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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1705-21**

**KELVIN HARRISON,
TRAINER,**

Petitioner-Appellant,

v.

**NEW JERSEY RACING
COMMISSION,**

Respondent-Respondent.

**BRETT PELLING,
TRAINER,**

Petitioner-Appellant,

v.

**NEW JERSEY RACING
COMMISSION,**

Respondent-Respondent.

JEFFREY CULLIPHER,
TRAINER,

Petitioner-Appellant,

v.

NEW JERSEY RACING
COMMISSION,

Respondent-Respondent.

KEVIN C. MCDERMOTT,
TRAINER,

Petitioner-Appellant,

v.

NEW JERSEY RACING
COMMISSION,

Respondent-Respondent.

MARCUS MELANDER,
TRAINER,

Petitioner-Appellant,

v.

NEW JERSEY RACING
COMMISSION,

Respondent-Respondent.

KEITH D. TORRO, TRAINER,

Petitioner-Appellant,

v.

NEW JERSEY RACING
COMMISSION,

Respondent-Respondent.

RICHARD D. JOHNSON,
TRAINER,

Petitioner-Appellant,

v.

NEW JERSEY RACING
COMMISSION,

Respondent-Respondent.

RICHARD J. NORMAN,
TRAINER,

Petitioner-Appellant,

v.

NEW JERSEY RACING
COMMISSION,

Respondent-Respondent.

Argued February 15, 2023 – Decided September 1, 2023

Before Judges Accurso and Vernoia.

On appeal from the New Jersey Racing Commission.

Joseph A. Deer argued the cause for appellants (Bashwiner and Deer, LLC, attorneys; Joseph A. Deer, on the briefs).

Steven M. Gleeson, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Steven M. Gleeson and Levi Klinger-Christiansen, Deputy Attorneys General, on the brief).

PER CURIAM

Petitioners Kelvin Harrison, Brett Pelling, Jeffrey Cullipher, Richard D. Johnson, Kevin C. McDermott, Marcus Melander, Richard J. Norman, and Keith D. Torro, licensed horse trainers in New Jersey, appeal from final decisions of the New Jersey Racing Commission imposing penalties for their violation of the Commission's rules governing the administration of controlled therapeutic medications to racehorses. Finding no error, we affirm.

These matters, consolidated for hearing in the Office of Administrative Law, were the subject of cross-motions for summary disposition initiated by petitioners. We take the facts from that record.

In 2014, the Commission amended its regulations to incorporate by reference the controlled therapeutic medication schedule of the Association of Racing Commissioners International (ARCI), as amended and supplemented, in accordance with N.J.A.C. 1:30-2.2. 46 N.J.R. 2162(a) (Nov. 3, 2014) (codified at N.J.A.C. 13:71-23.1). In December 2019, ARCI amended its schedule in several respects, including lowering the acceptable level of phenylbutazone, commonly referred to as "bute," a non-steroidal anti-inflammatory drug (NSAID), in a horse's body on race day from 2.0 micrograms per milliliter in blood or serum to 0.3 micrograms per milliliter. In early January 2020, the Executive Director of the Racing Commission, Judith A. Nason, wrote to the head of the Standardbred Breeders and Owners Association summarizing the changes and enclosing a copy of the revised schedule, which she noted was then in effect, "as a courtesy for your membership."

In June 2020, each of the petitioners ran at least one horse placing first or second in races at the Meadowlands that was determined to have had an excess level of bute in its blood in a post-race blood test. See N.J.A.C. 13:71-23.1(b)(14). The Racing Commission's Board of Judges disqualified the horse in each case, forfeited the purse, fined the trainer \$500 and suspended him for

fifteen days for breach of his obligations under N.J.A.C. 13:71-23.6.¹ N.J.A.C. 13:71-23.8(g).

Petitioners appealed and the Racing Commission transferred each case to the OAL, where they were consolidated on petitioners' motion. On their motion for summary disposition, petitioners asserted in their statement of

¹ N.J.A.C. 13:71-23.6 provides:

(a) A trainer shall be the absolute insurer of and is responsible for the condition of a horse within his care and custody.

(b) A trainer shall not enter or start a horse that has in its body any drug or substance foreign to the natural horse except as otherwise provided for in these rules and regulations.

(c) A trainer has the duty to be familiar with the medication rules of this Commission and with any drug or substances foreign to the natural horse administered to said horse at his direction or while in his care and custody.

(d) The trainer, owner, veterinarian, groom or other person charged with the custody, care and responsibility of a horse are all obligated to protect and guard the horse against administration of any drug or substances foreign to the natural horse, except as otherwise provided for in these rules and regulations by any unauthorized individual, and the administration of any unauthorized drug or substance foreign to the natural horse by any person.

undisputed material facts that each horse had a level of bute in its blood below the threshold allowed before the 2019 amendment but above the threshold permitted in 2020 on the day they raced, supporting their motion with a copy of the lab report of the post-race blood analysis of each horse.

Petitioners argued the Racing Commission had an obligation under the Administrative Procedure Act to provide them personal notice ARCI had lowered the threshold for bute in December 2019. They also argued the inoperability of the link included in N.J.A.C. 13:71-23.1(b)(14) to ARCI's controlled therapeutic medication schedule at <http://arcicom.businesscatalyst.com/assets/arci-controlled-therapeutic-medication-schedule---version-2.1.pdf> deprived them of the ability to access the revised schedule and perform their obligations under N.J.A.C. 13:71-23.6. Petitioners contended those failures warranted the dismissal of the violations and penalties imposed by the Racing Commission.

