

**Horse Racing Appeal Panel**

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**HORSE RACING APPEAL PANEL**

**TORONTO, ONTARIO – FEBRUARY 11 AND 12, 2019**  
**TB HRAP 06002 2019**

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**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 WOODBINE ENTERTAINMENT GROUP OF  
RULING NUMBER TB 10951/18**

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| Dates of Hearing:                                                | February 11 and 12, 2019                                                              |
| Horse Racing Appeal Panel (Panel):                               | Stanley Sadinsky, Q.C., Chair<br>Sandra Meyrick, Vice-Chair<br>Dr. John Hayes, Member |
| Representatives for the Appellant, Woodbine Entertainment Group: | Deepshikha Dutt<br>Eric Freilich                                                      |
| Counsel for the Registrar of Alcohol, Gaming and Racing:         | Aviva Harari<br>Nicolle Pace                                                          |
| Representatives for the Respondent, Dr. Brian Van Arem:          | Marisa Gilmore<br>Martin Smith                                                        |
| Decision:                                                        | The Panel grants the appeal in part and varies the penalty as articulated below.      |

WHEREAS Dr. Brian Van Arem (“VAN AREM”) is licensed with the Alcohol and Gaming Commission of Ontario (“Commission”) as a Veterinarian/Trainer, Licence Number 116293;

AND WHEREAS the Woodbine Entertainment Group (“WEG”) is licenced with the Commission as a Corporation, Licence Number 124052;

AND WHEREAS on August 1, 2018, VAN AREM was providing services for Norm McKnight, licenced with the Commission as an Owner/Trainer, Licence Number 117184;

AND WHEREAS on September 18, 2018, Commission Stewards issued Ruling Number TB 10951/18 wherein VAN AREM was ordered to pay a monetary penalty of seven thousand, five hundred dollars (\$7,500), to be paid on or before October 18, 2018, for misconduct by providing treatment to horses with Extracorporeal Shock Wave Therapy (“ESWT”) within four days (96 hours) prior to competing in a race, in accordance with Rules 1.05, 15.09.01, 15.37(b), 16.13(d) and 24.04 of the Rules of Thoroughbred

Racing ("Rules") and Policy Directive No. 1, 2018;

AND WHEREAS Ruling Number TB 10951/18 further directs that the following conditions be placed on VAN AREM's licence for a period of one (1) year (October 4, 2018 through October 3, 2019):

1. VAN AREM shall keep the peace and be of good behaviour,
2. VAN AREM may be subject to Commission Investigators' requests to seize Veterinarian records of horses treated in racing by him or his associates,
3. Any violations of a similar occurrence during the probation period may result in an immediate suspension and subsequent review by the Stewards;

AND WHEREAS on October 18, 2018, WEG filed a Notice of Appeal with the Panel, requesting that the penalties in Ruling Number TB 10951/18 be increased to include a 6-month full suspension;

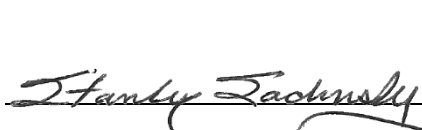
AND WHEREAS on February 11 and 12, 2019, the Panel convened to hear WEG's appeal;

AND WHEREAS on February 12, 2019, the Panel reserved their decision and requested written final submissions from all parties;

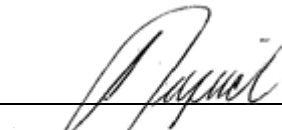
TAKE NOTICE that by a majority ruling the Panel grants the appeal in part and varies the penalty to include a stayed 30-day full suspension effective upon any further violation of the ESWT Rule(s) by VAN AREM, a monetary penalty of \$7,500 (already paid) and the conditions of licence set out above.

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

DATED this 10<sup>th</sup> day of April, 2019.



