



DECISION the FEI TRIBUNAL

dated 26 April 2018

Positive Controlled Medication Case No.: 2017/CM18

Horse: W [REDACTED] **FEI Passport No:** [REDACTED]

Person Responsible/NF/ID: P [REDACTED] G [REDACTED] / [REDACTED]

Event/ID: [REDACTED] [REDACTED] (HUN)

Date: 28 September – 1 October 2017

Prohibited Substances: Phenylbutazone, Oxyphenbutazone, Dexamethasone

I. COMPOSITION OF PANEL

Mr. Cesar TORRENTE (COL), one member panel

II. SUMMARY OF THE FACTS

1. Memorandum of case: By Legal Department.

2. Summary information provided by Person Responsible (PR):
The FEI Tribunal duly took into consideration all evidence, submissions and documents presented in the case file and during the oral hearing, as also made available by and to the PR.

3. Oral hearing: 23 April 2018 – via telephone conference call.

Present:

The FEI Tribunal Panel
Ms. Erika RIEDL, FEI Tribunal Clerk

For the PR:

Mr. P [REDACTED] G [REDACTED], PR
Mr. Réka BÁBOS, interpreter

For the FEI:

Ms. Anna THORSTENSON, FEI Legal Counsel

EADCMRs APPENDIX 1 – Definitions:

“Fault. Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Person Responsible and/or member of the Support Personnel’s degree of Fault include, for example, the Person Responsible’s and/or member of the Support Personnel’s experience, whether the Person Responsible and/or member of the Support Personnel is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Person Responsible and/or member of the Support Personnel and the level of care and investigation exercised by the Person Responsible and/or member of the Support Personnel in relation to what should have been the perceived level of risk. In assessing the Person Responsible’s and/or member of the Support Personnel’s degree of Fault, the circumstances considered must be specific and relevant to explain the Person Responsible’s and/or member of the Support Personnel’s departure from the expected standard of behaviour. Thus, for example, the fact that the Person Responsible would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Person Responsible only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.”

“No Fault or Negligence. The Person Responsible and/or member of the Support Personnel establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had administered to the Horse, or the Horse’s system otherwise contained, a Banned or Controlled Medication Substance or he or she had Used on the Horse, a Banned or Controlled Medication Method or otherwise violated an EAD or ECM Rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.”

“No Significant Fault or Negligence. The Person Responsible and/or member of the Support Personnel establishing that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the EADCM Regulation violation. Except in the case of a Minor, for any violation of Article 2.1 of the EAD Rules and Article 2.1 of the ECM Rules, the Athlete must also establish how the Prohibited Substance entered his or her system.”

IV. DECISION

Below is a summary of the relevant facts, allegations and arguments based on the Parties’ written submissions, pleadings and evidence adduced in the hearing. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out,

where relevant, in connection with the legal discussion that follows. Although the Tribunal has fully considered all the facts, allegations, legal arguments and evidence in the present proceedings, in its decision it only refers to the submissions and evidence it considers necessary to explain its reasoning.

1. Factual Background

- 1.1 W [REDACTED] (the "Horse") participated at the [REDACTED] in [REDACTED], Hungary, from 28 September to 1 October 2017 (the "Event"), in the discipline of Para-Equestrian Driving. The Horse was ridden by Mr. P [REDACTED] G [REDACTED] who is the Person Responsible in accordance with Article 118.3 of the GRs (the "PR").
- 1.2 The Horse was selected for sampling during the Event on 1 October 2017.
- 1.3 Analysis of the blood sample number 5560311, taken from the Horse at the Event, was performed at the FEI-approved Laboratory, the LGC, Newmarket Road Laboratory (the "Laboratory") in Fordham, Cambridgeshire, United Kingdom. The analysis of the sample revealed the presence of Phenylbutazone, Oxyphenbutazone and Dexamethasone in the blood.
- 1.4 The Prohibited Substances detected are Phenylbutazone, Oxyphenbutazone and Dexamethasone. Phenylbutazone and Oxyphenbutazone (metabolite of Phenylbutazone) are non-steroidal anti-inflammatory drugs (NSAID) with anti-inflammatory and analgesic effect. Dexamethasone is a corticosteroid with anti-inflammatory effects. These substances are classified as Controlled Medication Substances under the FEI Equine Prohibited Substances List (the "FEI List"). Furthermore, no valid Veterinary Form exists for the respective substances. Therefore, the positive finding for Phenylbutazone, Oxyphenbutazone and Dexamethasone in the Horse's sample gives rise to a Controlled Medication Rule violation under the EADCMRs.

