

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	HPA Docket No. 02-0001
)	
Ronald Beltz, an individual; and)	
Christopher Jerome Zahnd, an individual,)	
)	Decision and Order as to
Respondents)	Christopher Jerome Zahnd

PROCEDURAL HISTORY

William R. DeHaven, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 25, 2001. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on May 25, 2000, Christopher Jerome Zahnd [hereinafter Respondent] entered a horse known as “Lady Ebony’s Ace” as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview “S.H.O.W. Your Horses” in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony’s Ace,

while Lady Ebony's Ace was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II.1).¹ On December 4, 2001, Respondent filed an answer denying the material allegations of the Complaint, and on May 6, 2004, Respondent filed an amended answer denying the material allegations of the Complaint.

On December 1, 2004, the Chief ALJ presided at a hearing in Huntsville, Alabama. Brian T. Hill, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Greg L. Shelton, Shelton & Shelton, Decatur, Alabama, represented Respondent. At the hearing, Complainant called four witnesses and introduced eight exhibits. Respondent called two witnesses, but did not introduce any exhibits.

On February 17, 2005, Respondent filed a "Brief in Support of Christopher Jerome Zahnd." On February 18, 2005, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof." On March 18, 2005, Complainant filed "Complainant's Reply Brief."

On September 6, 2005, the Chief ALJ issued a "Decision as to Christopher J. Zahnd" [hereinafter Initial Decision as to Christopher J. Zahnd]: (1) concluding Complainant failed to prove by a preponderance of the evidence that Lady Ebony's Ace

¹Complainant also alleged that Ronald Beltz violated the Horse Protection Act (Compl. ¶¶ II.1, II.2). Complainant and Ronald Beltz agreed to a consent decision which Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] entered on January 18, 2005. *In re Ronald Beltz*, 64 Agric. Dec. ____ (Jan. 18, 2005) (Consent Decision as to Ronald Beltz).

was sore on May 25, 2000, when Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace; and (2) dismissing the Complaint (Initial Decision as to Christopher J. Zahnd at 11).

On October 24, 2005, Complainant appealed to the Judicial Officer. On November 16, 2005, Respondent filed a response to Complainant's appeal petition. On November 23, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ's conclusion that Complainant failed to prove by a preponderance of the evidence that Lady Ebony's Ace was sore on May 25, 2000, when Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee. Therefore, I do not adopt the Chief ALJ's Initial Decision as to Christopher J. Zahnd as the final Decision and Order as to Christopher Jerome Zahnd.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

.....

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

.....

(3) The term “sore” when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that—

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1824. Unlawful acts

The following conduct is prohibited:

....

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

....

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to

pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

....

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than \$3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than \$3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

....

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1824(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

DECISION

Decision Summary

I conclude Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace, while Lady Ebony's Ace was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). I assess Respondent a \$2,200 civil penalty and disqualify Respondent for a period of 1 year from showing, exhibiting, or entering any horse, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

Discussion

Respondent admits on May 25, 2000, he entered Lady Ebony's Ace as entry number 15 in class number 13 in the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace (Compl. ¶ I.3; Amended Answer ¶ I.3). Thus, the only issue in this proceeding is whether Lady Ebony's Ace was sore when Respondent entered her in the 30th Annual Spring Fun Show Preview. Complainant proved by a preponderance of the evidence² that Lady Ebony's Ace was sore when Respondent entered her in the 30th

²Complainant, as the proponent of an order, has the burden of proof in this proceeding (5 U.S.C. § 556(d)). The standard of proof by which this burden is met is the preponderance of the evidence standard. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Jackie McConnell*, 64 Agric. Dec. ____, slip op. at 39 (June 23, 2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 (2004), *appeal docketed sub nom. Winston T. Groover, Jr. v. United States Dep't of Agric.*, No. 04-4519 (6th Cir. Dec. 13, 2004); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re*

(continued...)