Stanley Sadinsky, Q.C.,  
Chair,  
Horse Racing Appeal Panel



Sandra Meyrick,  
Vice-Chair,  
Horse Racing Appeal Panel



Dr. John Hayes,  
Member,  
Horse Racing Appeal Panel

## REASONS FOR DECISION

The Horse Racing Appeal Panel ("Panel") convened on February 11 and 12, 2019 to hear the appeal of Woodbine Entertainment Group ("WEG"). The appeal was from the decision of the Stewards at Woodbine, Ruling Number TB 10951/18 dated September 18, 2018 (Appeal Book ("AB"), Tab 1) wherein they assessed a monetary penalty to veterinarian Dr. Brian Van Arem ("VAN AREM") of \$7,500 for violating TB Rule 15.37(b) in treating horses trained by Norm McKnight with Extracorporeal Shock Wave Therapy ("ESWT") within 96 hours of the day that the horses were due to race. The penalty was to be paid before October 18, 2018 and it was paid.

In addition, conditions were added to VAN AREM's licence for a 1-year period (October 4, 2018 to October 3, 2019) as set out in the Order.

VAN AREM did not appeal the decision but WEG did so on the grounds that the penalty imposed by the Stewards was too lenient and ought to be increased.

On the appeal, Aviva Harari and Nicolle Pace appeared for the Registrar of the Alcohol and Gaming Commission of Ontario ("Commission"), Deepshikha Dutt and Eric Freilich appeared for WEG, and Martin Smith and Marisa Gilmore appeared for VAN AREM.

Ms. Harari called three witnesses, Compliance Officials Troy Moffatt and Tyler Durand and Steward John Dorion. Ms. Dutt called two witnesses, Jonathan Zammit, Vice President of Thoroughbred Racing Operations at WEG and Bruce Pollock, a thoroughbred trainer at WEG. Mr. Smith called two witnesses, veterinarians VAN AREM and Dr. Ted Coker. This appeal proceeded as a hearing de novo.

Following the testimony of all of the witnesses, the Panel invited the parties to provide written final submissions. Those helpful submissions have now been received and the Panel is prepared to render its decision as set out below.

TB Rule 15.37(b) reads in part as follows:

No person, other than a veterinarian licensed by the Commission, shall have or use of Extracorporeal Shock Wave Therapy, Radial Pulse Wave Therapy on any race horse and the following conditions of use must be met:

...(b) No treatment or procedure is allowed within 4 days (96) hours prior to competing in a race...

The evidence is clear and uncontested that VAN AREM administered ESWT to 3 horses trained by Norm McKnight within 96 hours of the times that they were due to compete, in contravention of the Rule. The administrations to 2 of the horses on July 30, 2018 were discovered by security personnel at Woodbine Racetrack and ultimately reported to the Stewards. Those 2 horses were scratched from competing. At that time VAN AREM, to his credit, advised the Stewards that he had administered ESWT to a third horse that was in to race and also trained by McKnight and it too was scratched.

Following a review attended by VAN AREM and McKnight, the Stewards rendered their Decision with Reasons (AB, Tab 1) and levied the penalties set out above.

The crux of WEG's appeal is that the penalty imposed by the Stewards was too lenient in the circumstances. Zammit testified that Woodbine Racetrack strives to be, and be seen to be, a venue where the integrity of the racing product that it offers is very high and that all participants including horsemen and the wagering public should have confidence in its

level of integrity. It is concerned that ESWT is being administered by many licensees in contravention of the Rules and that Woodbine's integrity is suffering.

Ms. Dutt asked us to also consider other instances when VAN AREM apparently violated this same Rule in the past as referred to below.

We find it somewhat inconsistent that WEG seeks to have us increase the penalties imposed on VAN AREM for the reasons set out above yet it did not appeal the monetary penalty of \$5,000 imposed on McKnight. Rhetorically, one might ask that if WEG considers the penalties imposed on VAN AREM too lenient, why is the penalty imposed on McKnight sufficient? In treating a horse, a veterinarian acts on the instructions of the trainer who is primarily responsible for a horse under his/her care.