2. The Further Proceedings

- 2.1 On 13 November 2017, the FEI Legal Department officially notified the PR through the Hungarian National Federation ("HUN-NF") of the presence of the Prohibited Substances following the laboratory analysis, the possible rule violation and the possible consequences.
- 2.2 The Notification Letter included notice that the PR was provisionally suspended and granted him the opportunity to be heard at a Preliminary Hearing before the Tribunal.

3. The B-Sample analysis

- 3.1 Together with the Notification Letter of 13 November 2017, the PR was also informed that he was entitled (i) to the performance of a B-Sample confirmatory analysis on the positive sample; (ii) to attend or be represented at the B-Sample analysis; and/or (iii) to request that the B-Sample be analysed in a different laboratory than the A-Sample.
- 3.2 The PR did not request for the B-Sample to be analysed. Hence, he accepted the results of the A-Sample analysis.

4. Written submission by the PR

- 4.1 On 3 December 2017, the PR submitted the following explanations for the positive finding:

"In this document I would like to respond to the positive dope test of the horse name W█████ on the █████ International Coach-driving Competition. Pozitive medication case:2017/CM18 W█████.

I would like to inform you that I did not give any dope or medicine to the horse and I did not have knowledge of that somebody else would have been do this.

The horse is not my property, I just trained with him. He was offered to me only for this competition. I do not know the medical treatment and the past of the horse. I do not know anything about the horse since the competition.

I was very thankful that the horse was offered to me because I could not prepare and enter for the competition from my own resources.

Please do not establish penalty against me, I cannot pay because of my poorly off, my only incoming is the disability pension. Without help I even could not enter for the competition.

It was not in my own interest to dope the horse neither because I faced that I will be the only competitor in my category long before the competition.

I also could not proceed with the "B" sampling of the horse, as I am not aware of the necessity of this."

5. Written Response by the FEI

- 5.1 On 14 February 2018, the FEI provided its Response to the explanations provided by the PR.

5.2 In essence the FEI submitted that:

- a) Article 3.1 of the ECM Rules made it the FEI's burden to establish all of the elements of the ECM Rule violation charged, to the comfortable satisfaction of the Tribunal. The elements of an Article 2.1 violation were 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 was a "strict liability" offence, established simply by proof that a Controlled Medication Substance was present in the Horse's sample. The results of the analysis of the A-Sample taken from the Horse at the Event confirmed the presence of Phenylbutazone, Oxyphenbutazone and Dexamethasone, and together constituted "sufficient proof" of the violation of Article 2.1 of the ECM Rules. In any event, the PR did not dispute the presence of the Prohibited Substances in the Horse's sample. Accordingly, the FEI had discharged its burden of establishing that the PR has violated Article 2.1 of the ECM Rules.
- b) Where a Controlled Medication Substance was found in a horse's sample without a valid Veterinary Form, a clear and unequivocal presumption arose under the ECM Rules that it was administered to the horse deliberately, in an illicit attempt to enhance its performance. As a result of this presumption of fault, Article 10.2 of the ECM Rules provided that a Person Responsible with no previous doping offence who violated Article 2.1 of the ECM Rules was subject to a period of Ineligibility of six (6) months, unless he was able to rebut the presumption of fault. To do this the rules specified that he must establish to the satisfaction of the Tribunal (it being his burden of proof, on a balance of probability) (i) how the Prohibited Substances entered the Horse's system and (ii) that he bore No Fault or Negligence for that occurrence, *i.e.*, that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had administered to the Horse (or the Horse's system otherwise contained) a Controlled Medication Substance; or, alternatively (iii) that he bore No Significant Fault or Negligence for that occurrence. If the PR failed to discharge this burden, the presumptive six-month ban under Article 10.2 of the ECM Rules applied.
- c) The ECM Rules stipulated, and the jurisprudence of the Tribunal and the Court of Arbitration for Sport ("**CAS**") was very clear: it was a strict threshold requirement of any plea of No (or No Significant) Fault or Negligence that the PR proved how the substance(s) entered into the Horse's system. The FEI submitted in this context that the PR must provide clear and convincing evidence that proved how the Phenylbutazone, Oxyphenbutazone and Dexamethasone had entered the Horse's system. The PR explained that he has no idea how the Controlled Medication Substances entered the Horse's system. The FEI was therefore of the opinion that the PR has – so far in the proceedings – not established how the substance entered the Horse's system, and hence the threshold requirement was not fulfilled.

