UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 13-0080
	)	
Justin R. Jenne, d/b/a	)	
Justin Jenne Stables and	)	
Justin Jenne Stables at Frazier	)	
and Frazier Farms,	)	
	)	
Respondent	)	**Decision and Order**

PROCEDURAL HISTORY

On November 14, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], initiated this administrative disciplinary proceeding against Justin R. Jenne, d/b/a Justin Jenne Stables and Justin Jenne Stables at Frazier and Frazier Farms, by filing a Complaint. The Administrator alleges Mr. Jenne entered a horse known as "Jose's Flamingo Dancer" as entry number 107, class number 16, on April 16, 2009, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer while Jose's Flamingo Dancer was sore, in violation of the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act].[1] On February 11, 2013, Mr. Jenne filed an answer in which Mr. Jenne: (1) admitted that, on April 16, 2009, he entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show in

[1]Compl. ¶ IV(10) at 2-3.

Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer;[2] and (2) denied that Jose's Flamingo Dancer was sore when he entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 16, 2009.[3]

Administrative Law Judge Janice K. Bullard [ALJ] conducted a hearing on March 11, 2014, by an audio-visual connection between Washington, DC, and Nashville, Tennessee.[4] Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Mr. Jenne appeared pro se.[5]

[2]Answer of Justin R. Jenne, Individually and Doing Business as Justin Jenne Stables [Answer] ¶¶ 5, 10 at 1.

[3]Answer ¶ 10 at 1-2.

[4]References to the transcript of the March 11, 2014, hearing are designated as "Tr." and the page number.

[5]Prior to the March 11, 2014, hearing, Dudley W. Taylor, Taylor & Knight, Knoxville, Tennessee, represented Mr. Jenne, but, in a conference call with the ALJ and Ms. Deskins on March 6, 2014, Mr. Taylor withdrew his representation of Mr. Jenne.

Mr. Jenne and two witnesses called by the Administrator testified at the hearing. The Administrator introduced 10 exhibits which the ALJ received into evidence at the March 11, 2014, hearing.[6] Mr. Jenne did not introduce any exhibits at the March 11, 2014, hearing; however, the ALJ held the record open to enable Mr. Jenne to submit a statement by Dr. Stephen L. Mullins, a veterinarian who examined Jose's Flamingo Dancer on April 17, 2009. Mr. Jenne submitted Dr. Mullins' statement on March 28, 2014, and the ALJ admitted the statement to the record.[7]

On July 29, 2014, after the Administrator filed Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof [Post Hearing Brief],[8] the ALJ issued a Decision and Order in which the ALJ: (1) concluded Mr. Jenne entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show on April 16, 2009, in Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer while Jose's Flamingo Dancer was sore, in willful violation of the Horse Protection Act; (2) assessed Mr. Jenne a $2,200 civil penalty; and (3) disqualified Mr. Jenne for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[9]

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[6]The Administrator's exhibits are designated as "CX" and the exhibit number.

[7]Mr. Jenne's exhibit is designated as "RX 1."

[8]Mr. Jenne had an opportunity to file a post hearing brief, but did not avail himself of that opportunity.

[9]ALJ's Decision and Order at 15-17.

On September 8, 2014, Mr. Jenne filed a timely appeal of the ALJ's Decision and Order[10] and a petition to reopen the hearing to take additional evidence.[11] On October 30, 2014, the Administrator filed a response to Mr. Jenne's Appeal Petition, a response to Mr. Jenne's Petition to Reopen Hearing, and an appeal petition.[12]

Mr. Jenne failed to file a response to the Administrator's Appeal Petition, and, on June 18, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record that was before the ALJ, I agree with the ALJ's conclusion that Mr. Jenne violated the Horse Protection Act and the sanction imposed on Mr. Jenne by the ALJ.

DECISION

Pertinent Statutory Provisions

Congress enacted the Horse Protection Act to end the cruel practice of deliberately soring Tennessee Walking Horses for the purpose of altering their natural gait and improving their performance at horse shows. When a horse's front feet are deliberately made sore, usually by using chains or chemicals, "the intense pain which the horse suffers when placing his forefeet on the ground causes him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee

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[10]Appeal to Judicial Officer [Appeal Petition].

[11]Petition to Re-Open Hearing for Submission of Additional Evidence [Petition to Reopen Hearing].

[12]Complainant's Opposition to the Appeal to the Judicial Officer and Petition to Re-open Hearing for Submission of the Additional Evidence and Complainant's Appeal Petition [Appeal Petition].

Walking Horse. (H.R. Rep. No. 91-1597, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871.)

Congress' reasons for prohibiting soring were twofold. First, soring inflicts great pain on the animals. Second, trainers who sore horses gain an unfair competitive advantage over trainers who rely on skill and patience. In 1976, Congress strengthened the Horse Protection Act by amending it to make clear that intent to sore the horse is not a necessary element of a violation.[13] *See Thornton v. U.S. Dep't of Agric.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

The Horse Protection Act defines the term "sore," as follows:

§ 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 . . . .

