

A PERSONAL OPINION

"No Harm, No Foul"

In Search of a New Standard for Equine Drug Testing

by Robyn T. Ranke

*In the wake of revitalizing Thoroughbred horse racing as a national pastime, the industry may prove to be its own worst enemy. New standards for equine drug testing have been rumored time and again, yet remain one of many unsettled issues before the California Horse Racing Board (CHRB). The need to amend existing regulations which govern equine drug testing is as important to the economic prosperity of the sport as many of the high-profile issues, like national broadcast exposure, state tax relief, and simulcast revenues. Inevitably, California will alienate owners, old and new, because of its so-called "zero tolerance" policy in drug testing cases.*¹*

Modern Drug Testing Techniques Have Advanced Beyond Current Regulations

The core of the problem arises out of Board regulations which do not appear to be informed by modern drug testing advances. Modern drug testing techniques have advanced to a state where substances can be detected at levels so infinitesimal as to be totally without effect on race performance. Under existing Board regulations, the standard of review in drug testing cases in California is one of strict liability. Under this standard, commonly known as the "trainer-insurer rule," the trainer is considered to be the absolute insurer of the condition of the horses entered in a race, regardless of the acts of third persons. Any drug, medication, or other substance, whether natural or synthetic, found in a test sample taken from a horse shall be deemed a "prohibited drug substance," unless otherwise authorized. Penalties may be imposed but not only against the trainer, but also the owner, foreman, groom, and any other person "shown to have had the

care or attendance of the horse." Penalties may include: the disqualification of the horse from the race, forfeiture of any purse, revocation or suspension of the horsemen's license, and monetary fines not to exceed \$10,000. Disqualification of the horse from the race occurs regardless of who is responsible for the condition of the horse. In other words, owners and trainers may be held responsible for anyone, including unrelated third-parties, who accidentally or otherwise, cause contamination of the horse's food, water, or bedding - even when the horsemen have absolutely no knowledge of such contamination until after the fact, and even where it can be shown that the contamination had no effect on the horse's performance.

In the Future, Virtually All Horses Can Test "Positive" Based on Modern Drug Testing

CHRB Rule 1888 provides a defense to the "trainer-insurer rule." The trainer, or other person charged, may defend, mitigate, or appeal the charges on either (1) procedural grounds challenging notice, right to

counsel, and the opportunity to be heard; or (2) evidentiary grounds showing that he/she made every reasonable effort to protect the horses from tampering by unauthorized persons. Nevertheless, in many instances, the need to defend against such a charge arises out of modern drug testing techniques becoming so accurate that in the future "virtually all horses can be found 'positive' for some past administration of a medication, or for the most innocuous exposure to environmental contaminants." In the process, the horsemen's reputations for honesty and integrity have been damaged. We would all agree that preserving the legislative intent in requiring drug testing - to protect the integrity of horse racing, to protect the health of the horse, and to safeguard the interests of the public and racing participants - is as important today as it was 50 years ago. However, we are living in a new era of Thoroughbred drug testing technology. Perhaps it is time the law be revisited to accommodate the times.

The "Scopolamine" Cases Illustrate Unreasonableness of Current Regulations

In August 1994, the Board of Stewards at Del Mar began the first set of hearings involving four of the six prominent Thoroughbred trainers who had seven horses test "positive" for scopolamine during a 30-day period of racing at Santa Anita. Despite an overwhelming amount of

evidence which established infinitesimal levels of scopolamine² originating from the horses' bedding which had been contaminated with jimsonweed (a flowering plant containing scopolamine), the stewards imposed monetary fines against the trainers, disqualified the horses from the races involved, and ordered a return of the purse money - one purse totaling \$66,300. The trainers and owners appealed the stewards' decision to the Office of the Administrative Hearings. Upon appeal, the Administrative Law Judge (ALJ) concluded that the presence of scopolamine had little or no effect on the performance of the horses and was the result of an accidental contamination of straw bedding. The ALJ held that CHRB Rule 1843 did not apply because the presence of scopolamine was not the result of a drug substance "administered" to the horse within the meaning of the Rule. The ALJ exonerated the trainers from any liability, however the ALJ upheld disqualification of the horses and forfeiture of the purse money pursuant to CHRB Rule 1859.5 where the language mandates disqualification of the horse upon a test finding a "positive" with no exceptions.

The owners appealed the ALJ's decision to the Los Angeles Superior Court. The Court agreed with the owners and concluded that the enabling legislation (*California Business and Professions Code 19582.5*), upon which CHRB Rule 1859.5 was based, takes precedence and that its statutory language - a horse "may" be disqualified - does not mandate disqualification of the horse. According to the Court's ruling, the enabling legislation implies that the Stewards and the Board have the discretion *not* to disqualify a horse in a proper case, which discretion neither the Stewards nor the Board employed in the *Scopolamine* cases.

CHRB Allowed to Overrule its "Zero Tolerance" Policy

In other words, California law currently provides that the Racing Board

modern drug testing techniques are becoming so accurate that in the future "virtually all horses can be found 'positive'"

should use its discretion and may disregard its "zero tolerance" policy in appropriate circumstances. Moreover, 19517 of the *California Business and Professions Code* expressly provides the Board may overrule any steward's decision (other than a disqualification due to a foul or a riding or driving infraction in a race) if the evidence indicates any of the following: (1) the steward mistakenly interpreted the law; (2) new evidence of a convincing nature is produced; or (3) the best interests of racing and the state may be better served. Clearly, the legislature has empowered the CHRB to exercise its own discretion on a case-by-case basis.

Why Doesn't CHRB Use Its Discretion to Serve Racing's Best Interests?

The *Scopolamine* cases give the Board authority to set precedent and make reasonable use of its discretion, as provided by law, to ensure that the best interests of racing are being served for all parties involved. Nonetheless, the CHRB continues to challenge the *Scopolamine* ruling. On November 22, 1996, the CHRB filed an appeal in the California Court of Appeals challenging the lower court ruling. The Board is, in effect, requesting that its "discretion," confirmed by the Superior Court, be taken from it - the discretion to do justice in reasonable cases.

New Standard of "No Harm, No Foul" More Reasonable Solution

It is clear that, in California, horsemen are held to very strict standards of review in drug testing cases. Other states, like Kentucky, continue to

operate well within the bounds of maintaining the integrity of the sport, yet with more relaxed standards of review and disciplinary actions in drug testing cases. Taking into consideration the history of the sport and laws currently in effect in California, the Board's appeal in the *Scopolamine* cases appears unjustified. Based upon the overwhelming evidence and exoneration of the trainers, why doesn't the Board override the steward's disqualification of the horses and the forfeiture of the purse money?

It has been argued the case would set precedent and open the door for owners to litigate in similar cases. But, in most instances, the cost of litigation would far exceed the total of the purse money. Moreover, when the Board utilizes its discretion properly, it has rarely, if ever, been overturned. A new standard of "no harm, no foul" would seem to serve everyone's interests and is the more reasonable solution in this era of Thoroughbred racing and ownership. 🐾

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Additional footnotes were withheld from this article due to lack of space.

¹ The CHRB's zero tolerance policy applies only to "performance enhancing" substances. Therapeutic medications, such as Bute and Banamine, are allowed at certain levels.

² "Scopolamine" is a natural ingredient in jimsonweed weed, a large toxic flowering plant frequently growing in fields where hay and straw are harvested. Such straw is grown in the southern parts of California's San Joaquin Valley and Paso Robles and was used as bedding for racehorses at Santa Anita during the late winter and early spring of 1994. (Richard Craig, "The bizarre California scopolamine cases," *Thoroughbred Times* (August 20, 1994); see also ALJ Frank Britt's proposed decision of October 19, 1995).