



COMMISSION HEARING

TORONTO, ONTARIO – MAY 27, 2009

IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;

**AND IN THE MATTER IN THE APPEAL OF
STANDARD BRED LICENSEE TREVOR HENRY**

On December 9, 2008, the Judges at Western Fair issued Standardbred Official Ruling SB 39037 wherein Trevor Henry ("HENRY") was fined \$1000 and subject to a four month driving suspension (December 10, 2008 – April 10, 2009 inclusive). The reasons given for the penalty were:

Violation of ORC Rule 22.22

Mr. Henry did use his whip in an excessive manner while driving LANDFAIR LIZZIE in the stretch of Race 4 at Western Fair Raceway on December 6, 2008. 4th offence, fine of \$1000. As a result of this whipping violation, Mr. Henry is in breach of his probation and in accordance with ORC Ruling COM SB 028/2008 Part v., Mr. Henry is hereby suspended from driving for four months.

On December 11, 2008, David Moore, counsel for HENRY, filed a Notice of Appeal on behalf of HENRY.

On December 15, 2008, the Executive Director issued Ruling Number SB 183/2008 wherein HENRY was granted a stay of the fine but not of the driving suspension pending the outcome of the Hearing.

On May 27, 2009, a Panel of the Ontario Racing Commission, comprised of Chair Rod Seiling, Vice Chair Hon. James M. Donnelly, and Commissioner Brenda Walker, was convened to hear the appeal.

Jennifer Friedman appeared as counsel for the Administration. David Moore attended as counsel for HENRY.

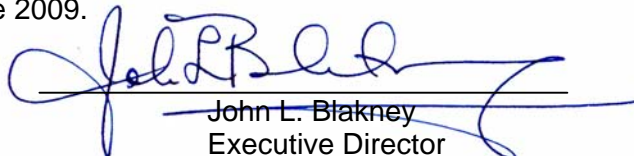
Upon hearing the testimony of Senior Judge Don Lawrence, Associate Judge Bill Maertens and HENRY, reviewing the documents, and upon hearing the closing submissions, the Panel decided as follows:

- i) Whipping a horse twenty-two to twenty-four times during the stretch run of a race is excessive in the extreme. Such action cannot and will not be condoned by this Commission.
- ii) HENRY'S appeal fails.

The Panel's Reasons for Decision is attached to this Ruling.

DATED at Toronto this 4th day of June 2009.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

Overview

1. Standardbred licensee, Trevor Henry, appealed SB Ruling No. 39037 issued on December 15, 2008, wherein he was fined \$1,000 for a breach of probation and suspended from driving for a period of four months (12/10/08 to 4/10/09) for violating SB Rule No. 22.22 while driving the horse LANDFAIR JAZZIE in the stretch of Race 4 at Western Fair Raceway on December 6, 2008. On December 15, 2008, the Executive Director of the Ontario Racing Commission (ORC) issued SB Ruling No. 183/08 wherein Mr. Henry was granted a stay of the fine but not the driving suspension.

Background

2. Jennifer Friedman, legal counsel for the ORC, attempted to introduce a Joint Book of Documents which she had disclosed to the appellant's legal counsel, David Moore, according to the Commission's Rules of Procedure. Mr. Moore objected on the basis that some of the material contained in the document dealt with his client's penalty record. Notwithstanding that, Mr. Moore had not contacted Ms. Friedman to advise her of his concern. The Panel opted to not accept the proposed document book as Exhibit 1 but marked it for reference only. Ms. Friedman did file a Factum on behalf of the Commission as required per ORC Rules of Procedure. The Panel noted that Mr. Moore did not file a similar document.

3. Mr. Moore, on behalf of his client, clarified that the only issue before the Panel was the matter of whether there was a violation of SB Rule No. 22.22 on December 6, 2008, in the fourth race at Western Fair Raceway by Mr. Henry during the stretch run of the race.

4. The Panel allowed both ORC Judges, William Maertens and Don Lawrence, listed in Ms. Friedman's Factum to testify over the objection of Mr. Moore who claimed that he had not been provided any will says for either witness. Mr. Moore had been provided the proposed Joint Book of Documents a week in advance according to the Commission's Rules of Procedure. Both individuals were listed as intended witnesses. The information contained in the book dealt with what each witness would testify. Mr. Moore had not filed any advance notice of concern and under ORC Rules of Procedure its Judges/Stewards may give testimony at a hearing. Precedent Rulings in the *Austin v. Ontario (Racing Commission)* [2007] O.J. No. 3249 (Ont. C.A.); and *In the Matter of the Racing Commission Act, S.O., 2000, c. 20*; And *In the Matter and Request for Hearing of Dr. Shane Durnin* (April 22, 2009).

5. ORC Judges William Maertens and Don Lawrence both testified that in their opinion, Mr. Henry violated the rule by whipping the horse twenty-two to twenty-four times from the head of the stretch to the finish line, a distance estimated to be about five hundred feet. Judge Maertens referenced it as "extremely excessive" and added this was the appellant's fourth or fifth violation of the whipping rules in a year. To determine the number of times the whip was used on the horse during the stretch run, the Judges independently, during each respective testimony, counted the times the horse was whipped as the video of the race was played. The number was not disputed.