[13]The Horse Protection Act also provides for criminal penalties for "knowingly" violating the Horse Protection Act (15 U.S.C. § 1825(a)). This provision of the Horse Protection Act is not at issue in this proceeding.

15 U.S.C. § 1821(3). The Horse Protection Act creates a presumption that a horse with abnormal, bilateral sensitivity is sore, as follows:

> **§ 1825. Violations and penalties**
>
> . . . .
>
> **(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**
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> . . . .
>
> (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.

15 U.S.C. § 1825(d)(5). The Horse Protection Act prohibits certain conduct, including:

§ 1824. Unlawful acts

> The following conduct is prohibited:
>
> . . . .
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> (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.

15 U.S.C. § 1824(2). Violators of the Horse Protection Act are subject to civil and criminal sanctions. Civil sanctions include both civil penalties (15 U.S.C. § 1825(b)(1)) and disqualification for a specified period from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction" (15 U.S.C. § 1825(c)). The maximum civil penalty for each violation is $2,200 (15 U.S.C. § 1825(b)(1)).[14] In making the determination concerning the amount of the monetary penalty, the Secretary of Agriculture must "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." (15 U.S.C. § 1825(b)(1)).

[14]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture is authorized to adjust the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824. The maximum civil penalty for violations of the Horse Protection Act occurring in April 2009 was $2,200 (7 C.F.R. § 3.91(b)(2)(viii) (2009)).

As to disqualification, the Horse Protection Act further provides, as follows:

§ 1825. Violations and penalties

. . . .

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

In addition to any . . . civil penalty authorized under this section, any person . . . 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 . . . 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.

15 U.S.C. § 1825(c).

Jose's Flamingo Dancer Manifested Abnormal Bilateral Sensitivity

On April 16, 2009, Mr. Jenne, who, at all times material to this proceeding, was the trainer of Jose's Flamingo Dancer, presented Jose's Flamingo Dancer to Ricky McCammon, a Designated Qualified Person [DQP],[15] for inspection at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky (Tr. at 73-74; CX 2-CX 3). Mr. McCammon found Jose's Flamingo Dancer unilaterally sore (Tr. at 32-33; CX 4-CX 5) and then asked another DQP, Les Acree, to examine the horse. Mr. Acree also found Jose's Flamingo Dancer unilaterally sore (CX 7 at 1). Peter Kirsten, DVM, an Animal and Plant Health Inspection Service [APHIS] supervisory animal

[15]A DQP is a person meeting the requirements of 9 C.F.R. § 11.7 who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the United States Department of Agriculture and who 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 any records pertaining to such horses for the purpose of enforcing the Horse Protection Act (9 C.F.R. § 11.1).

care specialist, conducted a pre-show examination of Jose's Flamingo Dancer after the DQPs' examinations and found Jose's Flamingo Dancer reacted to palpation on both forelimbs (Tr. at 36-37).[16] Dr. Kirsten described his inspection of Jose's Flamingo Dancer, as follows:

> When I palpated the left pastern on the lateral aspect by the coronary band the horse reacted with a strong leg withdrawal. When I palpated the left pastern on the medial aspect about 2" proximal to the coronary band, anterior to the medial, the horse reacted with a strong leg withdrawal. When I palpated the right pastern, medial aspect, about 2" proximal to the coronary band there was a very strong leg withdrawal and when I palpated the lateral aspect of the right pastern about 2" proximal to the coronary band there was a strong leg withdrawal. All of these reactions previously described were consistent and repeatable. . . . I told [Mr. Jenne] we were going to prepare a government case for a two foot sore horse.

CX 7 at 1. Dr. Kirsten stated, in his professional opinion, Jose's Flamingo Dancer was sored by a person using chemical and/or physical means and Jose's Flamingo Dancer could reasonably be

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[16]Routinely, DQP examinations are found to be less probative than United States Department of Agriculture examinations and the Judicial Officer has accorded less credence to DQP examinations than to United States Department of Agriculture examinations. Oppenheimer (Decision as to Oppenheimer), 54 Agric. 221, 269 (U.S.D.A. 1995); Sparkman (Decision as to Sparkman and McCook), 50 Agric. Dec. 602, 610 (U.S.D.A. 1991); Edwards, 49 Agric. Dec. 188, 200 (U.S.D.A. 1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992). Mr. Jenne did not call the DQPs who examined Jose's Flamingo Dancer as witnesses or introduce any reports of the results of the DQPs' examinations of Jose's Flamingo Dancer. On the other hand, the Administrator called Dr. Kirsten as a witness. Dr. Kirsten testified extensively regarding his examination of Jose's Flamingo Dancer and his finding that Jose's Flamingo Dancer was bilaterally sore (Tr. at 26-67). In addition, the Administrator introduced Dr. Kirsten's affidavit which Dr. Kirsten prepared the day after his examination of Jose's Flamingo Dancer and which describes Dr. Kirsten's examination of Jose's Flamingo Dancer and the basis for his finding Jose's Flamingo Dancer bilaterally sore (CX 7). Further still, the Administrator introduced Dr. Kirsten's written report documenting his finding that Jose's Flamingo Dancer was bilaterally sore, an audio-visual recording of Dr. Kirsten's examination of Jose's Flamingo Dancer, and a thermography report of Jose's Flamingo Dancer (CX 6, CX 16A-CX 16B). After reviewing the record, I find no basis for deviating from my usual practice of according less credence to the DQP examinations and findings than to the United States Department of Agriculture examination and findings in this proceeding. I accord Dr. Kirsten's examination of, and findings regarding, Jose's Flamingo Dancer more credence than the DQPs' examinations of, and findings regarding, Jose's Flamingo Dancer.