Both Dr. Coker and VAN AREM, veterinarians with considerable experience in treating racehorses, gave evidence to the effect that they use ESWT to treat low-grade injuries and aches and prefer it to invasive medications and injections. They both testified that ESWT is in common usage at Woodbine Racetrack. Based on their experience, they both felt that ESWT promotes healing and if it has any significant analgesic effect (which VAN AREM disputes), it would have less effect after approximately 48 hours. Dr. Coker testified that ESWT is used to deal with a horse's "aches and pains". Both he and VAN AREM also testified that they did not use ESWT for its analgesic effect but as a healing therapy.

VAN AREM testified that ESWT directs high-energy sound waves at an affected area of the horse and that it has the effect of breaking up any calcium deposits particularly found at the front and hind proximal suspensories of horses. He testified that he did not know the details of Rule 15.37(b) even though it had been a Rule for over 10 years. He had heard that there was such a Rule but thought that it was just a guideline. He did not know of the 96 hour window. He was fully aware of the Canadian Pari-Mutual Agency's (CPMA) Guidelines that deal with suggested withdrawal times for a large number of medications and he thought that, like these provisions, the Rules were also guidelines. He also complained that he was not expressly notified of the Rule, by email or otherwise, either by the Commission or by Woodbine Racetrack.

Dr. Coker testified that it was also his understanding that the Rule in question was only a guideline and that he would expect notification from the Commission and WEG if the guideline was about to be enforced.

VAN AREM testified that he would palpate an area on the horse to see if he would get some reaction and when he did, he would apply ESWT to that area. The 'reaction' that he described was some resistance by the horse that he concluded was due to some degree of discomfort or pain. He testified that the treatment could hopefully alleviate this condition.

VAN AREM stated that he had not read the Rules of Thoroughbred Racing even though there are several Rules that deal specifically with veterinarians who treat thoroughbred race horses. He took comfort in the fact that when he was asked by Moffatt and Durand to produce his medication records dealing with the horses trained by McKnight, Durand who reviewed the records with VAN AREM, indicated that there were no problems. (Exhibit 1)

The two sets of records that were provided were records from January 1 to April 30, 2018 and records from May 1 and July 30, 2018. The first set of records disclosed that the horse BAKERSFIELD received ESWT on April 20 and raced on April 22, 2018. The later records included some 13 instances when VAN AREM had apparently administered

ESWP to horses within the 96 hour window set out in the Rule, all of whom raced within the 96 hour window. However, VAN AREM was not charged with any offences as a result of these administrations.

In response to WEG's submission that the penalty in this case should be increased to a 6-month suspension and a fine of \$7,500, Ms. Harari argued that the penalty imposed by the Stewards should be upheld. Mr. Smith submitted that the monetary penalty imposed should be reduced and that there should be no suspension.

WEG tendered no evidence that the wagering level at Woodbine Racetrack has diminished nor that any owners were moving their horses to race in other jurisdictions as a result of the penalty imposed in the Van Arem matter. There was a statement by Pollock in his evidence that an American trainer, Michael Maker, will not be returning to Woodbine but there was no direct evidence linking the penalty imposed on VAN AREM nor the alleged extensive use of ESWP at Woodbine to the apparent decision by Mr. Maker to not race at Woodbine. There was also a copy of a letter from a thoroughbred owner, Gabe Grossman, to the CEO of WEG expressing his concern about the "compliance and enforcement of medication guidelines and astonishing performance enhancement displayed by certain owners/trainers at Woodbine" (Exhibit 4) This note made no reference to VAN AREM and the penalty imposed on him.

When dealing with penalty a number of considerations come into play. On the one hand, penalties are designed to punish licensees who breach the Rules and deter them and others from doing so. Furthermore, as Ms. Dutt forcefully argued, penalties are meant to help preserve the integrity of horse racing and protect the legitimate interest of the wagering public, the race horse, and the reputation of racing and all those that provide the racing product. The Rules are also in place to insure that a level playing field exists for those competing in a race. (R. v. Cotton Felts Ltd., (1982), 2 C.C.C. (3d) 287 (C.A.); Scott v. Ontario Racing Commission, (2009), 253 O.A.C. 73 (O.S.C.J. Div. Ct.)