- d) In terms of the degree of Fault or Negligence by the PR for the rule violation, the starting point of any evaluation was the “*personal duty*” of the PR following from Article 2.1.1 of the ECM Rules, *i.e.*, his personal duty to ensure that “*no Controlled Medication Substance is present in the Horse’s body*”.
- e) The FEI argued that, through the FEI Clean Sport programme and in particular the “*Athletes Guide*”¹, it had gone to considerable lengths to communicate relevant information on the EADCMRs to Athletes. It had to be noted that, in the *Glenmorgan decision*², CAS had stated that the Athlete’s Guide “*contains straightforward advice both to PRs and Support Personnel in a non-technical, non-legal form*” and described the Athlete’s Guide as “*required reading*”.
- f) That CAS in the *Royal des Fontaines case*³ had endorsed the rationale behind the FEI’s policy of making the Athlete/rider the Person Responsible. The CAS Decision states as follows (at para 57):

“No doubt the degree of care is high; but horses cannot care for themselves. As the Respondent (the FEI) put it in its skeleton argument

“The FEI believes that making the rider the responsible in this way is necessary to protect the welfare of the horse, and to ensure fair play. It strongly incentivises riders to ensure compliance with the rules, whether by caring for the horse personally or else by entrusting that task only to third parties who are up to the job. In the case of such delegation, it protects the welfare of the horse, and clean sport, by requiring the rider to stay apprised of and be vigilant with respect to the way the horse is being prepared for competition, including as to any treatments given to the horse”

The Sole Arbitrator respectfully agrees.”

- g) In the *Glenmorgan case* (in para 209) the Panel confirmed that the rider was best fit to control the Horse before a competition. “*... Among them (any support personnel), the rider is best able to function as the “last check” on the physical condition of the horse immediately prior to and during the race, regardless of whether he knows the horse or mounts it for the first time. An experienced rider can quite often identify with the naked eye an irregularity in the condition and behaviour of the animal both before mounting and during the competition.*”
- h) The Panel further stated as follows (in para 203):

“The Panel wishes to emphasize again that the fault or negligence which determines the measure of the Appellant’s sanction is not that

¹ Athlete’s Guide to the Equine Anti-Doping and Controlled Medication Regulations, effective 5 April 2010

² CAS 2014/A/3591 Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan v. FEI

³ CAS 2015/A/4190 Mohammed Shafi Al Rumaithi v. FEI

of the Dr. It is the Appellant's own fault and negligence in not having exercised the standard of care applicable to a PR which, like the non-equine Athlete, is placed at the exercise of "utmost caution". It is the PR's personal duty to ensure that no Banned Substance is present in the Horse's body."

- i) In light of the stated CAS jurisprudence on this point, the FEI respectfully submitted that making the PR prima facie responsible for the condition of the Horse while competing, subject to his ability to prove he bore No (Significant) Fault or Negligence for the horse's positive test results was a reasonable and justifiable stance. Further, as the CAS jurisprudence confirmed, the rider was, no matter what, the Person Responsible for the horse he is competing with, and cannot delegate that duty to another person. He therefore has an obligation to ensure that no Prohibited Substance enters into the horse's system, and must act with utmost caution in order to fulfil this duty. Conclusions to be drawn from the case law were that the duty of care was very high and that this duty of care was non-delegable. But also that Persons Responsible were responsible for their Support Personnel and the medical treatments given to their horses by their veterinarians, trainers or grooms.
- j) In the case at hand, the PR has not provided any plausible explanation of the positive finding. The FEI was of the opinion that no evidence has been provided that would allow any elimination or reduction of the period of Ineligibility in this case. The FEI further invited the PR to submit further evidence in the case.
- k) The FEI therefore respectfully submitted that the period of Ineligibility of the PR should be six (6) months, depending on the Tribunal's evaluation if the PR can establish the source of the substances and his degree of fault and negligence for the rule violation.
- l) The FEI further submitted that the PR and Horse combination obtained in the Competition had to be disqualified with all resulting Consequences, including forfeiture of any related medals, points and prizes. Furthermore, since this was a case with a Controlled Medication Substance, occurring during or in connection with an Event, and in order to safeguard the level playing field, all of the Person Responsible's individual results obtained in that Event, with any and all Horses with which the Person Responsible competed, with all consequences, including forfeiture of all medals, points and prizes, might be disqualified in accordance with Article 10.1.2 of the ECM Rules.
- m) Article 10.2 of the ECM Rules provides that a Person Responsible for an Article 2.1 ECM Rule violation should also be fined up to CHF 15,000 "*unless fairness dictates otherwise*" and should be ordered to pay "*appropriate legal costs*". However, in this particular case the FEI found that if the PR can show his economic situation, there were reasons for imposing a lower fine. The FEI respectfully

submitted that for the same reasons fairness did also dictate that no legal cost be levied in this case.