expected to experience pain while moving (CX 7 at 1).

Pursuant to 15 U.S.C. § 1825(d), Jose's Flamingo Dancer must be presumed to be sore based upon Dr. Kirsten's finding that Jose's Flamingo Dancer manifested abnormal sensitivity in both of her forelimbs. Once the statutory presumption is established, the burden of persuasion shifts to the respondent to provide proof that the horse was not sore or that soreness was due to natural causes. The ALJ found that Mr. Jenne failed to present sufficient evidence to rebut the statutory presumption that Jose's Flamingo Dancer was sore when Mr. Jenne entered her in the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 16, 2009.

Mr. Jenne's Appeal Petition

Mr. Jenne raises two issues in his Appeal Petition. First, Mr. Jenne assigns error to the ALJ's determination that Mr. Jenne did not rebut the statutory presumption that Jose's Flamingo Dancer was sore. Mr. Jenne contends Dr. Kirsten's testimony was not credible. Further, Mr. Jenne submits his testimony that Jose's Flamingo Dancer was not sore rebuts the statutory presumption that Jose's Flamingo Dancer was sore, especially when his testimony is coupled with the results of Dr. Mullins' April 17, 2009, examination of Jose's Flamingo Dancer. (Mr. Jenne's Appeal Pet. ¶¶ 4-7 at 2).

Dr. Kirsten states in an affidavit prepared on April 17, 2009, the day after he examined Jose's Flamingo Dancer, that, during his examination, Mr. Jenne yelled at him (Dr. Kirsten) regarding the manner in which Dr. Kirsten was conducting his examination of Jose's Flamingo Dancer. Based on the audio-visual recording of Dr. Kirsten's examination of Jose's Flamingo Dancer (CX 16A), the ALJ found Dr. Kirsten had mistaken recall about Mr. Jenne's yelling during Dr. Kirsten's examination, and the ALJ held she was unable to entirely credit

Dr. Kirsten's testimony (ALJ's Decision and Order at 11).[17] However, the ALJ found "Dr. Kirsten's credibility regarding his examination findings is not tainted, as he took contemporaneous notes about the examination results, and based his conclusions upon those notes." (ALJ's Decision and Order at 11).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[18] The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
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> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall

[17]I also reviewed the audio-visual recording of Dr. Kirsten's April 16, 2009, examination of Jose's Flamingo Dancer and found no evidence that Mr. Jenne yelled at Dr. Kirsten during the examination.

[18]See also, Perry (Decision as to Perry and Perry's Wilderness Ranch & Zoo, Inc.), No. 05-0026, 2013 WL 8213618, at *6 (U.S.D.A. Sept. 6, 2013); KOAM Produce, Inc. (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470, 1474 (U.S.D.A. 2006); Southern Minnesota Beet Sugar Cooperative, 64 Agric. Dec. 580, 605 (U.S.D.A. 2005); Excel Corp., 62 Agric. Dec. 196, 244-46 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); McCloy, 61 Agric. Dec. 173, 210 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); Brandon (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 560 (U.S.D.A. 2001), *appeal dismissed sub nom.* Graves v. United States Dep't of Agric., No. 01-3956 (6th Cir. Nov. 28, 2001); Midland Banana & Tomato Co., 54 Agric. Dec. 1239, 1271-72 (U.S.D.A. 1995), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom.* Heimann v. Department of Agric., 522 U.S. 951 (1997).

> initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review*. . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[19]

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[19]Perry (Decision as to Perry and Perry's Wilderness Ranch & Zoo, Inc.), No. 05-0026, 2013 WL 8213618, at *7 (U.S.D.A. Sept. 6, 2013); KOAM Produce, Inc. (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470, 1476 (U.S.D.A. 2006); Bond (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1175, 1183 (U.S.D.A. 2006); G&T Terminal Packing Co., 64 Agric. Dec. 1839, 1852 (U.S.D.A. 2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006), *cert. denied*, 552 U.S. 814 (2007); Southern Minnesota Beet Sugar Cooperative, 64 Agric. Dec. 580, 608 (U.S.D.A. 2005); Excel Corp., 62 Agric. Dec. 196, 244-46 (U.S.D.A. 2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); McCloy, 61 Agric. Dec. 173, 210 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); Brandon (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (U.S.D.A. 2001), *appeal dismissed sub nom.* Graves v. United States Dep't of Agric., No. 01-3956 (6th Cir. Nov. 28, 2001); Sunland Packing House

Co., 58 Agric. Dec. 543, 602 (U.S.D.A. 1999); Zimmerman, 57 Agric. Dec. 1038, 1055-56 (U.S.D.A. 1998); Goetz, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); Saulsbury Enterprises (Order Denying Pet. for Recons.), 56 Agric. Dec. 82, 89 (U.S.D.A. 1997); Andershock's Fruitland, Inc., 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); White, 47 Agric. Dec. 229, 279 (U.S.D.A. 1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); King Meat Packing Co., 40 Agric. Dec. 552, 553 (U.S.D.A. 1981); Thornton (Remand Order), 38 Agric. Dec. 1425, 1426 (U.S.D.A. 1979); Unionville Sales Co. (Remand Order), 38 Agric. Dec. 1207, 1208-09 (U.S.D.A. 1979); Beech, 37 Agric. Dec. 869, 871-72 (U.S.D.A. 1978); National Beef Packing Co., 36 Agric. Dec. 1722, 1736 (U.S.D.A. 1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); Whaley, 35 Agric. Dec. 1519, 1521 (U.S.D.A. 1976); Davis, 35 Agric. Dec. 538, 539 (U.S.D.A. 1976); American Commodity Brokers, Inc., 32 Agric. Dec. 1765, 1772 (U.S.D.A. 1973); Dishmon, 31 Agric. Dec. 1002, 1004 (U.S.D.A. 1972); Sy B. Gaiber & Co., 31 Agric. Dec. 474, 497-98 (U.S.D.A. 1972); Romoff, 31 Agric. Dec. 158, 172 (U.S.D.A. 1972).

I have examined the record and find no basis to reverse the ALJ's determination that Dr. Kirsten's credibility regarding his examination findings is not tainted. Therefore, I reject Mr. Jenne's contention that the ALJ's credibility determination regarding Dr. Kirsten, is error.

As for Mr. Jenne's evidence that Jose's Flamingo Dancer was not sore when Mr. Jenne entered her in the Spring Jubilee Charity Horse Show on April 16, 2009, Mr. Jenne testified that, while Jose's Flamingo Dancer was "moving around" in response to palpation, she was doing so "more out of fear than anything else." (Tr. at 75). Mr. Jenne explained, at the time of the April 16, 2009, Spring Jubilee Charity Horse Show, Jose's Flamingo Dancer was only three years old, had never been off the farm, and had never been inspected for compliance with the Horse Protection Act. Mr. Jenne further testified that, in his opinion, Dr. Kirsten's inspection was very aggressive. Based upon Jose's Flamingo Dancer's reactions to Dr. Kirsten's inspection, including Jose's Flamingo Dancer's facial expressions, Mr. Jenne concluded Jose's Flamingo Dancer "was basically scared to death by Dr. Kirsten's inspection." (Tr. at 75).

The ALJ accorded full weight to Mr. Jenne's testimony and found reasonable his conclusion that Jose's Flamingo Dancer reacted to being physically manipulated in an unaccustomed manner by strangers in a strange place. However, the ALJ also found Mr. Jenne's conclusions about the cause of Jose's Flamingo Dancer's reactions speculative and not entitled to great weight (ALJ's Decision and Order at 13). I agree with the ALJ. The presumption of soreness must be rebutted by more proof than speculation about other natural causes for the reaction, even when the evidence proffered to rebut the presumption consists of a reasoned

medical opinion by a licensed veterinarian with experience in an equine practice.[20] Therefore, I reject Mr. Jenne's contention that his testimony that Jose's Flamingo Dancer was not sore is sufficient to rebut the presumption that Jose's Flamingo Dancer was sore at the time Mr. Jenne entered her in the Spring Jubilee Charity Horse Show on April 16, 2009.

Mr. Jenne also contends that, when coupled with the results of Dr. Mullins' examination of Jose's Flamingo Dancer, Mr. Jenne's testimony that Jose's Flamingo Dancer was not sore is sufficient to rebut the presumption that Jose's Flamingo Dancer was sore at the time Mr. Jenne entered her in the Spring Jubilee Charity Horse Show on April 16, 2009.