On the other hand, the conduct and motivation of the licensee must be taken into account together with his/her degree of blameworthiness along with any mitigating factors, including the impact of the penalty on his/her livelihood. Consideration should also be given to the honesty of the licensee and his/her degree of cooperation with Commission personnel. VAN AREM was co-operative with Commission personnel and did not seek to obfuscate the facts relating to the administration of ESWP in the instances charged.

Mr. Smith correctly pointed out that Durand had failed to advise VAN AREM that he had violated the Rule when he treated one of McKnight's horses, BAKERSFIELD, with ESWP on April 20, 2018 that then raced on April 22. As stated above, this information appeared in the medication records that VAN AREM provided. Durand testified that he wasn't concerned with information regarding ESWT at that time as he was focused on medications that had been given to McKnight's horses as McKnight, not VAN AREM, was under investigation. He did not look at the race lines for the horses that received ESWT. This may have been an understandable omission on Durand's part but, in our view, it does not provide an excuse based on 'officially induced error' for VAN AREM to continue to violate Rule 15.37(b) as he did. We agree with the submissions made by Ms. Harari and Ms. Dutt on this issue.

We find it disconcerting and somewhat shocking that a veterinarian of the standing and experience of VAN AREM would be ignorant of the specific Rules of Racing that govern the activity of veterinarians that he is so heavily engaged in. Ignorance of the Rules is no defence. (Rules 1.05, Rules of Thoroughbred Racing; R. v. Jorgensen, (1995), 4 S.C.R. 5)

Aside from his veterinary practice, VAN AREM also manages his father's racehorses and has an interest in two training centres and therefore has extensive experience in the horse racing industry.

To suggest that the Rules are mere guidelines is specious especially when the annual applications for licences provide that a licensee will be bound by the Rules and Rule 1.05 expressly provides that ignorance of the Rules is no excuse for a violation. The Rules are posted on the Commission's and the Horsemen's Benevolent and Protective Association's (HBPA) websites and are contained in rulebooks that are readily available to all participants. As VAN AREM has broad experience in the horse racing industry aside from being a veterinarian he should be aware of all the Rules that might affect his practice.

We recognize that this case is the first instance in Ontario where the Stewards were enforcing this Rule and issuing a penalty. There were no precedents directly on point for their guidance. However, we find it helpful to draw an analogy for the purpose of comparison and guidance only from the CPMA Guidelines. While ESWT may be considered by some to be a 'treatment' it appears to also have some analgesic effect although for what period of time following administration is uncertain. It is also an administration that cannot be detected by any testing procedure.

The CPMA Guidelines deal with analgesics albeit those such as banamine, acetaminophen and oxaprozin, which are drugs that are directly administered to the horse. Analgesics are classified as Class IV medications in the CPMA Guidelines and the recommended penalty for a first offence is a suspension of between 15 and 75 days and a monetary penalty of \$2,000.

Having regard to all of the evidence and the unique circumstances of this case, we, the majority, have concluded that an appropriate penalty for this violation is a full suspension of 30 days and a monetary penalty of \$7,500, the monetary penalty having already been paid. However, given that this is a first offence of this kind dealt with by the Stewards, we have decided to stay the 30 day suspension. Should there be a further violation of this Rule by VAN AREM, the suspension will come into effect beginning on a day determined by the Stewards. The conditions placed by the Stewards on VAN AREM's licence remain.

In most similar cases in the future, we intend to consider the administration of ESWT as analogous and comparable to Class IV drugs listed in the CPMA Guidelines with penalties commensurate with that classification.

#### MINORITY REASONS OF DR. JOHN HAYES

I concur with the narrative set out in the Reasons of my colleagues in their entirety. However, I disagree with the penalty that they have decided to impose.

In my view, a monetary penalty of \$7500 plus a suspension of 30 days with 15 days stayed and 15 days to be served better reflects the import of VAN AREM's violation. My reason is that use of ESWT within 96 hours of post-time has significant analgesic potential which can create a very dangerous circumstance for horse and jockey. I would leave it to the Stewards to determine the days of suspension to be served.

We all wish to thank counsel for their assistance in dealing with this matter.