Annual Spring Fun Show Preview. Moreover, Complainant proved by a preponderance of the evidence³ that Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs when palpated during pre-show inspection at the 30th Annual Spring Fun Show Preview triggering the statutory presumption that Lady Ebony's Ace was a horse which was sore.⁴ As discussed in this Decision and Order as to Christopher Jerome Zahnd, *infra*, Respondent's evidence that Lady Ebony's Ace was not sore when Respondent entered her in the 30th Annual Spring Fun Show Preview is not sufficient to rebut the statutory presumption that she was a horse which was sore when Respondent entered her in the 30th Annual Spring Fun Show Preview and does not outweigh Complainant's

²(...continued)

William Earl Bobo, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

³See note 2.

⁴15 U.S.C. § 1825(d)(5).

evidence that Lady Ebony's Ace was sore when Respondent entered her in the 30th Annual Spring Fun Show Preview.

Findings of Fact

1. Respondent is an individual whose mailing address is 630 County Road 368, Trinity, Alabama 35673 (Compl. ¶ I.2; Amended Answer ¶ I.2; CX 4 at 1).
2. Respondent was the trainer of Lady Ebony's Ace on May 25, 2000 (CX 1, CX 4 at 1, CX 5, CX 6).
3. On May 25, 2000, Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 in the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace (Compl. ¶ I.3; Amended Answer ¶ I.3).
4. Lady Ebony's Ace spent most of May 25, 2000, prior to the show, in a horse trailer. Both Respondent and Larry Appleton, Jr., who was assisting Respondent as a groom, inspected Lady Ebony's Ace before the show and found no response to palpation. (Tr. 84-90, 98-99.)

5. On May 25, 2000, a Designated Qualified Person,⁵ Charles Thomas, inspected Lady Ebony's Ace during a pre-show inspection at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee (CX 5).

6. Mr. Thomas noted Lady Ebony's Ace reacted to palpation of each of her front feet and noted a limitation of the freedom of movement of Lady Ebony's Ace when led. Specifically, Mr. Thomas found Lady Ebony's Ace had a mild reaction to his palpation on the outside of the left front foot and a stronger reaction to his palpation on the outside of the right front foot and Lady Ebony's Ace pulled slightly on the reins and walked slowly when led. Based on his findings, Mr. Thomas gave Lady Ebony's Ace a score of 5, making her ineligible to be shown that night. However, Mr. Thomas concluded Lady Ebony's Ace was not "sore" as that term is defined in the Horse Protection Act. (CX 5, CX 7.)

7. Based on his examination of Lady Ebony's Ace, Mr. Thomas issued DQP Ticket number 22001 (CX 5, CX 6, CX 7).

8. On May 27, 2000, Mr. Thomas executed an affidavit which describes his May 25, 2000, examination of Lady Ebony's Ace and his findings, as follows:

⁵A Designated Qualified Person is defined in 9 C.F.R. § 11.1 as a person meeting the requirements specified in 9 C.F.R. § 11.7. Designated Qualified Persons are licensed by horse industry organizations or associations having a Designated Qualified Person program certified by the United States Department of Agriculture. Designated Qualified Persons may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under 15 U.S.C. § 1823 to detect or diagnose horses which are sore or to otherwise inspect horses and records pertaining to horses for the purpose of enforcing the Horse Protection Act.

On the evening of May 25, 2000, I was assigned to work the 30th Annual Spring Fun Show, Shelbyville, Tennessee. Around 9:10pm on May 25, 2000 on pre-show inspection, I inspected a mare, for Class Number 13 (Owner-Amateur Riders on Four-Year-Old Walking Mares or Geldings, Specialty) named Lady Ebony's [sic] Ace, with exhibitor number 15. The horse was presented by the trainer Chris Zahnd to the DQP station. The horse reacted to palpation on both front feet. I noted my findings on the DQP EXAMINATION score sheet, Locomotion, slight pull on reins when led, walked slow. Physical Examination, mild reaction on left front outside stronger reaction on right front outside. Appearance, no problem. I scored the horse five (5) on the Exam. I issued DQP Ticket Number 22001.

