

DECISION of the FEI TRIBUNAL

dated 21 November 2022

in the matter of

Ms Debra Lemmons (APR: Ref. C22-0031)

(FEI Case number: FEI 2022/FT25 –HIGHH STICKING)

I. Composition of the FEI Tribunal Hearing Panel:

Ms Harveen Thauli (HTH), one-member panel

II. Articles of the Statutes/Regulations which are, *inter alia*, applicable:

- Statutes 24th edition, effective 17 November 2021 (“Statutes”).
- General Regulations, 24th edition, 1 January 2020, updates effective 1 January 2022 (“GRs”).
- Internal Regulations of the FEI Tribunal, 3rd Edition, 2 March 2018 (“IRs”).
- FEI’s Equine Anti-Doping and Controlled Medication Rules, 3rd Edition, effective 1 January 2021 (“EADCM Rules”). The EADCM Rules are divided into the Equine Anti-Doping Rules and the Equine Controlled Medication Rules (the “ECM Rules”).
- FEI’s Endurance Rules, Updated 11th Edition, effective 1 January 2022 (“ERs”).

III. General details of the case:

FEI Tribunal Reference: C22-0031 [FEI 2022/FT25 –HIGHH STICKING]

Person Responsible/ID/NF: Shawn POLKE/10167207/USA

Additional Person Responsible/ID/NF: Debra LEMMONS/10101751/USA

Horse/Passport/NF: HIGHH STICKING/107NA85/USA

Event/ID: CEI1*100 - Lodge, SC (USA), 14.04.2022, 2022_CI_1770_E_S_07

Date of Event: 14.04.2022

Prohibited Substance(s): Cetirizine

Bar Code No.: 5610615

IV. Factual background

1. Ms. Debra LEMMONS (FEI ID: 10101751) was the registered Trainer of the Horse, HIGHH STICKING (the "Horse"), who competed with its rider, Mr. Shawn POLKE (the "Person Responsible") at the CEI1*100 - Lodge, SC (USA) on 14 April 2022 (the "Event").
2. According to Article 800.4.1 of the ERs, *"The Trainer is the person who is responsible for preparing the Horse both physically and mentally for competition (which includes determining the appropriate exercise programme, nutrition, and veterinary care for the Horse)."* Therefore, given the Trainer made relevant decisions about the Horse, the Trainer is also considered an additional Person Responsible (the "APR") pursuant to Article 118.3 of the GRs.
3. The Fédération Equestre Internationale (the "FEI" together with the APR, the "Parties"), is the sole IOC recognised international federation for equestrian sport. The FEI is the governing body for the FEI equestrian disciplines of Dressage, Jumping, Eventing, Driving, Endurance, Vaulting, Para-Equestrian.
4. Blood and urine samples were collected from the Horse on 14 April 2022 and sent to the FEI approved laboratory, the Laboratory of Racing Chemistry in Utsunomiya City, Tochigi Prefecture, Japan for analysis. The Horse's samples were divided into an "A Sample" and "B Sample".
5. The laboratory analysis of the A sample returned a positive finding for Cetirizine, which is an antihistamine drug used in the treatment of allergic rhinitis. It is a "Prohibited Substance" that is classified as a "Controlled Medication Substances" according to the FEI Equine Prohibited Substance List and subject to violations of the ECM Rules.
6. Cetirizine is an independent active ingredient in veterinarian products, but it is also one of the major metabolites of Hydroxyzine.

V. Procedural background

7. By way of a notification letter dated 10 May 2022, the FEI informed the APR of the alleged violations of Article 2.1 of the ECM Rules (*The Presence of a Controlled Medication Substance and/or its Metabolites or Markers in a Horse's Sample*) and Article 2.2 (*The Use of a Controlled Medication Substance and/or Controlled Medication Method*).