6. Both Judges opined that it was the number of times Mr. Henry hit the horse, not the force of the whipping, that was the basis for their decision to use the excessive provision of the rule, not the brutal or indiscriminate provision. Mr. Maertens testified that it is very rare to see a driver hit a horse that many



times. Mr. Henry agreed that he told the Judges at his December 9, 2008 hearing, that it looked pretty bad on seeing it replayed. He maintained that he was striking the saddle pad and thus it was not hurting the horse. The quality of the video made such a determination impossible. The Judges testified that it was highly unlikely that some of the whipping actions did not strike the horse's flesh.

7. Mr. Henry, in defence of his actions, claimed that he hit a horse in a race twelve times the week before and he was not cited by the Judges for his actions. Notwithstanding that, Judge Maertens could not remember this occurring and admitted that it could have been missed by the Judges. No evidence in the form of a video race replay was tabled to provide proof of the statement. Video replays of races conducted at licensed racetracks such as Western Fair, are readily available.

8. The ORC has a protocol for the use of the whip by drivers. It has been well communicated by way of paddock meetings at racetracks before the start of the race meeting and the results of those meetings are posted in the paddock for participants to read. Tab 3 in the Reference Book is a copy of the notice posted at Western Fair dated October 3/08 with the heading, "ATTENTION - DRIVERS, USE OF WHIPS". #3 in the document reads as follows: "If you are advancing, we feel that you should hit them once or twice, stop and then again once or twice, if you have hit five times, we will be taking a close look at a penalty. Please remember, it is the perception on how hard you are hitting."

9. Mr. Henry claimed not to remember if he attended any paddock meeting nor had he read the posting of the results of any meeting. He denied that the Judges reviewed the whipping protocol with him at his December 9, 2008 hearing. This testimony directly conflicted with the testimony of Judge Maertens who told the Panel that they did review the whipping protocol with Mr. Henry at his hearing, and it is referenced in his notes (Tab 7, reference book).

10. Mr. Moore argued that with his client forced to drive with a line in each hand via a prior whipping infraction, his client's actions were not hurting the horse like the whipping action of other drivers in the race who were whipping from the side with one hand. With his actions only hitting the saddle pad, no harm was done to the horse according to him, and that this fact created a "grey area" in the rules.

Issue

11. Did Mr. Henry violate SB Rule No. 22.22 during the stretch run in the fourth race at Western Fair Raceway on December 6, 2008, by whipping the horse, LANDFAIR JAZZIE, twenty-two to twenty-four times?

Decision

12. After carefully reviewing the evidence, the submissions, and listening to the testimony, whipping a horse twenty-two to twenty-four times during the stretch run of a race is excessive in the extreme. Such action cannot and will not be condoned by this Commission therefore Mr. Henry's appeal fails.

Reasons for Decision

13. The evidence is clear, cogent and compelling, there is no grey area as was suggested by Mr. Moore in terms of the rule or its interpretation. Whipping a horse twenty plus times is excessive by any standard and thus a violation of SB Rule No. 22.22. The rule does not make any allowance for where the whip



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was striking the horse nor does it reference the force of the strikes as per a person driving with a line in each hand versus a person whipping with a free hand.

14. Mr. Henry was in violation of the protocol "Use Of Whips" communicated to all drivers as to how the rules would be enforced. Ignorance of the rules (SB No. 1.04) is not a valid defence. On a balance of probabilities, a reasonable person driving on probation for a previous whipping violation would have made it his business to know what the standards were as they related to how judges would be enforcing the whipping rules. Given that the protocol discussions and postings were not isolated to Western Fair but extended to all tracks, it is difficult to comprehend any licensed driver being unaware. Mr. Henry's denial of having the Judges review the protocol at his hearing raises the credibility of his testimony in this area.

15. The protocol posted clearly stated that drivers were allowed to whip the horse twice, wait and see and then once more with two whips. Use of five strikes could result in a rule violation. Mr. Henry drove the horse home with the whip, excessive by any standard.

16. Mr. Henry did not offer any evidence as to the Judges not enforcing the protocol. The Judges did not recall seeing him whip a horse twelve times down the stretch the week before and admitted that they could have missed it. It would not have been difficult to provide that evidence in the form of a video of the race in question.

16. SB Rule 22.22 has two primary objectives. First and foremost it is to protect the health and welfare of the horse. This Commission has communicated on numerous occasions that it takes this responsibility very seriously and will deal with transgressions accordingly. It expects its Judges and Stewards to act accordingly in this shared responsibility. Licensees also share this responsibility and for those few who, for whatever reason, chose to transgress, they must expect to be and will be penalized. Secondly, it is to deal with the public's perception of the humane treatment by the sport of its equine stars. Mr. Henry admitted he had a problem as it related to his use of the whip. Unfortunately, despite his claim that he has changed, his actions bespeak otherwise. It is long past the time for him to realize that such actions are unacceptable and that he has the talent to succeed within the rules.

DATED this 4th day of June 2009.

Rod Seiling
Chair