CX 5.

9. Dr. Clement Dussault, a veterinarian employed by the Animal and Plant Health Inspection Service, United States Department of Agriculture, then examined Lady Ebony's Ace. Dr. Dussault noted Lady Ebony's Ace moved somewhat freely when being led around a cone. Dr. Dussault also noted, when palpating medial and lateral aspects of the right front foot, Lady Ebony's Ace withdrew her foot, and when palpating medial and lateral aspects of the left front foot, Lady Ebony's Ace withdrew her foot. Dr. Dussault termed Lady Ebony's Ace's responses to palpation "moderate." Dr. Dussault found Lady Ebony's Ace to be bilaterally sore and determined Lady Ebony's Ace would feel pain when moving. (CX 1, CX 3, CX 8; Tr. 35-36, 42.)

10. Dr. Dussault then asked Dr. Guedron, another Animal and Plant Health Inspection Service, United States Department of Agriculture, veterinarian who was present at the show, to examine Lady Ebony's Ace. Dr. Guedron noted Lady Ebony's Ace walked slowly with a shortened gait and was reluctant to lead. Dr. Guedron also noted, when palpating medial and lateral aspects of the right front foot, Lady Ebony's

Ace withdrew her foot, reared her head, and shifted her weight to her rear feet, and when palpating medial and lateral aspects of the left front foot, Lady Ebony's Ace withdrew her foot, reared her head, and shifted her weight to her rear feet. Dr. Guedron termed Lady Ebony's Ace's responses to palpation "strong." (CX 1, CX 2, CX 8; Tr. 18-20, 36-39.)

11. During Dr. Dussault's examination of Lady Ebony's Ace, he did not smell anything on Lady Ebony's Ace, he did not see any visible signs of scarring on Lady Ebony's Ace, and he did not note any hair loss on Lady Ebony's Ace. Dr. Dussault stated his notation on APHIS Form 7077, which is the Summary of Alleged Violations, that there was a failure to comply with the scar rule,⁶ was made in error, and that no scarring was evident. Dr. Dussault concluded, after conferring with Dr. Guedron, that the pain Lady Ebony's Ace would feel when moving was caused by mechanical or chemical means or both mechanical and chemical means. (CX 1, CX 2 at 2, CX 3 at 2; Tr. 24, 40, 49-50.)

12. On May 26, 2000, Dr. Dussault executed an affidavit which describes his May 25, 2000, examination of Lady Ebony's Ace and his findings, as follows:

On May 25, 2000 at about 2110 I observed DQP Charles Thomas pre-show check Exhibitor Number 15, in Class Number 13 later identified to me as Lady Ebany's [sic] Ace. I noted a foot withdrawal when the DQP palpated both pasterns. The DQP wrote ticket 22001.

I observed the horse move around the cone and noted it moved somewhat freely. I approached the horse on the left side making contact with the horse and the horse presented its foot. I examined the posterior

⁶The scar rule is set forth in 9 C.F.R. § 11.3.

aspect and then moved the leg forward. When I palpated the medial and lateral aspect as noted on the APHIS Form 7077, of the left front pastern, the horse withdrew its foot. I then placed the foot on the ground. I went to the right side of the horse and made contact with the horse and the horse presented its foot for inspection. I examined the posterior aspect of the right foot and moved the foot forward. When I palpated the areas as noted on the APHIS Form 7077, the medial and lateral aspects of the right foot the horse withdrew its foot. The responses to palpation were moderate.

I asked Dr. Guedron to check the horse and noted when it moved it did not move freely. I did not observe Dr. Guedron palpate this horse.

Dr. Guedron and I conferred and agreed the horse was sore as defined by the Horse Protection Act. I informed the custodian that the horse was sore. Mike Nottingham and I filled out the APHIS Form 7077.