8. In accordance with Article 7.4.1 of the ECM Rules, the FEI did not provisionally suspend the APR as the alleged violation involved only one Controlled Medication Substance and the APR had no prior/pending violations at the time of notification. However, the APR voluntarily accepted a Provisional Suspension that began on 23 May 2022.
9. On 17 May 2022, the APR requested the analysis of the B Sample. On 3 June 2022, the FEI informed the APR and her National Federation, the United States Equestrian Federation ("USEF") that the FEI approved laboratory, HKJC Racing Laboratory in Sha Tin, Hong Kong, China confirmed the presence of Cetirizine in the B Sample.
10. By way of a "Notice of Charge" dated 12 July 2022, the FEI formally notified the APR and USEF of the alleged violations of the ECM Rules. The APR was given a deadline of 20 days to admit the asserted violations and accept the proposed consequences of a six (6) month period of "Ineligibility", a fine of 3 500 CHF, a contribution towards legal costs of 2 000 CHF, and an automatic publication of the sanctions (the "Proposed Consequences"). If not, the APR could challenge the violations of the ECM Rules and/or the Proposed Consequences in writing.
11. The APR did not accept the Proposed Consequences.
12. By email dated 29 August 2022, the FEI submitted this case to the FEI Tribunal (the "Tribunal") for adjudication. USEF also received the FEI's correspondence.
13. On 12 September 2022, the Tribunal Chair informed the Parties of the appointment of a one-person hearing panel to decide this case. The Parties were asked to provide any objections to the constitution of the hearing panel by 15 September 2022. Furthermore, the Tribunal Chair granted the APR with the opportunity to respond to the FEI's allegations about the Prohibited Substance discovered in the Horse's system by providing a statement of defence and any supporting evidence by 3 October 2022. The Tribunal Chair further informed the APR that should she fail to respond within the deadline, the Tribunal hearing panel would decide this case using the file material in its possession. Finally, the Tribunal Chair informed the Parties of their right to request an oral hearing.
14. On 13 September 2022, the FEI informed the Tribunal that it did not have any objections to the constitution of the hearing panel.
15. The APR did not submit any objections to the constitution of the hearing panel, nor did she submit any statement of defence within the prescribed deadlines.
16. Neither party requested a hearing.

VI. Submissions by the Parties:

A. Submissions by the APR

17. In reply to the FEI's Notice of Charge, the APR submitted potential sources of the Prohibited Substance, which were primarily contamination scenarios, as follows:
- (i) On route to the Event, the Horse had an overnight stop in a grass turnout paddock with a "public" water trough.
 - (ii) At the Event, the Horse shared water troughs and grazing areas with other horses.
 - (iii) Veterinarians examined the horses, including examining the inside of their mouths during the Event. Two veterinarians were apparently taking Zyrtec (*i.e.*, Cetirizine) and another veterinarian was supposedly taking Hydroxyzine to combat allergies.
 - (iv) At the Event, the Horse was in a stall next to a mare and her companion horse. Both were apparently on Hydroxyzine to reduce swelling from bug bites. The horses were separated by five pipe panels only, which allowed hay, urine, and faeces to spread easily from one stall to another. The mare was apparently "in heat" and urinated in the Horse's stall. The mare's feed tube was small enough that the Horse could have reached through the separating pipe panels and pulled the mare's feed tube into his stall.
 - (v) The APR consulted the manager of the equestrian facility where the mare was normally boarded. The manager confirmed that the mare received an oral administration of 500mg/5cc Hydroxyzine HCl, a compounded antihistamine. The mare was given a dose of 5cc twice daily in her feed. The Hydroxyzine was apparently added to the feed that was sent to the Event with the mare. The manager provided the APR with a photograph of the Hydroxyzine product allegedly used.

B. Submissions by the FEI:

18. As stated, Cetirizine is a Controlled Medication Substance. The relevant violation of the ECM Rules are as follows:
- (i) Article 2.1 of the ECM Rules prohibits: *"The presence of a Controlled Medication Substance or its Metabolites or Markers in a Horse's Sample."*
 - (ii) In particular, Article 2.1.1 of the ECM Rules states that: *"It is each Person Responsible's personal duty to ensure that no Controlled Medication Substance is present in the Horse body during an Event without a valid Veterinary Form. Persons Responsible are responsible for any Controlled Medication Substance found to be present in their Horse's Samples [...]."*
19. On 29 August 2022, the FEI provided its response to these proceedings.
20. According to Article 3.1 of the ECM Rules, the FEI has the burden to establish all the elements of any violation of the ECM Rules. The standard of proof to do so is

the balance of probability.

21. The elements of a violation of Article 2.1 of the ECM Rules are straightforward, “[...] *It is not necessary that intent, Fault, negligence or knowing Use be demonstrated in order to establish an [ECM] Rule violation under Article 2.1*”. Instead, it is a “strict liability” offence, established by proof that a Controlled Medication Substance was present in a horse’s sample. The results of the A Sample analysis confirmed the presence of Cetirizine and constituted sufficient proof of the violation of Article 2.1 of the ECM Rules. This violation was further supported by the results of the B Sample. Therefore, the FEI submitted that it discharged its burden of establishing that the APR violated Article 2.1 of the ECM Rules.
22. Article 10.2 of the ECM Rules provides that an Additional Person Responsible with no previous doping and/or Controlled Medication offences, but who violates Article 2.1 of the ECM Rules, is subject to a period of Ineligibility of six (6) months, unless she can rebut the presumption of fault on a balance of probability. If the APR fails to do so, the six (6) months period of Ineligibility applies.
23. To rebut the presumption of fault, the ECM Rules stipulate, and the jurisprudence of the FEI Tribunal and CAS is very clear: it is a strict threshold requirement that the APR proves how the Prohibited Substance entered the Horse’s system before making any plea of No (Significant) Fault or Negligence. Indeed, this threshold requirement is strictly applied because without such proof, it would be impossible to assess the APR’s degree of Fault or Negligence (or No Significant Fault or Negligence) for the presence of the Prohibited Substance in the Horse.
24. The APR submitted potential contamination scenarios, which may have led to the positive finding of Cetirizine. Since Cetirizine is a metabolite of Hydroxyzine, the FEI consulted the laboratory that analysed the A Sample to find out whether the laboratory found any Hydroxyzine in the A Sample. The laboratory confirmed that the presence of Hydroxyzine in the A Sample was below reporting level.
25. The FEI consulted an external pharmacology expert (the “Expert”) on the scientific plausibility of the APR’s contamination scenarios. After taking into consideration the estimated concentrations of Cetirizine and Hydroxyzine in the A Sample, as well as the potential cross-contamination with the mare’s urine, the Expert concluded that contamination was highly unlikely. Given the high levels of Cetirizine and the pharmacokinetic relationship between Cetirizine and Hydroxyzine and their respective concentrations, the Expert further concluded that the evidence strongly supported that the Horse was directly exposed to the Cetirizine, that is, given the Prohibited Substance to ingest.
26. The APR did not submit any convincing evidence that corroborated her theory of contamination apart from a photograph. The APR did not provide evidence that the Horse was stabled in a stall next to a mare that was receiving medication. For example, the APR did not provide any evidence from the mare’s rider, trainer or

owner about whether the mare did indeed receive Hydroxyzine, the amount she received on a daily basis and if the Horse ever reached into the mare's stall and pulled her feed tube into his stall. The APR also did not obtain a sworn statement from the equestrian facility's manager who allegedly informed the APR that the mare was orally administered a compound of antihistamine containing Hydroxyzine.

27. Therefore, the FEI submitted that the APR did not provide any substantiated explanation on how the Cetirizine entered the Horse's body. The FEI further submitted that since the APR failed to establish, on a balance of probability, the "threshold requirement" of how the Prohibited Substances entered the Horse's body, it was not possible to evaluate the APR's level of fault or negligence under Articles 10.5 and 10.6 of the ECM Rules. Therefore, no elimination or reduction of the period of Ineligibility was possible.
28. The FEI requested the following prayers for relief against the APR:
- a) *upholding the charge that the APR has violated Article 2.1 of the ECM Rules;*
 - b) *imposing a period of Ineligibility of six (6) months on the APR, commencing from the date of the Final Decision;*
 - c) *fining the APR in the amount of three thousand (3 000) CHF;*
 - d) *ordering the APR to pay the legal costs of two thousand (2 000) CHF that the FEI has incurred in these proceedings; and*
 - e) *ordering the Trainer to pay the costs of the B Sample analysis of one thousand (1 000) CHF which the Trainer has incurred in these proceedings.*

VII. Legal Analysis

A. Jurisdiction

29. The Tribunal has jurisdiction over this matter pursuant to Article 38 of the Statutes, Article 159 of the GRs, the ECM Rules, and Article 18 of the IRs. The APR is a member of the USEF, which is a member of the FEI; therefore, the APR is bound by the ECM Rules.

B. Legal Discussion

30. Although the Tribunal has fully considered all the facts, allegations, legal arguments and evidence in the present proceedings, it only refers to the submissions and evidence it considers necessary to explain its reasoning in this decision.

▪ The Additional Person Responsible

31. The Trainer is the APR for the Horse pursuant to Article 118 par. 3 of the GRs and Article 800.4.1 of the ERs.

- **Considering**

32. As set forth in Article 2.1 of the ECM Rules, sufficient proof of its violation is established by the presence of a Prohibited Substance in a horse's sample. The Tribunal is satisfied that the laboratory reports on the A Sample and the B Sample reflect that the analytical tests were performed in an acceptable manner and that the findings are accurate. The Tribunal is further satisfied that the test results evidence the presence of Cetirizine in the A Sample and B Sample taken from the Horse at the Event. Cetirizine is a Controlled Medication Substance, the presence of which in a Horse's body during an Event without a valid Veterinary Form is prohibited under Article 2.1 of the ECM Rules.
33. As a result, the FEI has established an adverse analytical finding and sufficiently proven the objective elements of the offence in accordance with Article 3.1 of the ECM Rules.
34. Pursuant to Article 10.2 of the ECM Rules, the period of Ineligibility for the violation of Article 2.1, *i.e.*, the Presence of a Controlled Medication Substance in a horse's sample, as in this case, is six (6) months, subject to a potential reduction or suspension pursuant to Articles 10.5 or 10.6 of the ECMRs.
35. In cases brought under the ECM Rules, a strict liability principle applies as more particularly described in Article 2.1.1 of the ECM Rules. Once the FEI has established a violation of the ECM Rules, the APR has the burden of proving that she bears "*No Fault or Negligence*" for the rule violation pursuant to Article 10.5 of the ECM Rules, or "*No Significant Fault or Negligence*" pursuant to Article 10.6 of the ECM Rules.
36. For Articles 10.5 and 10.6 of the ECM Rules to apply, the APR must establish, as a threshold requirement, how the Prohibited Substances entered the Horse's system.
37. In accordance with various CAS panels as well as FEI Tribunal decisions, the PR must present facts substantiated with concrete evidence. Speculation or theoretical possibilities are not sufficient. Furthermore, it was suggested by various CAS panels that the 51% threshold was understood as meaning that panels should separately compare each alternative scenario with the scenario invoked by the APR. The APR's scenario must reach a 51% threshold for it to be successful.¹
38. The APR provided potential contamination scenarios but failed to submit any corroborating evidence to support her theories. A photograph of a product containing Hydroxyzine is not evidence. Furthermore, the Expert concluded that the

¹ See for example Viret, M., "Evidence in Anti-Doping at the Intersection of Science & Law", Asser International Sports Law Series, Springer 2016, (pp. 521-538), as well as CAS 2011/A/2234 & 2386, UCI v. Contador & RFEC, and CAS 2010/A/2230, IWBF v. UKAD & Gibbs. See for example also Case 2017/BS32 SAURA DE FONDCOMBE, Final Tribunal Decision dated 24 February 2020.

Horse was directly exposed to the Cetirizine given the high levels of it in the A Sample. Therefore, the Tribunal finds that the APR has not established, on a balance of probability, how the Prohibited Substances entered the Horse's body. The APR failed in her personal duty to ensure that no Prohibited Substance was present in the Horse's body pursuant to Article 2.1.1 of the ECM Rules.

39. Where the first hurdle has not been met, *i.e.*, establishing the source of the Prohibited Substance, the Tribunal cannot continue with the second step and evaluate the APR's degree of Fault or Negligence. Therefore, the Tribunal finds that the APR is not entitled to any reduction of the otherwise applicable period of Ineligibility under Articles 10.5 and 10.6 of the ECM Rules.
40. The Tribunal finds that the applicable period of Ineligibility is six (6) months pursuant to Article 10.2 of the ECM Rules.
41. The Tribunal also finds that the FEI's request for a fine of CHF 3 000 and repayment of the cost for the B Sample of 1 000 CHF is in keeping with the *FEI Guidelines for Fines and Contributions towards Legal Costs*. The Tribunal, however, does not agree with the request for legal costs of CHF 2 000 given the simplicity of this matter.

VIII. Terms of the Decision

42. As a result, the Tribunal makes the following decision and imposes the following sanctions in accordance with Article 169 of the GRs and Article 10 of the ECM Rules:
 - a) The APR violated Article 2.1 of the ECM Rules.
 - b) The APR is suspended for a period of six (6) months. The period of the Ineligibility will be effective from the day of the final decision and the Provisional Suspension served by the APR will be credited against the ordered period of Ineligibility.
 - c) The APR is fined three thousand Swiss Francs (CHF 3 000).
 - d) The APR is ordered to pay costs towards these proceedings of one thousand Swiss francs (CHF 1 000).
 - e) The APR is ordered to pay the cost of the B Sample of one thousand Swiss francs (1 000 CHF).
43. The APR, her National Federation of USEF and the FEI will be notified of this Decision.
44. The APR may not, during the period of Ineligibility, participate in any capacity in a competition or activity that is authorised or organised by the FEI or any National

Federation or be present at an event (other than as a spectator) that is authorized or organized by the FEI or any National Federation, or participate in any capacity in competitions authorized or organized by any international or national-level event organisation (Article 10.13.1 of the ECM Rules).

45. If the APR violates any of the conditions in the previous paragraph during the period of Ineligibility, the results of any such participation will be disqualified and a new period of Ineligibility equal in length up to the original period of Ineligibility will be added to the end of the original period of Ineligibility. In addition, further sanctions may be imposed if appropriate (Article 10.13.3 of the ECM Rules).
46. According to Article 170 of the GRs, the present decision is effective from the day of written notification to the persons and bodies concerned.

IX. Legal Action

47. In accordance with Article 12 of the ECM Rules the Parties may appeal this decision before the Court of Arbitration for Sport (CAS) within twenty-one (21) days of the present notification.

FOR THE TRIBUNAL



Ms Harveen Thauli, One-Member Panel