6. Further submissions by the PR

- 6.1 Between 6 and 18 March 2018, the PR further explained that he still had not idea of what might have happened in the case at hand. The Horse was not his, and he did not administer any Prohibited Substances to the Horse, nor did he know anything about the Horse's earlier life, *i.e.*, prior to the Event. Further, that he had not seen the Horse since the Event, nor had he received any information about the Horse. He was merely offered the Horse to ride at the Event.
- 6.2 Moreover, the PR provided a statement from the Pension Administration confirming that he has received a pension of around CHF 2,200 for the year 2017.

7. Hearing

- 7.1 At the outset of the hearing, the Parties confirmed that they did not have any objection to the constitution of the Panel.
- 7.2 The Parties also confirmed that they had ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Tribunal. After the Parties' final submissions, the Tribunal closed the hearing and reserved its final decision. The Panel heard carefully and took into consideration in its discussion and subsequent deliberation all the evidence and the arguments presented by the Parties even if they have not been summarized herein.
- 7.3 At the end of the hearing, the Parties also acknowledged that the Panel had respected their right to be heard and their procedural rights.
- 7.4 During the hearing the PR further explained that he had been requested by the HUN-NF to compete at the Event, and that he has been provided with a horse, *i.e.*, the Horse for the Event. The PR further explained that he was competing in this particular discipline, *i.e.*, Para-Equestrian Driving, for the first time at the Event, and that he normally competed in a different discipline, but not on an international level. For those competitions he also borrowed horses, but from the stable he normally trains at, and that there were no issues with borrowing horses from that stable. For the Event however, since that stable did not have any specific horses for that discipline, the PR had to borrow the Horse from a different stable.
- 7.5 Furthermore, whereas the PR initially argued that he was not responsible for the "medical status" of the Horse, as he was not the owner of the Horse, nor had he known the Horse prior to the Event, the PR later on stated that he understood that as the driver of the Horse at the Event he was to be held accountable for the ECM rule

violation.

- 7.6 Moreover, the PR agreed with the sanctions proposed by the FEI (as outlined further below), provided that he was able to pay the fine in instalments, given his economic situation, and since CHF 200 was still a lot of money for him.
- 7.7 Finally, the PR stated that due to him being provisionally suspended he has not competed over the winter, and that the Provisional Suspension has hindered him from finding any sponsors.
- 7.8 The FEI argued that the PR, having been the driver of the Horse at the Event, was considered as the Person Responsible under FEI Rules and Regulations.
- 7.9 Furthermore, the FEI maintained its request for a period of Ineligibility of six (6) months, since no reduction from that period of Ineligibility was possible, as the PR has not established how the Prohibited Substances entered the Horse's body. Since the PR was provisionally suspended since 13 November 2017, which was to be taken into account for the final suspension, the proposed period of Ineligibility of six (6) months would end on 12 May 2018.
- 7.10 Finally, the FEI suggested that, given the PR's economic situation, he should be freed of any legal costs, and accepted that the PR be imposed only a very low fine of CHF 200. Furthermore, the FEI agreed for the PR to pay the fine in instalments.

8. Jurisdiction

- 8.1 The Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and EAD Rules.

9. The Person Responsible

- 9.1 The PR is the Person Responsible for the Horse, in accordance with Article 118.3 of the GRs, as he was the driver of the Horse at the Event.
- 9.2 In this respect, the Tribunal wishes to clarify that the PR as the rider, or driver in the case at hand, remains the "main" Person Responsible for the Horse. In addition, in accordance with Article 118.3 of the GRs, the Owner and other Support Personnel may be regarded as additional Persons Responsible. However, the present decision concerns only the alleged rule violation of the PR.
- 9.3 Furthermore, in accordance with Article 111 of the GRs, the driver of the Horse, such as it is the case of the PR in the case at hand, also remains the Person Responsible in the case of a borrowed horse, such

as the Horse in the present case. Hence, the PR remains the Person Responsible for the Horse.