In my professional opinion this horse would feel pain while moving and this was caused by mechanical and/or chemical means.

CX 3.

13. On May 27, 2000, Dr. Guedron executed an affidavit which describes his May 25, 2000, examination of Lady Ebony's Ace and his findings, as follows:

I first saw Entry #15 in Class #13 - a 4 year-old black mare later identified as "Lady Ebony [sic] Ace" - when Dr. Dussault asked me to examine it pre-show at approximately 9:15 pm CDT. I did not witness the DQP's inspection or Dr. Dussault's exam, but understood that the horse had been disqualified from showing by the DQP.

As I had the horse walk and turn around the cone, I noted that it was walking slowly with a shortened gait and was reluctant to lead, as evidenced by its pulling back on the reins with its head held high. I began my physical exam with the left leg and foot and elicited strong, consistent and repeatable pain responses - as evidenced by the horse forcefully withdrawing its foot, rearing its head, and shifting its weight to its rear feet - to digital palpation of both the medial and lateral heel bulbs. I continued my exam with the right leg and foot and elicited the same strong, consistent and repeatable pain responses to digital palpation of the same areas of the pastern as described for the left foot.

Dr. Dussault and I conferred and agreed that the horse was sore as defined by the Horse Protection Act. He then informed the custodian of our decision and that USDA, APHIS would be initiating a Federal case in this regard. Mr. Nottingham and Dr. Dussault filled out the APHIS Form 7077, and I added my signature.

In my professional opinion, this horse was sores by the use of chemicals and/or action devices.

CX 2.

14. Respondent has trained and exhibited horses for 15 years and has shown Lady Ebony's Ace numerous times. Respondent testified he had never been cited before or since May 25, 2000, for a violation of the Horse Protection Act. Respondent stated Lady Ebony's Ace's reactions to palpation were due to her acting "silly" as a result of spending most of the day in a horse trailer and the extended examination process. (CX 4 at 2; Tr. 97, 99-100.)

15. On May 25, 2000, during pre-show examinations by Mr. Thomas, Dr. Dussault, and Dr. Guedron, Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs.

Conclusions of Law

On May 25, 2000, Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace, while Lady Ebony's Ace was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Sanction

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than \$2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from \$2,000 to \$2,200.⁷ The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.⁸

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

⁷ C.F.R. § 3.91(b)(2)(vii).

⁸ 15 U.S.C. § 1825(c).

NEED FOR LEGISLATION

The inhumanity of the practice of “soring” horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse’s limb, or by using various action or training devices such as heavy chains or “knocker boots” on the horse’s limbs. When a horse’s front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed’s natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained “champion” horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Complainant recommends that I assess Respondent a \$2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and

Brief in Support Thereof ¶ II and Proposed Order). The extent and gravity of Respondent's prohibited conduct are great. Two United States Department of Agriculture veterinary medical officers found Lady Ebony's Ace sore (CX 1, CX 2 at 2, CX 3 at 2). Dr. Dussault and Dr. Guedron found palpation of the forelimbs elicited consistent, repeatable pain responses from Lady Ebony's Ace (CX 2, CX 3). Dr. Dussault stated Lady Ebony's Ace's responses to palpation on the left front foot and right front foot were moderate. Dr. Dussault further stated, in his opinion, Lady Ebony's Ace would feel pain when moving and the pain was caused by mechanical or chemical means or both mechanical and chemical means. (CX 3 at 2.) Dr. Guedron stated Lady Ebony's Ace's responses to palpation on the left front foot and right front foot were strong. Dr. Guedron further stated, in his opinion, Lady Ebony's Ace was soled by the use of mechanical or chemical means or both mechanical and chemical means. (CX 2.) Weighing all the circumstances, I find Respondent culpable for the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Respondent presented no argument that he is unable to pay a \$2,200 civil penalty or that a \$2,200 civil penalty would affect his ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.⁹ Based on the factors that are required to be considered when