Mr. Jenne did not call Dr. Mullins as a witness, but testified that Dr. Mullins examined Jose's Flamingo Dancer the day after the Spring Jubilee Charity Horse Show (Tr. at 79). Dr. Mullins had prepared a statement regarding his April 17, 2009, examination of Jose's Flamingo Dancer; however, Mr. Jenne failed to offer the statement into evidence at the March 11, 2014, hearing. The ALJ held the record open to receive Dr. Mullins' statement (Tr. at 89-90, 186-87), and on March 28, 2014, Mr. Jenne submitted Dr. Mullins' statement, which the ALJ admitted to the record (RX 1). Dr. Mullins' statement describes his qualifications to conduct an examination to determine whether a horse is sore and the results of his April 17, 2009, examination of Jose's Flamingo Dancer, as follows:

> To Whom It May Concern:
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> > On Friday, April 17, 2009, at 7 AM CST, I was asked and did examine a filly named Joses [sic] Flamingo Dancer for trainer Justin Jenne. The filly was owned by David Mullis. I was asked to do a HPA examination of the horse.
> >
> > I am very familiar with HPA inspections and was the President of the

[20]Lacy, 66 Agric. Dec. 488 (U.S.D.A. 2007), *aff'd*, 278 Fed. App'x 616 (6th Cir. 2008).

> largest Horse Industry Organization (USDA HPA inspection organization) for 3 years. I am a 1980 graduate of Auburn University School of Veterinary Medicine and have predominately been in Equine Practice.
>
> The filly in question had been failed HPA inspections the previous night and I can in no way evaluate how the filly was the night before. However, on the day I examined her (less than 16 hours later), there was no indication that there was anything wrong with the filly and she definitely passed all HPA guidelines. The fillies [sic] appearance was very good. She led and turned very good and upon palpation of the fore pastern area she was unresponsive. The filly gave me no indication that she was "sore" or that she had been "sore".
>
> Sincerely,
>
> Dr. Stephen L. Mullins

RX 1. The ALJ credited Dr. Mullins' examination findings, and I have no basis upon which to disagree with the ALJ's credibility determination. However, Dr. Kirsten conducted his examination of Jose's Flamingo Dancer at approximately 8:40 p.m., on April 16, 2009, and Dr. Mullins conducted his examination at approximately 7:00 a.m., on April 17, 2009. As Dr. Mullins noted, he could not evaluate the condition of Jose's Flamingo Dancer at the Spring Jubilee Charity Horse Show on April 16, 2009, and I conclude Dr. Mullins' findings add little probative weight regarding that issue.[21]

Therefore, even when I couple Mr. Jenne's testimony with Dr. Mullins' examination findings, I do not find Mr. Jenne's evidence sufficient to rebut the presumption that Jose's Flamingo Dancer was sore at the time Mr. Jenne entered her in the Spring Jubilee Charity Horse Show on April 16, 2009.

Second, as an alternative to concluding that Mr. Jenne rebutted the statutory presumption

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[21]See, Thomas, 55 Agric. Dec. 800, 815 (U.S.D.A. 1996) (stating a horse may be found sore at one examination, but found not sore at a later examination, even when both examinations are conducted during the same horse show).

that Jose's Flamingo Dancer was sore, Mr. Jenne requests that I reduce the $2,200 civil penalty assessed by the ALJ and reduce the one year period of disqualification imposed by the ALJ. In support of this request, Mr. Jenne asserts he has no history of previous violations of the Horse Protection Act and he is unable to pay the civil penalty assessed by the ALJ. (Mr. Jenne's Appeal Pet. ¶ 9 at 3).

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 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 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200 (7 C.F.R. § 3.91(b)(2)(viii) (2009)). 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 one year for a first violation of the Horse Protection Act and not less than five years for any subsequent violation of the Horse Protection Act (15 U.S.C. § 1825(c)).

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.* (Decision as to Hickey and Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (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.

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.

The extent and gravity of Mr. Jenne's violation of the Horse Protection Act are great. Dr. Kirsten found palpation of Jose's Flamingo Dancer's forelimbs elicited consistent, repeatable pain responses and concluded Jose's Flamingo Dancer was sore (CX 7 at 1).

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[22] I have assessed less than the maximum civil penalty in cases in which the violator established an inability to pay the civil penalty.[23] However, I have consistently held the burden is on the respondent to come forward with evidence establishing an inability to pay the civil

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[22]Back, 69 Agric. Dec. 448, 463 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz (Decision as to Zahnd), 64 Agric. Dec. 1487, 1504 (U.S.D.A. 2005), *aff'd sub nom.* Zahnd v. Sec'y of Agric., 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1475 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 490 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, 61 Agric. Dec. 173, 208 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

[23]See, Clark (Decision as to Coleman), 59 Agric. Dec. 701, 711 (U.S.D.A. 2000) (wherein, based upon the respondent's evidence that she was unable to pay the $2,000 civil penalty assessed by the administrative law judge, the Judicial Officer assessed the respondent a $1 civil penalty).

penalty if the civil penalty is assessed,[24] and Mr. Jenne failed to present any evidence of his inability to pay a civil penalty at the March 11, 2014, hearing.

