY's racing to a 14-horse roster of specifically named horses that were the only horses he was allowed to race on the Woodbine Circuit. Accordingly, MENARY was not able to take on any new horses after June 11, 2019. MENARY raced approximately 30 horses prior to March 2019. He now races 5 horses.⁴

The evidence of Lydia Brooks, Chief Analytical Chemist, Manager of Research and Analysis, establishing testing protocols at the CPMA, confirmed that in and around 2013, concern arose within the industry regarding the excessive use of cobalt as a performance enhancing substance. The use of cobalt was not a regulated substance at that time.

A collaborative ring study was commenced in 2014 to identify an appropriate threshold which would be accepted internationally, to distinguish between naturally occurring and excessive cobalt. Australia,

² Exhibit "1", Tab 7

³ Exhibit "1", Tab 12

⁴ Menary Transcript pages 134/135, Lines 1-23; 1-23

Canada and the United States participated. The collaborators determined that 100 ng/mL in urine was an appropriate threshold.

The CPMA developed a method for testing blood/urine as an avenue to test for cobalt. The industry was notified. A Memorandum dated April 6, 2017 was circulated to the industry entitled "Implementation of cobalt testing under the CPMA's Equine Drug Control Program".⁵ Cobalt testing was added to the Regulations. Further Memoranda were circulated to the industry in 2017 and 2018.⁶ In 2017, there were 6 cobalt positives Canada-wide, in 2018 there were 6 positives, and in 2019 there were 4 positives Canada-wide (3 of which were MENARY's). These were all found in urine.

Cobalt testing is a "targeted test" done only at the Reference and Research Library in Ottawa. Of approximately 350 tests conducted since May 1, 2017, 4% of these horses have tested positive for cobalt. This is the highest rate of positives for any regulated drug or medication under the CPMA's jurisdiction. The normal rate for positive tests for all other regulated drugs is below 1%.⁷

Parties Submissions

MENARY gave oral evidence. Supported by the viva voce evidence of his primary veterinarian (Dr. Joseph Malone) and his expert witness (Dr. Clara Fenger), MENARY argued that the only possible explanation for the cobalt overages in his horses is the legume/alfalfa hay that his horses are fed.

MENARY specifically consulted Dr. Malone after the horse "Across Hanover's" cobalt positive, 130 ng/mL, in August 2018. At that time MENARY stopped the use of Ultra Ferron 48 hours pre-race and cut the use of Vitamaster by 50% in the electrolyte jugs given three days prior to race day. Ultra Ferron and Vitamaster both contain exogenous cobalt.

Dr. Malone gave evidence that the vitamin and supplement regime given to MENARY's horses would not cause cobalt overages. Dr. Malone stated that the program as revised after the 2018 positive was completely consistent with the CPMA's Notice to the Industry dated May 9, 2018, in that no products containing cobalt were given to MENARY's horses within 48 hours of race day.⁸

Dr. Malone also acknowledged that he was not aware that legume hay could contain high concentrations of cobalt until this situation arose.⁹

Dr. Fenger is a racetrack veterinary practitioner and a research consultant. She has practiced since 1996. She was qualified as an expert in these proceedings to opine on the following: equine pharmacology, equine physiology, equine exercise physiology, equine metabolism and equine clinical pharmacology.¹⁰

Dr. Fenger prepared a report for these proceedings. Both her report and oral testimony concluded that the cobalt overages experienced in MENARY's horses were the result of the horses feed of alfalfa hay.¹¹

Dr. Fenger opined that the regular administration of cobalt through the feeding of a high cobalt hay, such as legume/alfalfa hay, would result in cobalt accumulation with a longer elimination period for cobalt.

MENARY fed all of his racing horses the same hay, a mix of timothy and alfalfa hay, between three quarters to one full bale daily. These bales were approximately 80 pounds in weight.

⁵ Exhibit "2", Tab 15;

⁶ Exhibit "2", Tabs 16 and 17;

⁷ Lydia Brooks, Transcript p. 117, Lines 2-10

⁸ Malone, Transcript page 15, Lines 17-24;

⁹ Malone, Transcript page 10/11, Lines 24-25, 1-20;

¹⁰ Transcript page 55/56, Lines 14-1;

¹¹ Fenger Report, Exhibit "2" Tab 18;

Dr. Fenger stated that if “Deetzy” and “Sintra” consumed all of their ration of hay per day, these horses would have a daily intake of approximately 10 mg of cobalt. Dr. Fenger noted that cobalt is stored in the liver and kidneys of the horse with delayed and unpredictable elimination.¹²

MENARY did not test his hay for cobalt before or after these positives. He argues that he knows of no one in the industry who tests their hay. The constitution of the feed is influenced by whether the horses are eating a first, second or third cut and whether there is more timothy, alfalfa or other grass in the mix.