⁹*In re Mike Turner*, 64 Agric. Dec. ____, slip op. at 21 (Oct. 26, 2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. ____, slip op. at 60 (June 23, 2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, (continued...)

determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for Respondent's violation of the Horse Protection Act. Therefore, I assess Respondent a \$2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of

⁹(...continued)

2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.¹⁰

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer

¹⁰See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.¹¹

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

¹¹*In re Mike Turner*, 64 Agric. Dec. ____, slip op. at 23 (Oct. 26, 2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. ____, slip op. at 62 (June 23, 2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Respondent's violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

Complainant's Appeal Petition

The Chief ALJ found that on May 25, 2000, Respondent entered Lady Ebony's Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace. Moreover, the Chief ALJ found that on May 25, 2000, during pre-show inspection, Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs triggering the statutory presumption that Lady Ebony's Ace was a horse which was sore.¹² However, the Chief ALJ concluded Respondent rebutted the statutory presumption that Lady Ebony's Ace was a horse which was sore and Complainant did not prove by a preponderance of the evidence that Lady Ebony's Ace was sore. Complainant appeals the Chief ALJ's conclusions that Respondent rebutted the presumption that Lady

¹²The statutory presumption is set forth in 15 U.S.C. § 1825(d)(5).

Ebony's Ace was sore and that Complainant did not prove by a preponderance of the evidence that Lady Ebony's Ace was sore (Complainant's Appeal of the ALJ's Decision and Order, and Brief in Support Thereof at 2-12).

The Chief ALJ found the following factors support the conclusions that Respondent rebutted the statutory presumption that Lady Ebony's Ace was a horse which was sore and that Complainant failed to prove by a preponderance of the evidence that Lady Ebony's Ace was sore: (1) Dr. Guedron's failure to testify; (2) the absence of scarring, chemical odor, or hair loss on Lady Ebony's Ace; (3) the reasonableness of Respondent's explanation for Lady Ebony's Ace's reactions to palpation; and (4) Respondent's record of compliance with the Horse Protection Act (Initial Decision as to Christopher J. Zahnd at 6). I disagree with the Chief ALJ's conclusion that these factors rebut the statutory presumption that Lady Ebony's Ace was sore on May 25, 2000, when Lady Ebony's Ace manifested abnormal sensitivity in both of her forelimbs in response to palpation by two United States Department of Agriculture veterinarians and a Designated Qualified Person. I also disagree with the Chief ALJ's conclusion that these factors outweigh the evidence introduced by Complainant showing that Lady Ebony's Ace was sore on May 25, 2000.

Dr. Guedron's Failure to Testify

The Chief ALJ states "[t]he failure of Complainant to attempt to call Dr. Guedron, whose palpations of the horse appeared to my eye to be more forceful than that of

Dr. Dussault, to hear his explanations for his conclusions, is a significant detriment to Complainant's case." (Initial Decision as to Christopher J. Zahnd at 10.)

I do not find Dr. Guedron's failure to testify regarding the pressure he used when palpating Lady Ebony's Ace, a detriment to Complainant's case. Dr. Dussault addressed the issue of the pressure used to palpate a horse to determine whether the horse is "sore" as that term is defined under the Horse Protection Act, as follows:

BY MR. HILL:

Q. I'm just going to ask you a couple of questions or you can give me a couple of answers about the pain thresholds once again. Now, in palpation when you do your examination -- you told us that you palpate how hard in -- for your exams?

[BY DR. DUSSAULT:]

A. Basically, I palpate -- what we train all our veterinarians and DQPs is to palpate enough to just blanch your thumb.

Q. Okay.

A. The other thing in pain responses is that we don't know when the horse comes in as to where it is on the pain curve, I mean whether the pain is going up or the pain is coming down. Now --

JUDGE HILLSON: Can you -- wait. I'm sorry to interrupt. When -- you used the expression, Blanch your thumb. Maybe you ought to spell the word blanch and tell us what you mean by, Blanch your thumb.