On September 8, 2014, Mr. Jenne filed a Petition to Reopen Hearing in which Mr. Jenne requests that the hearing be reopened to allow the introduction of evidence that Mr. Jenne is unable to pay a civil penalty and has no history of previous violations of the Horse Protection Act. On July 16, 2015, I denied Mr. Jenne's Petition to Reopen Hearing because Mr. Jenne could have adduced evidence of his inability to pay a civil penalty and his Horse Protection Act compliance history at the March 11, 2014, hearing. As Mr. Jenne failed to present any evidence indicating an inability to pay a civil penalty, I reject Mr. Jenne's contention that he is not able to pay a $2,200 civil penalty.

The Administrator, an administrative official charged with responsibility for achieving the congressional purpose of the Horse Protection Act, recommends assessment of the maximum civil penalty (Administrator's Post Hearing Brief at 12). Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed, I do not find a maximum civil penalty in this case to be inappropriate. Therefore, I assess Mr. Jenne the $2,200 civil penalty recommended by the Administrator.

The Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under 15 U.S.C. § 1825(b) may be disqualified from showing or exhibiting any horse and

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[24]Clark (Decision as to Coleman), 59 Agric. Dec. 701, 710 (U.S.D.A. 2000); Stepp, 57 Agric. Dec. 297, 318 (U.S.D.A. 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), *printed in* 58 Agric. Dec. 820 (U.S.D.A. 1999); Oppenheimer (Decision as to Oppenheimer), 54 Agric. Dec. 221, 321 (U.S.D.A. 1995); Armstrong, 53 Agric. Dec. 1301, 1324 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); Burks, 53 Agric. Dec. 322, 346 (U.S.D.A. 1994).

from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than one year for the first violation of the Horse Protection Act and for a period of not less than five 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 the purpose of the Horse Protection Act 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.[25]

The Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture consider 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.

[25]*See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1705-06.

The record contains no evidence that Mr. Jenne violated the Horse Protection Act prior to the violation that I conclude Mr. Jenne committed on April 16, 2009. 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 I have 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.[26]

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, I generally find necessary the imposition of at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

Circumstances in a particular case might justify a departure from this policy. Since, under the 1976 amendments, intent and knowledge are not elements of a violation, few circumstances warrant 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 does not lead me to conclude that an exception from the usual practice

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[26]Back, 69 Agric. Dec. 448, 464 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz (Decision as to Zahnd), 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. 2005), *aff'd sub nom.* Zahnd v. Sec'y of Agric., 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1476 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 492 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, 61 Agric. Dec. 173, 209 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

of imposing the minimum disqualification period for Mr. Jenne's violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

The Administrator's Appeal Petition

The Administrator raises four issues in the Administrator's Appeal Petition. First, the Administrator contends the ALJ erroneously expressed skepticism about the reliability of palpation as a method to determine whether a horse is sore (Administrator's Appeal Pet. ¶ II(A) at 4-5).

The ALJ states she is skeptical about the reliability of palpation as a method to determine whether a horse is sore (ALJ's Decision and Order at 12). The ALJ's doubt about the reliability of digital palpation does not conform to the Secretary of Agriculture's long-held position that digital palpation is a highly reliable method to determine whether a horse is sore:

> 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. 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. . . . .
>
> 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.

Beltz (Decision as to Zahnd), 64 Agric. Dec. 1487, 1511-12 (U.S.D.A. 2005), *aff'd sub nom.*

Zahnd v. Sec'y of Agric., 479 F.3d 767 (11th Cir. 2007) (footnote omitted).[27] However, despite personal doubt about the reliability of digital palpation, the ALJ adhered to the Secretary of Agriculture's policy, as follows:

> Despite my doubts, it is clear that the legal precedent demonstrates that for purposes of the HPA, Jose's Flamingo Dancer must be presumed to have been sore based upon the findings of a USDA VMO Kirsten's palpation.

ALJ's Decision and Order at 12-13. Thus, the ALJ followed the Secretary of Agriculture's policy regarding the reliability of palpation as a method to determine whether a horse is "sore" as that term is defined in the Horse Protection Act. While I do not adopt the ALJ's discussion of the ALJ's skepticism in this Decision and Order, I reject the Administrator's contention that the ALJ's discussion of her personal view of the reliability of digital palpation as a means to determine whether a horse is sore, is error.

