

Non-Analytical Positives for Drugs in Horse Racing

In horse racing, drug positives are the result of a laboratory detecting that a prohibited drug was found in a blood or urine sample collected from a horse either before or immediately after a race.

In very few cases do you find a racing commission pursuing a trainer, a groom or a veterinarian based on circumstantial evidence which does not include a positive finding of a drug. Occasionally, an investigator may come upon a horse receiving a milkshake or a horse or receiving an injection, and the racing commission may elect to pursue the matter.¹

Yet, in the rest of the sports drug-testing world, non-analytical positives are increasingly being accepted as valid. The World Anti-Doping Code now provides for a violation for an “attempted use of a prohibited substance or prohibited method.”² Where there is a non-analytical positive, the doping can be established “through admissions, third party testimony, or other evidence.”³ Unlike the analytical positives, the burden of persuasion is always on the testing agency to prove intent to use the illegal substance by the athlete. The strict liability standard is not applied to non-analytical positives.⁴

This was clearly used in the BALCO cases. “These investigations were based not on urinalysis or other physical techniques of doping control but on non-analytical positive evidence of e-mail communications, calendars, drug schedules revealing evidence of the use by particular athletes of performance-enhancing substances, personal checks from athletes to BALCO, and other extrinsic paper evidence.”⁵

In the BALCO cases, information was provided to the United States Anti-Doping Agency [USADA] from the United States Senate Commerce Committee.⁶ USADA conducted its own investigations relying on “e-mail communications, calendars, drug schedules revealing evidence of the use by particular athletes of performance-enhancing substances, personal checks from athletes to BALCO, and other extrinsic paper evidence.”⁷

¹ See Matter of McGuire v. Hoblock, 2006 NY Slip Op 454 (1st Dept. 2006) upholding a 180 day suspension of a veterinarian who was observed giving a milkshake to a horse. Cf. Galvin v. Hoblock, 270 A.D.2d 147 (1st Dept. 2000) where an effort by the staff of the Racing and Wagering Board to suspend a veterinarian’s license for tubing a horse was unsuccessful in the absence of a positive drug test. The veterinarian was suspended for 60 days for failing to file his medical treatment records. The facts of the Galvin matter are discussed in greater detail at Galvin v. New York Racing Ass’n, 70 F. Supp. 2d 163 (E.D.N.Y. 1998).

² WADA Rule §2.2/

³ Id. Comment at §2.2.1

⁴ Id. Comment at §2.3

⁵ James A.R. Nafziger “Symposium: Alternative Dispute Resolution in Sports: Circumstantial Evidence of Doping: BALCO and Beyond,” 16 Marq. Sports L. Rev. 45, 52 (2005)

⁶ Id.

⁷ Id.

The top sprinter Kelli White, based on the BALCO circumstantial evidence and not a positive drug test, agreed to a two year suspension in 2004.⁸ Using the BALCO evidence, before the 2004 Olympic Games, five other athletes were suspended from competition by the USADA.⁹ For example, the sprinter Tim Montgomery received a two year suspension from the Court for Arbitration of Sport for using BALCO-provided performance enhancing drugs.¹⁰ The panel upheld the use of the non-analytical positives. While the procedure was not typical of drug positives, the procedure was “not wholly novel.”¹¹ The panel said in this case – as it said in the case of sprinter Michelle Collins¹² “The straightforward application of legal principles to essentially undisputed facts leads to a clear resolution of this matter.”¹³

In finding Montgomery guilty, the panel noted that it had probably not seen the last of the non-analytic positive cases.¹⁴ It concluded by quoting favorably from the Court of Arbitration for Sport’s decision in the Comitato Olimpico Nazionale Italiano case:

“In any event, the undeniable circumstance that the conviction for doping offences is more difficult when the evidence is other than positive testing must not prevent the sports authorities from prosecuting such offences, as already remarked, with the outmost earnestness and eagerness, using any available method of investigation.”¹⁵

These non-analytical BALCO positives are likely to be the wave of the future in prosecuting drug cases in athletes. “These cases were revolutionary because of both the expansion of the role of anti-doping agencies into investigative areas and also for using all evidence available to determine use of a prohibited substance in the absence of a traditional positive test. The significance of the BALCO cases is in their potential precedent. In these cases, all facts and circumstances were considered even in the absence of a positive test. These cases recognized the fact that a positive test does not always tell the whole story. If this is the trend in doping, it should lead to more facts and circumstances considered even when there is a traditional analytical positive test.”¹⁶

⁸ Jere Longman And Liz Robbins, “Olympics; Sprinter Barred From Olympics As U.S. Doping Scandal Grows,” New York Times May 20, 2004.