THE WITNESS: Basically, it would be, when I press down on my thumb, to white it out.

JUDGE HILLSON: Okay. And why don't you just spell that just to make sure we have it?

THE WITNESS: B-L-A-N-C-H.

JUDGE HILLSON: Okay.

THE WITNESS: So when we're palpating -- and that's -- why sometimes there looks to be a discrepancy is that -- the first person gets a little bit of a reaction and the next person gets a little more and the next person gets a little more is the horse is going up the pain curve. And the reverse of that is the first person will get a big reaction, the second person gets less, and the third person may not get a reaction at all, because the horse is going down the other side, you know.

So it's hard to tell where you're at in that pain threshold when you're examining a horse. But --

....

Q. In your experience, does a normal horse -- a normal, un-sore horse -- does it -- would it -- does it react -- is there any reaction to even fairly heavy touching with the thumbs?

A. I have never -- I've been around horses for many years. And I mean it's -- a diagnostic method that's used, you know, by veterinarians and by physicians, chiropractors and everyone is digital palpation. I've -- in fact, when I train new VMOs new to the Horse Protection Act, I'll --

Q. VMOs being what?

A. Veterinarian Medical Officers. Veterinarians that we've hired that have not worked in the Horse Protection Act before -- I'll in fact show them how -- you know, I'll put my thumb on their thumb and show them that you can press as hard as you want -- as long as you're not jabbing the horse, you can press as hard as you want -- you know proper digital palpation -- and you will not get that horse to move.

Q. All right.

A. If you would, just about anything you put on the horse -- the saddle, the bridle, anything like that -- a wrap -- would cause the horse pain. And it just doesn't. And I think, you know, the other thing you have to look at is -- we go through there, and we palpate hundreds of horses a night and get no reactions whatsoever.

Q. Okay. So basically, again, when you touch them with the thumbs, if you're getting that type of reaction just from just your thumbs, you're expecting that as this horse moves, it's going to be feeling pain if it's getting -- if you're getting a response just from your thumbs?

A. That's correct. That horse is in pain at that time --

Q. Okay. I have no --

A. -- and is going to feel pain.

Tr. 77-80. Based on the record before me, I find the pressure Dr. Guedron used to palpate Lady Ebony's Ace irrelevant to the issue of whether Lady Ebony's Ace was sore during the pre-show inspection on May 25, 2000. Therefore, I reject the Chief ALJ's conclusion that Dr. Guedron's failure to testify regarding the pressure he used when palpating Lady Ebony's Ace constitutes a detriment to Complainant's case.

Absence of Scarring, Chemical Odor, and Hair Loss

The Chief ALJ found scarring, chemical odor, and hair loss to be three of the most common indicia of the use of mechanical or chemical soring devices or both mechanical and chemical soring devices (Initial Decision as to Christopher J. Zahnd at 8).

Dr. Dussault testified he did not see any scarring or detect the odor of chemicals on Lady Ebony's Ace and did not remember any hair loss on Lady Ebony's Ace (Tr. 49-50).

The Secretary of Agriculture's policy has been that digital palpation alone is a highly reliable method to determine whether a horse is "sore," as defined in the Horse Protection Act.¹³ The Secretary of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act. Further, in the instant proceeding, Lady

¹³*See, e.g., In re Bowtie Stables, LLC*, 62 Agric. Dec. 580, 608-09 (2003); *In re William J. Reinhart*, 59 Agric. Dec. 721, 751 (2000), *aff'd per curiam*, 39 Fed. Appx. 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

Ebony's Ace's reactions to digital palpation are not the only evidence that she was sore. I also find significant observations of Lady Ebony's Ace's locomotion as described in Mr. Thomas' affidavit and the summary of his examination of Lady Ebony's Ace and Dr. Guedron's affidavit (CX 3 at 2, CX 5, CX 7).