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[27]See also, Bowtie Stables, LLC, 62 Agric. Dec. 580, 608-09 (U.S.D.A. 2003); Reinhart, 59 Agric. Dec. 721, 751 (U.S.D.A. 2000), *aff'd per curiam*, 39 Fed. Appx. 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003); Gray (Decision as to Cole), 55 Agric. Dec. 853, 878 (U.S.D.A. 1996); Thomas, 55 Agric. Dec. 800, 836 (U.S.D.A. 1996); Bennett, 55 Agric. Dec. 176, 180-81, 236-37 (U.S.D.A. 1996); Oppenheimer (Decision as to Oppenheimer), 54 Agric. Dec. 221, 309 (U.S.D.A. 1995); Armstrong, 53 Agric. Dec. 1301, 1319 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); Tuck (Decision as to Tuck), 53 Agric. Dec. 261, 292 (U.S.D.A. 1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); Bobo, 53 Agric. Dec. 176, 201 (U.S.D.A. 1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); Kelly, 52 Agric. Dec. 1278, 1292 (U.S.D.A. 1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); Sims (Decision as to Sims), 52 Agric. Dec. 1243, 1259-60 (U.S.D.A. 1993); Jordan (Decision as to Crawford), 52 Agric. Dec. 1214, 1232-33 (U.S.D.A. 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); Watlington, 52 Agric. Dec. 1172, 1191 (U.S.D.A. 1993); Crowe, 52 Agric. Dec. 1132, 1151 (U.S.D.A. 1993); Gray, 52 Agric. Dec. 1044, 1072-73 (U.S.D.A. 1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); Callaway, 52 Agric. Dec. 272, 287 (U.S.D.A. 1993); Brinkley (Decision as to Brown), 52 Agric. Dec. 252, 266 (U.S.D.A. 1993); Holt (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (U.S.D.A. 1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

Second, the Administrator contends the ALJ erroneously found that horses who wear chains of any weight may exhibit reactions to palpation (Administrator's Appeal Pet. ¶ II(B) at 6-7).

The ALJ states "[i]t is axiomatic that horses who are permitted to wear chains of any weight during training may exhibit reactions to the exertion of enough pressure to blanch the thumb, as Dr. Kirsten required." (ALJ's Decision and Order at 12). In support of the contention that the ALJ's statement is error, the Administrator quotes from a final rulemaking document published by APHIS which states the best evidence available to APHIS indicates that chains weighing 6 ounces or less are not likely to sore horses, as follows:

> One commenter stated that the reduction in chain weight from 10 ounces to 6 ounces has led to deeper soring of horses' pasterns, to enable the lighter chains to produce the desired, gait-enhancing, irritation. Another commenter recommended a 3-ounce limit on chain weight, but included no evidence to support that recommendation.
>
> We are making no changes to the regulations based on these comments. As we stated in our July 28 interim rule, we agree that the use of any action device on a pastern that is already sore will heighten the horse's discomfort. However, the best evidence available to us—including a study by Auburn University (discussed in our April 26 interim rule), as well as a Department study conducted at the National Veterinary Services Laboratories in Ames, Iowa in 1975—indicates that while chains and other action devices weighing more than 6 ounces can sore horses, those weighing 6 ounces or less are not likely to sore horses.

54 Fed. Reg. 7174, 7177 (Feb. 17, 1989).

As an initial matter, the conclusions described in the above-quoted final rulemaking document do not directly relate to the axiom referenced by the ALJ. APHIS' conclusions relate to the likelihood of horses being made "sore" as that term is defined in the Horse Protection Act; the axiom referenced by the ALJ relates to the possibility of any reaction to palpation. I find the

axiom referenced by the ALJ, whether accurate or not, is not relevant to this proceeding, and I do not adopt that axiom in this Decision and Order.

Third, the Administrator contends the ALJ erroneously found the failure to videotape DQP McCammon's examination of Jose's Flamingo Dancer casts doubt on Dr. Kirsten's examination of Jose's Flamingo Dancer (Administrator's Appeal Pet. ¶ II(C) at 7-8).

Prior to Dr. Kirsten's April 16, 2009, examination of Jose's Flamingo Dancer, two DQPs, Mr. McCammon and Mr. Acree, examined Jose's Flamingo Dancer. Mr. Acree's examination of Jose's Flamingo Dancer was videotaped; Mr. McCammon's examination of Jose's Flamingo Dancer was not videotaped.

The ALJ did not find the failure to videotape Mr. McCammon's examination of Jose's Flamingo Dancer casts doubt on Dr. Kirsten's examination of Jose's Flamingo Dancer, as the Administrator contends. Instead, the ALJ states the failure to videotape Mr. McCammon's examination of Jose's Flamingo Dancer "casts suspicion upon the audio-visual evidence and Dr. Kirsten's conclusions about the DQP findings." (ALJ's Decision and Order at 12). Therefore, I find the Administrator's assignment of error has no merit.

Fourth, the Administrator contends the ALJ erroneously concluded that Dr. Kirsten did little more than guess as to the cause of Jose's Flamingo Dancer's soreness (Administrator's Appeal Pet. ¶ II(D) at 8-9).

The ALJ states Dr. Kirsten did little more than hazard a guess about the cause of Jose's Flamingo Dancer's soreness, as follows:

> Further, Dr. Kirsten did little more than hazard a guess about the cause of the animal's soreness, testifying that it was made sore by either mechanical or chemical means. Tr. at 53. In my experience, such speculative opinions by

> experts without reliable scientific proof would be accorded little probative weight, if found admissible at all.