On the other hand, the CPMA conducted cobalt testing of alfalfa hay in October 2019. The testing involved four horses at the Ontario Research Farm in Jerseyville. The existence of this testing was raised first in the cross examination of Ms. Brooks. Although aware of the testing, Ms. Brooks was either unwilling or unable to speak to the test results, produce a report or provide any information in relation to this study.¹³ Mr. Todd has asked the Panel to draw an adverse inference from the lack of transparency in regard to this study from the CPMA. In Reply Submissions on behalf of the Commission, this testing is referred to as “preliminary testing” in Jerseyville, where testing is ongoing and where Ms. Brooks has limited involvement.

The CPMA’s interest in testing alfalfa hay is of significance. The results of this testing will be a valuable resource to the industry.

Reasons of the Panel

“Deetzy” and “Sintra” were issued Certificates of Positive Analysis during the period of MENARY’s probation, which is significant to this Panel.

The Panel is aware that MENARY did take steps after the 2018 positive to mitigate against further cobalt positives. The Panel is not persuaded that the steps taken were adequate.

It is clear from the evidence that MENARY has an aggressive regimen of stable supplementation and veterinary administration. It is also clear from MENARY’s own testimony that he is not the only person in the stable who administers this supplementation. MENARY provided medication logs to the investigators at his initial interview however it is not clear whether these records were produced for the investigation or contemporaneously with administration. The logs affixed to the Occurrence Report 19-019¹⁴ appear to be prepared for the investigation and may not be reliable.

“Deetzy’s” urine cobalt value was inordinately high at 479 ng/mL, more than four times the permitted value. The evidence before the Panel was that most horses test 9-10 ng/mL of cobalt in urine.

The mitigation efforts which MENARY took after 2018, with the support of Dr. Malone, appeared arbitrary and subjective in nature. Given the gravity of the future violations, these efforts were not compelling. The Panel was not provided any evidence to explain MENARY’s continued administration of supplements containing cobalt to his horses, in particular “Deetzy” and “Sintra”, particularly given the unpredictable elimination rate of cobalt, as identified by Dr. Fenger.

Dr. Fenger stated that alfalfa hay, or in MENARY’s case, 50/50 timothy/alfalfa, eaten hours before MENARY’s positive horses raced, was the cause of cobalt being detected in post-race urine since cobalt is eliminated quickly. Later Dr. Fenger argued that an excess intake of cobalt can result in cobalt being stored in bone and muscle and other tissues with elimination “slowly” over an extended time period. Dr Fenger also opined that cobalt given by slow IV two to three days pre-race can have calcium-blocking results on race day to prevent a horse “tied up”. Both these later points suggest that cobalt may also remain in the horse’s system days after intake, by any source. The administration of supplements together with a diet of alfalfa hay may be the cause of the four positives. There is

¹² Fenger Report, *supra*, page 42 -43

¹³ Transcript, pages 110-115, 135-127;

¹⁴ Exhibit “2”, Tab 5

insufficient evidence to establish a cause, or in fact, to eliminate the administration of cobalt contained in supplements as a possible source. It is noteworthy as well, that MENARY's hay source at the time of his 2018 positive analysis was different from his suggested positive-hay source in 2019 and neither hay was tested.

Again, at no time did MENARY take steps to test the timothy/alfalfa hay for cobalt. It would not have been possible to retrace steps and test the hay consumed by these horses prior to race day but due diligence would indicate a test on product to protect against future positives.

Cobalt is a performance enhancing agent. Cobalt, when given in excess, negatively impacts the health and welfare of horses. At the urging of the industry, the CPMA has (since 2017) regulated cobalt. When considering penalty, the Panel must address the concerns which lead to such regulation, trainer responsibility rules and the need for protection of horses, protection of the public interest and deterrence.

The fact that MENARY has incurred four Certificates of Positive Analysis for cobalt in a 12-month period, all absolute liability offences, inhibits the Panel's willingness to substantially reduce or stay the given penalty even if it is within our discretion to do so.

The Panel is not unanimous in its decision to reduce MENARY's suspension to eighteen (18) months, less time served. Two of the three members share the view that given the timing of the notice to MENARY, the three positives of February 16 and 23, 2019, should be treated as two and some adjustment should be made to reduce the suspension. Our third panel member would have had the penalty remain as set out in Amended Ruling Number SB ADMIN 19/2019.