I disagree with the Chief ALJ's finding that scarring, chemical odor, and hair loss are the three most common indicia of the use of mechanical or chemical soring devices or mechanical and chemical soring devices. Instead, based upon my experience with Horse Protection Act cases, I find that the most common indicium of the use of mechanical or chemical soring devices or both mechanical and chemical soring devices is a horse's repeatable, consistent reactions to digital palpation on both of the horse's forelimbs.

Dr. Dussault testified that a horse may be found to be sore without any chemical odor or hair loss (Tr. 59-60). In addition, Dr. Dussault testified, when he finds a horse that reacts to digital palpation, he examines the horse to determine if the cause of the reaction could be something other than the use of mechanical or chemical devices, as follows:

[BY MR. HILL:]

Q. Okay. And talking about the palpation, what is it that you're looking for with the palpation?

[BY DR. DUSSAULT:]

A. I'm looking for the animal to give me a repeatable consistent response to palpation. It would be the same type of technique that any doctor would use when he's trying to -- when you're trying to figure out

where somebody is feeling pain. It's -- the thing that's true and tested for hundreds of years is to put your hands on and palpate.

And what you're trying to do is localize where the horse or where the subject will react. And the first reaction to any pain is withdrawal; you try to get away from pain. So I'm trying to -- the least thing I'm looking for is to have the animal repeatedly withdraw the limb --

Q. Okay.

A. -- or move the limb.

Q. And this pain would be an indication that what -- of what necessarily?

A. That the animal's feeling some pain.

Q. And from -- by chemical, or by --

A. It can be a chemical or mechanical means, something that somebody has done. We'll also look to see if there are other -- you know, if there is another reason why the animal is probably feeling the pain, you know, if it came out post-show, you know, did it struck itself in the ring, is there a cut on there, or is there something else going on.

If it's not repeatable and it's not consistent and -- then we will try to eliminate any other cause. And if we can't -- and that's done -- as I said, that's all done --

Q. All right.

A. -- in a minute to a minute and 15 seconds. Then we'll find it -- you know, we'll do the paperwork.

Q. So you do try to determine whether there were some other source, a cut, or that he bumped his leg on something?

A. Yes.

Q. And --

A. Because you can -- you know, if it bumped its leg recently, you may -- there may be some swelling there. He may have a cut. I mean it's not -- you know, we see periodically horses coming in that have struck themselves, and you'll have a cut, and you'll have bleeding, something like that. And that's what we're trying to find.

Tr. 16-18.

I do not find the absence of evidence of scarring, chemical odor, and hair loss on Lady Ebony's Ace rebuts the statutory presumption that Lady Ebony's Ace was a horse which was sore during Mr. Thomas', Dr. Dussault's, and Dr. Guedron's pre-show examinations on May 25, 2000. Moreover, the absence of evidence of scarring, chemical odor, and hair loss does not support the Chief ALJ's finding that "Dr. Dussault's conclusion that soring occurred by mechanical or chemical means was simply based on the statutory presumption." (Initial Decision as to Christopher J. Zahnd at 8.) Instead, the evidence establishes that Dr. Dussault examined Lady Ebony's Ace for natural causes for her reactions to digital palpation before concluding that she had been soled by mechanical or chemical devices or both mechanical and chemical devices.

Respondent's Explanation for Lady Ebony's Ace's Reactions to Palpation

Respondent stated Lady Ebony's Ace's reactions to palpation were not a response to pain, but rather were caused by Lady Ebony's Ace acting "silly" as a result of spending most of May 25, 2000, in a horse trailer and the extended examination process (CX 4 at 2; Tr. 99). The Chief ALJ found Respondent "suggested reasonable explanations for [Lady Ebony's Ace's] behavior" (Initial Decision as to Christopher J. Zahnd at 10).