⁹ Nafziger note 6 supra at 53.

¹⁰ See <http://www.tas-cas.org/en/pdf/Montgomery.pdf>. See also Ryan Connolly, Balancing the Justices in Anti-Doping Law, 5 Va. Sports & Ent. L.J. 161, 200 (2006).

¹¹ Id.

¹² U.S. Anti-Doping Agency v. Collins, Am. Arb. Ass'n, Case No. 30 190 00658 04 (2004) (Rivkin, Arb.), cited at Paul C. McCaffrey, “Playing Fair: Why the United States Anti-Doping Agency’s Performance-Enhanced Adjudications Should Be Treated as State Action,” 22 Wash. U. J.L. & Pol’y 645, 654 note 76 (2006); Cathy Harasta, “Former Lakeview Sprinter Accepts Four-Year Doping Ban Collins Drops Appeal,” Dallas Morning News, May 20, 2005.

¹³ See note 10 supra. See also <http://www.tas-cas.org/en/pdf/Gaines.pdf> where the same language was employed in the case of sprinter Chryste Gaines.

¹⁴ Id.

¹⁵ Id.

¹⁶ Jessica Foschi, “Note: A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport,” 16 Duke J. Comp. & Int’l L. 457, 482 (2006).

In short, non-analytical positives have now become standard practice in human athletic drug prevention efforts and are considered the wave of the future. Yet, in horse racing, these non-analytical positives are considered almost as an afterthought.

This situation may come up fairly quickly in New Jersey. The New Jersey Racing Commission had suspended top harness driver Eric Ledford and his father, trainer Seldon Ledford for 10 ½ years after they (and two grooms and a veterinarian) had been arrested for race-fixing charges that included allegations of blood-doping of horses and possession of Aranesp.¹⁷ There were no positive drug tests. Recently, the Ledfords pleaded guilty to possession of the anabolic steroid Equipoise. They were sentenced to one year's probation, and they were not convicted of any race fixing charges. Eric Ledford's attorney stated, "Eric was not charged with having it or even touching it, only with knowledge of it being present and not reporting the possession."¹⁸

Ledford's attorney also stated, "We're very close to finalizing a deal which hopefully will have Eric Ledford back racing in the near future."¹⁹ This means the matter is returning to the New Jersey Racing Commission for its determination. If the Racing Commission applied the non-analytical positive treatment, it could use the possession of the aranesp and the plea to the Equipoise possession as evidence of non-analytical positives.²⁰ Yet, it may be that without a formal positive and without a major criminal conviction, the Racing Commission could significantly reduce its penalty on Eric Ledford.

The point is that racing commissions, like New Jersey's, need a specific policy in place for non-analytical positives. They could use the results of raids, records of purchases, admissions, e-mails, investigations, testimony from others, etc., to establish positives even in the absence of a positive test. In all likelihood, non-analytical positives will establish far more significant wrongdoing than the normal drug testing incident where the trainer or groom administered the wrong medication to the wrong horse on the wrong day. The bad guys are invariably ahead of the drug regulators, and by utilizing non-analytical positive, we might actually catch the evildoers and not just the schmoes.

The process of establishing procedures for non-analytical positives should not involve reinventing the wheel. Just apply the World Anti-Doping Code to horse racing. There would be no presumptions of trainer responsibility. The racing commission would have to prove the positive by a fair preponderance of the evidence.²¹ It could bring in all

¹⁷ Aranesp is a special synthetic form of EPO that is produced in Chinese hamster ovary cells using recombinant DNA technology. See http://www.chemsoc.org/chembytes/ezone/2002/salvage_jul02.htm

¹⁸ Bob Jordan, "Guilty Pleas in Racing Scandal," *Asbury Park Press*, January 25, 2007.

¹⁹ *Id.*

²⁰ Also to be considered in a non-analytical positive case would be the significant improvement in performance once horses were trained by the Ledfords (See Bob Jordan, "Police: Horse trainer cheated," *Asbury Park Press*, April 4, 2006) and the fact that Seldon Ledford was not normally present in New Jersey. (Dave Briggs, "Woodbine Entertainment Group Looking at Enhancing Blood Testing," *Guelph Mercury*, April 20, 2006).

²¹ The World Anti-Doping Code employs a somewhat more stringent burden of persuasion between the fair preponderance standard and the reasonable doubt standard of criminal law.

manner of circumstantial evidence to establish the positives, and it could be applied not merely to trainers but to every licensee involved with caring for the horse.

If there is anything that the Association of Racing Commissioners and the Racing Medication and Testing Consortium should be working together on, it is a policy for authorizing racing commissioners to pursue non-analytical positives