ALJ's Decision and Order at 12.

Dr. Kirsten is a veterinarian who received his degree in veterinary medicine from Michigan State University in 1975 (Tr. at 27). Dr. Kirsten practiced veterinary medicine for 13 years prior to being hired by APHIS as a veterinary medical officer (Tr. at 28). Prior to Dr. Kirsten's April 16, 2009, examination of Jose's Flamingo Dancer, APHIS promoted Dr. Kirsten to "supervisory animal care specialist" (Tr. at 28). Thus, at the time Dr. Kirsten identified the cause of the painful areas he located on Jose's Flamingo Dancer's forelimbs, he had been a veterinarian for 34 years and had worked for APHIS as a veterinary medical officer and supervisory animal care specialist for 21 years. Dr. Kirsten prepared an affidavit on April 17, 2009, the day after he examined Jose's Flamingo Dancer to determine whether she was sore. Dr. Kirsten states in that affidavit, as follows:

> It is my professional opinion that this horse was sored by a person by chemical and/or physical means and could reasonably be expected to experience pain while moving.

CX 7 at 1. Similarly, Dr. Kirsten testified that, based upon his examination of Jose's Flamingo Dancer, he concluded Jose's Flamingo Dancer had been sored by mechanical or chemical means (Tr. at 53). I find no evidence in the record indicating that Dr. Kirsten did little more than hazard a guess about the cause of Jose's Flamingo Dancer's soreness. Instead, I find Dr. Kirsten's determination of the cause of Jose's Flamingo Dancer's soreness is, as he states in his affidavit, a "professional opinion" formed in light of Dr. Kirsten's experience and qualifications as a veterinarian, an APHIS veterinary medical officer, and an APHIS supervisory

animal care specialist and based on his examination of Jose's Flamingo Dancer on April 16, 2009. Therefore, I do not adopt the ALJ's finding that Dr. Kirsten did little more than hazard a guess about the cause of Jose's Flamingo Dancer's soreness.

Findings of Fact

1. Mr. Jenne is a resident of Tennessee.

2. Mr. Jenne owns and operates Justin Jenne Stables, also known as Justin Jenne Stables at Frazier and Frazier Farms.

3. At all times material to this proceeding, Mr. Jenne was the trainer of Jose's Flamingo Dancer.

4. On April 16, 2009, Mr. Jenne entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer.

5. On April 16, 2009, Mr. Jenne presented Jose's Flamingo Dancer for inspection at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, after training the horse for more than one year.

6. On April 16, 2009, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, two DQPs, Mr. McCammon and Mr. Acree, examined Jose's Flamingo Dancer and each found Jose's Flamingo Dancer unilaterally sore.

7. Dr. Kirsten, an APHIS supervisory animal care specialist, inspected horses participating in the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 16, 2009, for compliance with the Horse Protection Act.

8. On April 16, 2009, Dr. Kirsten conducted a pre-show examination of Jose's

Flamingo Dancer at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, and found Jose's Flamingo Dancer manifested abnormal bilateral sensitivity in response to his palpation of her forelimbs. Dr. Kirsten found that Jose's Flamingo Dancer's reactions to his palpation of her forelimbs were consistent and repeatable.

9. Dr. Kirsten's April 16, 2009, examination of Jose's Flamingo Dancer was videotaped.

10. Based upon his April 16, 2009, examination of Jose's Flamingo Dancer, Dr. Kirsten concluded Jose's Flamingo Dancer was "sore" within the meaning of the Horse Protection Act.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On the basis of the evidence in the record, I conclude Jose's Flamingo Dancer was "sore," as that term is defined in the Horse Protection Act, when entered on April 16, 2009, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.

3. On April 16, 2009, Mr. Jenne entered Jose's Flamingo Dancer as entry number 107, class number 16, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, for the purpose of showing or exhibiting Jose's Flamingo Dancer while Jose's Flamingo Dancer was sore, in violation of 15 U.S.C. § 1824(2)(B).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Jenne 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:

USDA APHIS General
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Jenne's payment of the civil penalty shall be forwarded to, and received by, APHIS within six months after service of this Order on Mr. Jenne. Mr. Jenne shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 13-0080.

2. Mr. Jenne is disqualified for a period of one uninterrupted 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 Mr. Jenne shall become effective on the day after the period of disqualification imposed on Mr. Jenne in *Jenne*, No. 13-0308, 2015 WL 1776433 (U.S.D.A. Apr. 13, 2015), concludes.

RIGHT TO JUDICIAL REVIEW

Mr. Jenne has the right to obtain judicial review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which Mr. Jenne resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit.

Mr. Jenne must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of the notice of appeal by certified mail to the Secretary of Agriculture.[28] The date of the Order in this Decision and Order is July 17, 2015.

Done at Washington, DC

July 17, 2015

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William G. Jenson
Judicial Officer

[28]15 U.S.C. § 1825(b)(2), (c).