Dr. Dussault testified that one can distinguish between a “silly” horse and a horse that is sore, as follows:

[BY MR. HILL:]

Q. Okay. Are there horses that may just be -- that may just act up, that may, you know, just be nervous? And have you run across horses that are just nervous?

[BY DR. DUSSAULT:]

A. Yes. We call them a silly horse.

Q. Okay.

A. And basically, these horses are very good in the aspect that they get their feet looked at a lot. So 99 percent of them -- 99.99 percent of them, we don't have any issues with them. But every once in awhile, you'll get a horse that just doesn't want his feet touched the minute you go up to it, and we call it a silly horse. And --

Q. So how do you determine whether it's a silly horse or whether it's a sore horse?

A. Basically, a silly horse, no matter where you touch it -- sometimes even before you start touching it, the horse is moving around. And basically, again, what we're looking for is a repeatable consistent response in an area of the foot. In a silly horse, you know, you can start up at the knee, and the horse is all over the place.

Tr. 21-22. The video tape of the examinations of Lady Ebony's Ace by Mr. Thomas, Dr. Dussault, and Dr. Guedron reveals that Lady Ebony's Ace was not a “silly” horse that reacted as soon as she was approached or touched (CX 8). Instead, Lady Ebony's Ace responded to the three examinations only when she was touched on her two front feet. Moreover, Respondent and Mr. Appleton each examined Lady Ebony's Ace on May 25,

2000, prior to the pre-show examinations conducted by Mr. Thomas, Dr. Dussault, and Dr. Guedron. Respondent described Lady Ebony's Ace's lack of reaction to Mr. Appleton's and Respondent's examinations, as follows:

[BY MR. SHELTON:]

Q. Did you inspect this horse?

A. Yes, sir.

Q. Did you inspect this horse before -- on the evening of all this going on, did you inspect her?

A. Yes, sir.

Q. Did you do it before she went in, or after?

A. Before.

Q. Did you see Larry Appleton inspect her?

A. Yes, sir.

Q. Did you see any palpation responses when Larry examined her?

A. No, sir.

Q. Did you see any palpation responses when you examined her?

A. No, sir.

Tr. 98. Mr. Appleton confirmed Lady Ebony's Ace reacted in the same manner to his examination as she reacted to Respondent's examination (Tr. 84-85). Based on the record before me, I do not find Respondent's explanation that Lady Ebony's Ace was merely "silly" a reasonable explanation for Lady Ebony's Ace's reactions to palpation by

Mr. Thomas, Dr. Dussault, and Dr. Guedron. The evidence establishes that Lady Ebony's Ace was not a "silly" horse that reacted to each touch by those examining her or to the mere approach of an individual to examine her.

Respondent's Record of Compliance with the Horse Protection Act

The Chief ALJ states Respondent's record of compliance with the Horse Protection Act, while not determinative, is an indication that Lady's Ebony Ace's reactions to palpation were not a result of soring (Initial Decision as to Christopher J. Zahnd at 11).

I do not find Respondent's record of compliance with the Horse Protection Act prior to and after May 25, 2000, relevant to the issue of whether Lady Ebony's Ace's reactions to palpation on May 25, 2000, were the result of soring. As discussed in this Decision and Order as to Christopher Jerome Zahnd, *supra*, Respondent's history of violations of the Horse Protection Act is only relevant to the sanction to be imposed for his May 25, 2000, violation of the Horse Protection Act.

ORDER

1. Respondent is assessed a \$2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Brian T. Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Hill within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 02-0001.

2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Decision and Order as to Christopher Jerome Zahnd in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order as to Christopher Jerome Zahnd and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.¹⁴ The date of the Order in this Decision and Order as to Christopher Jerome Zahnd is December 28, 2005.

Done at Washington, DC

December 28, 2005

William G. Jenson
Judicial Officer

¹⁴15 U.S.C. § 1825(b)(2), (c).