10. The Decision

- 10.1 As stated in Article 2.1.2 of the ECM Rules, sufficient proof of an ECM Rule violation is established by the presence of a Controlled Medication Substance in the Horse's A-Sample where the PR waives analysis of the B-Sample and the B-Sample is not analysed. The Tribunal is satisfied that the laboratory reports relating to the A-Sample reflect that the analytical tests were performed in an acceptable manner and that the findings of the Laboratory are accurate. The Tribunal is satisfied that the test results evidence the presence of Phenylbutazone, Oxyphenbutazone, and Dexamethasone in the sample taken from the Horse at the Event. The PR did not contest the accuracy of the test results or the positive findings. The substances are classified as Controlled Medication Substances under the FEI List. The presence of Phenylbutazone, Oxyphenbutazone, and Dexamethasone during an Event without a valid Veterinary Form is prohibited under Article 2.1 of the ECM Rules.
- 10.2 The FEI has therefore established an Adverse Analytical Finding, and has sufficiently proven the objective elements of an offence by the PR, in accordance with Articles 2.1 of the ECM Rules.
- 10.3 In cases brought under Article 2.1 of the ECM Rules, a strict liability principle applies, as described in Article 2.1.1 of the ECM Rules. Once an ECM Rule violation has been established by the FEI, the PR has the burden of proving that he bore "No Fault or Negligence" for the rule violation as set forth in Article 10.4 of the ECM Rules, or "No Significant Fault or Negligence," as set forth in Article 10.5 of the ECM Rules.
- 10.4 However, in order to benefit from any elimination or reduction of the applicable sanction under Article 10.4 or 10.5 of the ECM Rules, the PR must first establish how the Controlled Medication Substances entered the Horse's system.
- 10.5 The Tribunal takes note that the PR has no idea how the Prohibited Substances entered the Horse's system, since - according to his argument - he only borrowed the Horse for the Event. The Tribunal further also takes note of the FEI's position in this respect. The Tribunal holds that the PR has not established - on a balance of the probability, as required under Article 3.1 of the ECM Rules - how the Prohibited Substances entered the Horse's system.
- 10.6 In the absence of establishing, on the balance of the probability, how the Prohibited Substances entered the Horse's system, the Tribunal cannot evaluate the degree of fault of the PR for the rule violation.
- 10.7 Therefore, the Tribunal concluded that no elimination or reduction of the otherwise applicable period of Ineligibility is warranted.

10.8 The Tribunal takes note that the PR has been provisionally suspended since 13 November 2017.

11. Disqualification

11.1 For the reasons set out above, the Tribunal disqualifies the Horse and the PR from the Competition and the entire Event and all medals, points and prize money won must be forfeited, in accordance with Articles 9 and 10.1.2 of the ECM Rules.

12. Sanctions

12.1 As a result of the foregoing, the period of Ineligibility imposed on the PR shall be six (6) months.

12.2 The Tribunal imposes the following sanctions on the PR in accordance with Article 169 of the GRs and Article 10 of the ECM Rules:

1) The PR shall be suspended for a period of **six (6) months**. The period of Provisional Suspension, effective from 13 November 2017 shall be credited against the period of Ineligibility imposed in this decision. Therefore, the PR will be ineligible **until 12 May 2018**.

2) The PR is fined **two hundred Swiss Francs** (CHF 200,-). The fine shall be paid in instalments to be agreed between the Parties.

3) No costs for this procedure shall be attributed to the PR.

12.3 No Person Responsible who has been declared Ineligible may, 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 10.11.1 of the ECM Rules).

12.4 Where a Person Responsible who has been declared Ineligible violates the rule against participation or attendance during Ineligibility, the results of any such participation shall be Disqualified and a new period of Ineligibility equal in length up to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. In addition, further sanctions may be imposed if appropriate (Article 10.11.2 of the ECM Rules).

12.5 According to Article 168 of the GRs, the present decision is effective from the day of written notification to the persons and bodies concerned.

12.6 In accordance with Article 12 of the ECM Rules the Parties may appeal against this decision by lodging an appeal with the Court of Arbitration for Sport (CAS) within twenty-one (21) days of receipt hereof.

V. DECISION TO BE FORWARDED TO:

- a. **The person sanctioned: Yes**
- b. **The President of the NF of the person sanctioned: Yes**
- c. **The President of the Organising Committee of the Event through his NF: Yes**
- d. **Any other: No**

FOR THE PANEL

A handwritten signature in blue ink, appearing to read 'Torrente', with a large circular flourish above the first part of the name.

Mr. Cesar Torrente, one member panel