The Racing Commission cross-moved to uphold the violations and the penalties imposed on petitioners, arguing the Commission had properly noticed its incorporation of ARCI's controlled therapeutic medication schedule in 2014, providing all the notice to petitioners required. The Commission also contended it did not maintain the link to the medication schedule, which was

simply provided as a convenience to the reader, and the link, even if broken, contained all the information required to locate the ARCI schedule.

In a thorough and thoughtful opinion tracing the history of the use of bute in the horse racing industry, its advantages in reducing inflammation, and its "major drawback" of interfering "with a veterinarian's ability to evaluate the degree of lameness" in a horse, as well as the efforts of various bodies to harmonize the rules governing horse racing around the country so trainers racing in different states face fewer conflicting rules, Administrative Law Judge William J. Courtney upheld petitioners' rule violations and penalties. ALJ Courtney found petitioners did not dispute the Racing Commission provided the required public notice when it adopted the amendments incorporating ARCI's controlled therapeutic medication schedule in 2014, and he rejected their argument that the Racing Commission was obligated to provide them personal notice in 2019 when ARCI lowered the threshold for bute.

Specifically, the ALJ rejected petitioners' reliance on In re Adoption of Rules Concerning Conduct of Judges of Compensation, N.J.A.C. 12:235-3.11 through 3.23, 244 N.J. Super. 683 (App. Div. 1990), as inapposite. In that case, we invalidated the adoption of regulations, after the shortest possible

comment period, creating a commission to review the performance of the judges of workers' compensation with the power to recommend their "censure, suspension or removal." Id. at 684-85. We held "a proposed regulation directly, uniquely and significantly affecting about 50 state employees whose identities and addresses are well known" required more than the minimal statutory notice "to inform them of the proposed regulation and the time and manner of comment." Id. at 687.

ALJ Courtney correctly found the case does not stand for the proposition that an agency incorporating into its rules a third-party source by reference "as amended and supplemented" under N.J.A.C. 1:30-2.2 has any obligation to provide further notice of amendments to the source. He found the Racing Commission, having lawfully amended N.J.A.C. 13:70-14(b)(14) in 2014 to include the threshold level of bute contained in ARCI's controlled therapeutic medication schedule "as amended and supplemented," was under no obligation in 2019 to advise petitioners directly or personally that ARCI had amended the threshold.

The ALJ also rejected petitioners' claim that the failure of the link to the ARCI schedule in N.J.A.C. 13:71-23.1(b)(14) prevented them from fulfilling their obligations under N.J.A.C. 13:71-23.6 to be familiar with the

Commission's medication rules and to not race a horse with any drug in its system except as provided in those rules. ALJ Courtney found petitioners have known since 2014 where to find the threshold for bute, and "there was enough information contained within the hyperlink," — which included the words "arci-controlled-therapeutic-medication-schedule," — "to put the reader on notice" that the threshold for bute was "on an ARCI website or an ARCI-related website." Indeed, the ALJ found a trainer could "simply type" "arci-controlled-therapeutic-medication-schedule" into an internet search engine and be taken directly to the schedule.

Finding the level of bute in each horse on race day "as set forth in petitioners' own chart leaves no doubt" petitioners' horses exceeded the permitted ARCI threshold under the Racing Commission's regulations, the ALJ denied petitioners' motion to dismiss the charges and granted the Commission's cross-motion, upholding the violations and penalties. The Racing Commission adopted the ALJ's initial decision and issued a final agency decision in each matter, subsequently staying the penalties pending our resolution of petitioners' appeal.

On appeal, petitioners have reprised their arguments to the ALJ and added a claim he erred in deciding "an issue not before the [OAL]," namely the

validity of the lab results. Having reviewed the record, we reject petitioners' arguments as without sufficient merit to warrant discussion in a written opinion, Rule 2:11-3(e)(1)(E), and affirm, essentially for the reasons expressed by ALJ Courtney in the initial decision adopted by the Racing Commission. We add only the following.

Petitioners have not cited a single case, and we are not aware of one, holding an agency is required to provide notice of changes to a source, "as amended and supplemented," it incorporated in its regulations by reference pursuant to N.J.A.C. 1:30-2.2 in formal rulemaking. N.J.A.C. 1:30-2.2 requires only that the agency specifically identify the source, "whether the section incorporated includes future supplements and amendments," and "[w]here and how a copy of the section may be obtained." N.J.A.C. 1:30-2.2(c)(1) and (2). There is no question but that the Racing Commission complied with those requirements when it adopted N.J.A.C. 13:71-23.1(b)(14) incorporating ARCI's controlled therapeutic medication schedule "by reference, as amended and supplemented."

We agree with the ALJ and the Racing Commission that although the link advising where the schedule could be accessed — <http://arcicom.businesscatalyst.com/assets/arci-controlled-therapeutic-medication-schedule--->

version-2.1.pdf — was broken, it nevertheless served to advise "where and how" a copy of the source could be obtained, that is through the internet by searching "ARCI controlled therapeutic medication schedule" or going on ARCI's website. Nothing more was required.

We also reject petitioners' assertion that they could "stipulate that the lab results are what they are for each horse," attaching a copy of the lab results to their statement of uncontested material facts to establish the bute in their horses' blood was below the threshold allowed before ARCI amended the schedule in 2019, while reserving "the right to contest the efficacy of the lab itself that generated the results." It was not the ALJ who decided the lab "that conducted the tests on the horses post-race, was credible," as petitioners allege; they stipulated to the credibility of the lab results to support their motion to dismiss the charges. Because the lab results were credible, a position accepted by the ALJ, the doctrine of invited error precludes them from changing tack now. See Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402, 447 (App. Div. 2021) ("The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the

proposition now alleged to be error." (quoting Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996))).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION