UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 99-0034
	)	
Jackie McConnell, an individual;	)	
Cynthia McConnell, an individual;	)	
and Whitter Stables, a partnership or	)	
unincorporated association,	)	
	)	
Respondents	)	**Decision and Order**

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 7, 1999. 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: (1) on or about August 26, 1998, Jackie McConnell, Cynthia McConnell, and Whitter Stables [hereinafter Respondents] shipped a horse known as "Regal By Generator" to the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse,

while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)); and (2) on or about September 3, 1998, Respondents entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶¶ 11-12).[1]

On October 4, 1999, Cynthia McConnell and Whitter Stables filed "Motion to Stay and Answer of Cynthia McConnell" and Jackie McConnell filed "Motion to Stay and Answer of Jackie McConnell" in which Respondents denied the material allegations of the Complaint.

Administrative Law Judge Dorothea A. Baker presided at a hearing in Memphis, Tennessee, on August 8, 2000, through August 10, 2000, and March 12, 2002, through March 15, 2002. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Lee Ann Rickard of Steen,

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[1]Complainant also alleged Raymond F. Akin, Lillie Akin, Camille C. Akin, Mark A. Akin, and Akin Equine Veterinary Services violated the Horse Protection Act (Compl. ¶ 13). Four of these respondents, Raymond F. Akin, Camille C. Akin, Mark A. Akin, and Akin Equine Veterinary Services, entered into consent decisions with Complainant. *In re Jackie McConnell* (Consent Decision as to Raymond F. Akin), 59 Agric. Dec. 831 (2000); *In re Jackie McConnell* (Consent Decision as to Mark A. Akin, Camille C. Akin, and Akin Equine Veterinary Services), 59 Agric. Dec. 832 (2000). Further, Lillie Akin was dismissed as a respondent. *In re Jackie McConnell* (Consent Decision as to Raymond F. Akin), 59 Agric. Dec. 831 (2000). On May 12, 2003, Administrative Law Judge Jill S. Clifton amended the case caption to omit references to the "Akin" respondents (Order Amending Case Caption).

Reynolds & Dalehite, Jackson, Mississippi, represented Jackie McConnell. Mike R. Wall, Oxford, Mississippi, represented Cynthia McConnell and Whitter Stables.[2]

On July 22, 2002, Complainant filed three separate proposed findings of fact and proposed conclusions of law, one for each of the three Respondents.[3] On October 17, 2002, Jackie McConnell filed proposed findings of fact and conclusions of law. On October 25, 2002, Cynthia McConnell and Whitter Stables filed "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof." On December 19, 2002, Jackie McConnell filed "Respondent Jackie McConnell's Response to Complainant's Proposed Findings of Fact and Conclusions of Law," and Complainant filed "Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Jackie McConnell." On December 24, 2002, Cynthia McConnell and Whitter Stables filed "Respondent's [sic] Cynthia McConnell and Whitter Stables Reply Brief." On January 8, 2003, Complainant filed "Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Cynthia McConnell" and

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[2]On February 10, 2004, Lee Ann Rickard withdrew as counsel for Jackie McConnell and Mike R. Wall was substituted as counsel for Jackie McConnell (Notice of Withdrawal and Substitution of Counsel for Respondent Jackie McConnell).

[3]"Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Jackie McConnell"; "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Cynthia McConnell"; and "Complainant's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof as to Respondent Whitter Stables."

"Complainant's Reply to Proposed Findings of Fact and Conclusions of Law Filed by Respondent Whitter Stables."

On November 25, 2003, Administrative Law Judge Jill S. Clifton[4] [hereinafter the ALJ] issued a "Decision" [hereinafter Initial Decision]: (1) concluding that, on September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (2) concluding that, on or about August 23, 1998, through August 26, 1998, Cynthia McConnell and Whitter Stables shipped, transported, moved, and delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)); (3) concluding that, on or about September 2, 1998, through September 3, 1998, Cynthia McConnell and Whitter Stables entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C.

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[4]Administrative Law Judge Dorothea A. Baker retired from federal service, and former Chief Administrative Law Judge James W. Hunt assigned the proceeding to Administrative Law Judge Jill S. Clifton effective January 9, 2003, for a decision (Notice of Case Reassignment).

§ 1824(2)(B)); (4) assessing Jackie McConnell a $2,200 civil penalty; (5) assessing Cynthia McConnell and Whitter Stables a $2,200 civil penalty; (6) disqualifying Jackie McConnell from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction for 5 years; and (7) disqualifying Cynthia McConnell and Whitter Stables from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction for 1 year (Initial Decision at 39-41).

On December 19, 2003, Complainant appealed to the Judicial Officer. On December 24, 2003, Respondents appealed to, and requested oral argument before, the Judicial Officer. On January 22, 2004, Complainant filed responses to Respondents' appeal petitions. On January 30, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Respondents' request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused, because Respondents and Complainant have thoroughly addressed the issues. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision, except that I find Whitter Stables is merely a name under which Cynthia McConnell does business and that I increase the sanction imposed against Cynthia McConnell. Therefore, except for the ALJ's findings, conclusions, and sanction

regarding Whitter Stables, the sanction imposed on Cynthia McConnell, and minor modifications, I adopt the Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion, as restated.

Complainant's exhibits are designated by "CX." Respondents' exhibits are designated by "RX." Transcript references are designated by "Tr. I" for the August 2000 segment of the hearing and "Tr. II" for the March 2002 segment of the hearing.

APPLICABLE STATUTORY AND REGULATORY 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:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, horse sale, or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or the employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(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(1)-(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI—PARTICULAR PROCEEDINGS

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CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment.

Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

28 U.S.C. § 2461 note.

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general*. The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*– . . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of $2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as "Webster's."

. . . .

Exhibitor means (1) any person who enters any horse, any person who allows his horse to be entered, or any person who directs or allows any horse in his custody or under his direction, control or supervision to be entered in any horse show or horse exhibition; (2) any person who shows or exhibits any horse, any person who allows his horse to be shown or exhibited, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be shown or exhibited in any horse show or horse exhibition; (3) any person who enters or presents any horse for sale or auction, any person who allows his horse to be entered or presented for sale or auction, or any person who allows any horse in his custody or under his direction, control, or supervision to be entered or presented for sale or auction in any horse sale or horse auction; or (4) any person who sells or auctions any horse, any person who allows his horse to be sold or auctioned, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be sold or auctioned.

. . . .

Horse Exhibition means a public display of any horses, singly or in groups, but not in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

. . . .

Horse Industry Organization or Association means an organized group of people, having a formal structure, who are engaged in the promotion of horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the horse.

. . . .

Horse Show means a public display of any horses, in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

Inspection means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

. . . .

Person means any individual, corporation, company, association, firm, partnership, society, organization, joint stock company, or other legal entity.

. . . .

Sore when used to describe a horse means:

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

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

(3) 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

(4) 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.

9 C.F.R. § 11.1.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Jackie McConnell and Cynthia McConnell are husband and wife, whose mailing address is 125 Valleywood, Collierville, Tennessee 38017. During all times relevant to this proceeding, Jackie McConnell and Cynthia McConnell held valid horse trainers' licenses. Cynthia McConnell is the owner of an unincorporated business known as "Whitter Stables" which has a mailing address of P.O. Box 205, Collierville, Tennessee 38027. Whitter Stables is a horse training facility for the care and training of Tennessee Walking Horses. Jackie McConnell and his business, Jackie McConnell Stables, buy and sell horses (Tr. II at 728-29). At the time of the alleged violations, Jackie McConnell Stables and Whitter Stables were situated on the same real estate.

Sanctions have been imposed on Jackie McConnell under the Horse Protection Act on three occasions: as the result of two consent decisions, where Jackie McConnell did not admit to violating the Horse Protection Act, a civil monetary penalty twice and a

6-month period of disqualification twice; and, in a case heard on the merits, a $2,000 civil penalty and a 2-year period of disqualification (CX 17).[5]

Whitter Stables employed several professional trainers, including Jackie McConnell, to train horses under its care (Tr. II at 419-22). In 1998, Whitter Stables boarded and trained a horse known as "Regal By Generator." The horse is female and was 9 years old at the time of the alleged violations (CX 9). The owners of Regal By Generator wanted to have her entered in the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (CX 10).

Cynthia McConnell engaged an independent contractor on August 23, 1998, to transport horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration, and on or about September 2, 1998, Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 in the 1998 Tennessee Walking Horse National Celebration (Tr. I at 284; Tr. II at 124-25, 130, 180; CX 4, CX 7). In addition to the evidence presented by Complainant, Cynthia McConnell testified that she personally participated in the act of entering Regal By Generator in the 1998 Tennessee Walking Horse National Celebration (Tr. II at 141-42).

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[5]*In re Jackie McConnell*, 52 Agric. Dec. 1156 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re Rose Day* (Consent Decision as to Jackie McConnell), 47 Agric Dec. 1756 (1988); *In re Jackie McConnell*, 44 Agric. Dec. 712 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992).

Cynthia McConnell testified that her business, Whitter Stables, was a sole proprietorship and that her husband, Jackie McConnell, was merely a salaried employee of Whitter Stables and had no business interest in Whitter Stables (Tr. II at 113, 115-16, 125, 138-39). Cynthia McConnell testified about her interest in Whitter Stables and Jackie McConnell's relationship to Whitter Stables, as follows:

BY MR. WALL:

Q. Before we proceed on with any other documents, let me ask some questions about Whitter Stables.

[BY MS. McCONNELL:]

A. Yes, sir.

Q. It was formed in 1994?

A. Yes, sir.

Q. Why did you form Whitter Stables at that time?

A. Jackie was going on suspension and I decided to go in and take over the business and run it myself.

Q. How long have you been in the walking horse business?

A. Probably 31 or 32 years.

Q. All right. So in 1994 it would have been 23 or 24 years you had been in the business in some form or fashion?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. When you opened up Whitter Stables, did you in fact take over the business?

A. Yes, sir.

Q. Have you maintained that business to this day?

A. Yes, sir.

. . . .

Q. What's entailed in running Whitter Stables? What are your job responsibilities just for running Whitter Stables?

A. Well, we take care of Tennessee walking horses for show, but when a horse is brought to me, I am solely responsible for the shoeing, the bedding, the feeding, the grooming, the employees. Anything that has to be done with them, I do it.

Q. You being Cyndi McConnell?

A. Cyndi McConnell.

Q. Do you have employees that work for you?

A. Yes, sir.

Q. Do you have trainers that work for you?

A. Yes, sir.

Q. There's been a document – I don't know that the deed was introduced into evidence where you and Jackie purchased some land in Fayette County.

A. Yes, sir.

Q. Who is paying that bill?

A. I am.

Q. And what account do you use to pay that bill?

A. Whitter Stables.

Q. And once again, does Jackie McConnell have any interest at all in Whitter Stables?

A. No, sir.

. . . .

Q. How is Jackie McConnell compensated by Whitter Stables?

A. I pay him.

Q. Do you pay him a commission, do you pay him a monthly salary, how do you pay him?

A. I pay him a monthly salary.

Q. All right. Are you all in any type of partnership?

A. It's Whitter Stables. I'm the sole proprietor.

Q. Other than Whitter Stables, are you and Jackie in a partnership?

A. No, sir.

Q. Okay. Did Jackie McConnell have anything to do with hauling Regal by Generator to the 1998 Celebration?

A. No, sir.

. . . .

Q. What activities did Jackie McConnell have to do with getting Regal by Generator from Fayette County, Tennessee to the celebration?

A. He didn't.

Q. What activities or responsibilities did Jackie McConnell have in getting Regal by Generator eligible to show at the celebration?

A. He didn't.

Tr. II at 135-40.

Complainant offered evidence in an attempt to show that Whitter Stables was not a sole proprietorship but was, in fact, a general partnership between Cynthia McConnell and Jackie McConnell. Specifically, Complainant offered: (1) the affidavit of Camille C. Akin tending to show that people who do business with Whitter Stables had a belief that Jackie McConnell was part owner of Whitter Stables (CX 10); (2) a paid advertisement in a horse show magazine showing Sarah Akin riding Regal By Generator which also indicated that Jackie McConnell was a "manager" at Whitter Stables (CX 11); (3) a paid advertisement in a horse show magazine indicating that Jackie McConnell was getting the major credit for work done by Whitter Stables (CX 28); (4) an article from a horse show magazine which mentioned "Jackie McConnell's Whitter Stables" tending to show that Jackie McConnell was believed by the horse show industry to be more than just an employee (CX 29); (5) a recorded warranty deed from Fayette County, Tennessee, dated December 28, 1989, showing the land occupied by Whitter Stables was titled in joint ownership by Jackie McConnell and Cynthia McConnell; and (6) a copy of a Fayette County, Tennessee, real property tax receipt dated November 20, 1998, for the same property tending to show that the tax was paid by check by Jackie McConnell (CX 1).

Animal and Plant Health Inspection Service [hereinafter APHIS] investigator James Odle tried to recall at the hearing the basis for his opinion that Jackie McConnell "owned" Whitter Stables (Tr. I at 450-54, 560-61). Complainant contends, during the time of the alleged violations of the Horse Protection Act, Jackie McConnell had an ownership stake (a general partnership interest) in Whitter Stables because Whitter Stables occupied the same real estate, used the same physical facilities, had some of the same clients, and employed some of the same employees as Jackie McConnell Stables (Tr. II at 415-17, 437-39). James Odle stated he "knew" Whitter Stables was owned by both Jackie McConnell and Cynthia McConnell and he was "convinced" that Jackie McConnell was the trainer of Regal By Generator (Tr. I at 607-08, 684).

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

At the pre-show inspection on September 3, 1998, John Michael Guedron, a doctor of veterinary medicine, an APHIS veterinary medical officer, and an experienced examiner of Tennessee Walking Horses, inspected Regal By Generator. Dr. Guedron observed Regal By Generator's movements and examined the horse's front legs and feet. Dr. Guedron testified that he prepared a report of his examination that same day (by

completing portions of APHIS Form 7077) and prepared an affidavit the following day (Tr. I at 52-54; CX 9).

In their affidavits and on APHIS Form 7077, Dr. Guedron and Dr. Peter R. Kirsten, also an experienced doctor of veterinary medicine and an APHIS veterinary medical officer, described Regal By Generator's pain responses during their inspections (CX 9). Dr. Guedron stated in his affidavit:

> I began my physical exam on the left leg and foot and elicited strong, consistent and repeatable pain responses - as evidenced by the horse forcefully withdrawing its foot and rearing its head - to digital palpation of the anterior aspect of the pastern, approximately 1-2 inches above the coronary band, and the lateral aspect just above the coronary band. I also noted several thick, firm, abraded ridges of tissue on the posterior pastern that extended onto the medial and lateral aspects of the pastern. I continued with the right leg and foot and elicited the same consistent and repeatable pain responses to digital palpation of the medial, anterior, and lateral aspects of the pastern above the coronary band. In addition, there were several firm, raised red "button lesions" noted in the sulcus or "pocket" of the posterior pastern.

CX 9 at 2-3.

Dr. Guedron testified that the lesions and sensitivity to pain by Regal By Generator would have existed prior to the pre-show examination, as follows:

> [BY MS. CARROLL:]
>
> Q. Now, in paragraph 4 of page 2, it states: "As evidenced by the horse forcefully withdrawing its foot and rearing its head."
>
> What does rearing its head indicate, if anything, to you?

[BY DR. GUEDRON:]

A. The rearing of the head was in conjunction with withdrawal of the foot which would indicate that the horse was trying to remove its foot and leg from my grasp to avoid the painful sensations that I was eliciting through palpation.

Q. At the end of that paragraph which continues on page 3 of Exhibit 9, it says:

> "I continued with the right leg and foot and elicited the same consistent and repeatable pain response to digital palpation of the medial, anterior, and lateral aspects of the pastern above the coronary band."

Are those depicted anywhere else in this exhibit?

A. Yes, they are depicted in the schematics under block 31 on the APHIS Form 7077.

Q. And what were those consistent and repeatable pain responses you are describing in here?

A. There was a forcible withdrawal of the leg in conjunction with the rearing of the head.

Q. And the last sentence of that paragraph says:

> "There were several firm, raised, red 'button lesions' noted in the sulcus or 'pocket' of the posterior pastern."

Where, if anywhere, are those noted on the documentation?

A. Again, they are noted under block 31 on the APHIS Form 7077.

Q. What is the sulcus or pockets?

A. That is the posterior or back of the pastern, that area in the center is commonly referred to as the sulcus or the pocket pastern.

Q. Do you have an opinion whether this horse was in pain during your examination?

A. Yes, I do.

Q. What is that opinion?

A. My opinion is the horse was in pain.

Q. And what is the basis for that opinion?

A. The locomotion of the horse as well as the response to digital palpation.

Q. What did the locomotion tell you that led you to believe that the horse was in pain?

A. Locomotion indicates to me that the horse didn't want to place the normal amount of weight carried by the front feet on its front feet due to the painful condition.

Q. How was that indicated?

A. By the horse being back on its rear feet, having its weight back on its rear feet, its rear feet further up underneath the horse’s body to support more of the weight.

Q. And in locomotion?

A. As it walked and as it stood, yes.

Q. And did you note that anywhere in your documentation?

A. I noted under block 31 on the APHIS Form 7077 a description to the right that the horse led and turned around the cone and that same description is in my affidavit, paragraph 4.

Q. What does that say?

A. That the horse led slowly and had difficulty turning around the cone.

Q. Do you have an opinion as to whether this horse would have been in pain if it had been exhibited after your examination?

A. Yes, I do.

Q. And what is that opinion?

A. I believe it would have been in pain.

Q. And what is the basis for that opinion?

A. Again, the basis for that opinion is the painful responses that I elicited upon my physical exam through digital palpation in conjunction with my observation of its locomotion and its stance would indicate to me that if this horse under saddle was forced to suffer concussive forces on its front feet that he would indeed experience pain.

Q. Do you have an opinion as to whether the conditions of this horse's posterior pasterns would have existed previously? That is before the date of your examination.

A. Yes, I believe these conditions would have taken, as I stated before, weeks to become that severe.

Tr. I at 70-73.

At the conclusion of his examination of Regal By Generator, Dr. Kirsten signed APHIS Form 7077 (CX 9; Tr. I at 302). In his affidavit, Dr. Kirsten described both his inspection and Dr. Guedron's inspection of Regal By Generator, as follows:

I then observed Dr. Guedron examine the horse. He elicited a painful response to palpation, evidenced by a strong leg withdrawal, when he palpated the lateral bulb of the left foot extending around the lateral aspect to the anterior of the pastern. There also was a response to palpation on the right foot from medial to lateral extending across the anterior of the pastern, evidenced by a strong leg withdrawal.

I then palpated the horse and got a strong leg withdrawal when I palpated the lateral and anterior aspect of the left pastern, and a mild leg

> withdrawal when I palpated the anterior and medial aspect of the right pastern. These responses were consistent and repeatable. I also observed that this horse had his rear legs tucked under. I also observed button lesions on the posterior of the right pastern and raised and thickened ridges on the posterior of the left pastern. . . .
>
> Dr. Guedron and I conferred and agreed on our findings. Dr. Guedron notified the custodian that we intended to write a government case on the horse.

CX 9 at 4-5.

Dr. Kirsten testified that the lesions and sensitivity to pain by Regal By Generator would have existed prior to the pre-show examination, as follows:

> [BY MS. CARROLL:]
>
> Q. What is your opinion, Dr. Kirsten, as to the length of time that it would take for a normal pastern to develop the abraded ridges and button lesions that you have just described?
>
> [BY DR. KIRSTEN:]
>
> A. My opinion is that it would occur chronically over a longer period of time. This is not, in my opinion, an acute suddenly onset lesion. It would be chronic and I would not give you a length of time. I don't have an opinion on that.
>
> Q. It would not have occurred overnight?
>
> A. It would not.
>
> . . . .
>
> Q. And what is the basis for your opinion?
>
> A. The granulomatous lesion is, in my opinion, the response to chronic inflammation, chronic irritation.

Q. And is that the same for -- are you speaking of the button lesions or the ridges?

A. To both.

Q. And how does a granulomatous condition occur?

A. As a result of chronic, repeated inflammation or irritation.

Q. Do you have an opinion as to what the cause was of this condition on this horse?

. . . .

Q. Do you have an opinion?

A. That these lesions were caused by chemicals and/or mechanical devices.

Q. What is the basis for your opinion?

. . . .

THE WITNESS: This is my professional opinion as an inspector with the U. S. Department of Agriculture, Animal and Plant Health Inspection Service, Animal Care.

Q. Dr. Kirsten, do you have an opinion as to whether this horse would have been in pain?

. . . .

MS. CARROLL: If it had been exhibited following your examination?

. . . .

THE WITNESS: My opinion is that the horse would have been in pain if exhibited following my inspection, yes.

Q. What is the basis for your opinion?

A. The basis for my opinion is based upon my inspection of the horse, my observation of its movements and appearance and the results of my digital palpation.

Q. Dr. Kirsten, do you have an opinion as to a cause of the pain you elicited on the areas marked as X's in item 31?

. . . .

Q. Do you have an opinion?

A. Could you repeat the question, please?

Q. Do you have an opinion as to the cause of the responses of this horse that you elicited in the areas identified on item 31 in Exhibit 9, page 1?

A. My opinion is that a person applied chemicals and/or mechanical devices to the pasterns of this horse's feet in order to inflict pain and distress to this animal.

Q. What is the basis for your opinion?

A. The basis for my opinion is my professional experience as a veterinarian and my training and experience as an animal care VMO working the Horse Protection Act program for 11 years. Nine years at the time of this inspection.

Tr. I at 316-19.

James Odle was present in the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration. He completed a portion of APHIS Form 7077. (Tr. I at 429.) Mr. Odle told Jackie McConnell that Regal By Generator was "excused" from the horse show and that further information would be required (Tr. I at 430). Mr. Odle testified about his recollection of his encounter with Jackie McConnell on September 3, 1998, as follows:

[BY MR. ODLE:]

A. Well, I remember on the evening that Mr. McConnell presented the horse for inspection and upon completion of the DQP examination and inspection by the USDA veterinarians, they alleged that the horse was sore in violation of the Horse Protection Act and we had this form prepared and I approached Mr. Jackie McConnell for the information to complete the form, explained the allegations and told him that he could excuse the horse and come back and give me the information at which time he told me that Cyndi would come, his wife, Mrs. McConnell would come and give me the information.

Tr. I at 430.

Cynthia McConnell was not present when Regal By Generator was inspected on September 3, 1998 (Tr. II at 150-51).

Respondents presented no evidence to refute the testimony and documentation of Drs. Guedron and Kirsten, except to show that Regal By Generator had successfully completed three pre-show inspections and at least one post-show inspection during the 1998 Tennessee Walking Horse National Celebration.

Discussion

I. Constitutional and Administrative Law Issues

A. Respondents Did Not Prove the Existence of an Agreement Between APHIS and the National Horse Show Commission

A significant portion of the testimony was devoted to an alleged agreement between APHIS and the National Horse Show Commission. Respondents contend there was an agreement, known throughout the Tennessee Walking Horse industry, that, if the National Horse Show Commission imposed an appropriate penalty for a Horse Protection

Act violation, APHIS would not institute an administrative proceeding under the Horse Protection Act (Tr. II at 370).

Cynthia McConnell believed, if she accepted an 8-month suspension and paid a $500 fine to the National Horse Show Commission for her violations of the Horse Protection Act related to the entry of Regal By Generator in the 1998 Tennessee Walking Horse National Celebration, APHIS would not initiate a proceeding for the same violations. Cynthia McConnell testified she completed the National Horse Show Commission suspension on May 5, 1999, and paid the $500 fine. (Tr. II at 156-57, 166-71.)

Respondents provided evidence of the agreement between APHIS and the National Horse Show Commission through National Horse Show Commission executive vice president, Lonnie Messick (Tr. II at 362, 389, 395-96), and through National Horse Show Commission attorney, Craig Evans (Tr. II at 296-97).

Lonnie Messick testified he heard Dr. Ronald DeHaven, Acting Associate Administrator of APHIS, talk to horse owners and horse trainers about the agreement between APHIS and the National Horse Show Commission regarding a Horse Industry Organization penalty in lieu of the APHIS penalty (Tr. II at 403).

Respondents asserted the agreement between APHIS and the National Horse Show Commission was not in writing (Tr. II at 297). To demonstrate the parameters of the oral agreement, Respondents' witness, Craig Evans, described one occasion, where another horse trainer, Bill Barnett, asked Dr. Dehaven if he could have the agreement in writing

"that if he accepted [the National Horse Show Commission penalty] . . . there would be no Federal initiation of a complaint. And I carried that to Dr. DeHaven and he responded that what he said was enough. And it was." (Tr. II at 298.)

Complainant's witness, Dr. Ronald DeHaven, testified that "there was no specific agreement between APHIS, the agency, and any of the [Horse Industry Organizations]" (Tr. II at 962). Dr. DeHaven's version of APHIS' position was that "I made it known through discussions and meetings with industry, that included the National Horse Show Commission, but as well as others, that we would certainly consider penalties imposed by a [Horse Industry Organization] in exercising our prosecutorial [discretion]. There was no agreement per se." (Tr. II at 963.) Dr. DeHaven stated a proposed "Strategic Plan" did include terms concerning non-enforcement by APHIS if certain criteria were met; however, he also stated "[the proposed Strategic Plan] was rejected by all but one of the certified [Horse Industry Organizations]. So that constituted no agreement. So, again, to the best of my recollection, there was nothing official put out by [APHIS] . . . that would have made that kind of commitment." (Tr. II at 964.) Dr. DeHaven believed that he committed APHIS to the extent that "[APHIS] would in its exercising prosecutorial discretion, would certainly take such an industry penalty into consideration. And that would be a significant factor." (Tr. II at 966.) He stated "I had no specific agreement with Craig Evans." (Tr. II at 968.) In response to a hypothetical question, Dr. DeHaven described the various factors that would have been considered as to whether APHIS would have instituted an administrative proceeding instead of allowing a Horse Industry

Organization to administer a penalty for a violation of the Horse Protection Act. Dr. DeHaven said the factors would be the timing of the penalty, the involvement of other persons in the violations, and the backdating of the suspension (Tr. II at 1028).

Proof of an agreement between APHIS and the National Horse Show Commission is lacking, even accepting all the testimony as credible, because there was no meeting of the minds. Even if I were to assume arguendo that there was an oral agreement, APHIS retained prosecutorial discretion to institute administrative proceedings based on several factors, including, most relevant here – the involvement of parties other than the party who is subject to a Horse Industry Organization penalty.

Jackie McConnell is a party well known to APHIS and believed by the APHIS investigator to have been involved with the soring of horses on other occasions over a long period of time. When APHIS found evidence of the soring of Regal By Generator during the 1998 Tennessee Walking Horse National Celebration pre-show inspection, it is reasonable that APHIS would not be content to forgo instituting an administrative proceeding against Jackie McConnell as one of the alleged offenders, but would instead present a case against all alleged offenders.

During cross-examination, Dr. Guedron stated he told Jackie McConnell at the pre-show inspection area that "[a] federal case would be initiated." (Tr. I at 205.) There is no evidence that Cynthia McConnell or Jackie McConnell received assurances from APHIS that it would retract its stated intent to institute an administrative proceeding in this matter as a result of Cynthia McConnell taking an 8-month suspension and paying a

$500 fine through the National Horse Show Commission. Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that Complainant instituted this proceeding contrary to an agreement between APHIS and the National Horse Show Commission.

B. Respondents Did Not Prove Selective Enforcement of the Horse Protection Act Against Jackie McConnell

Jackie McConnell contends no other person who was merely a custodian of a horse has been found to have entered a sore horse in a horse show or horse exhibition in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Jackie McConnell asserts he was merely the custodian of Regal By Generator, and, in light of the Secretary of Agriculture's past practice, a conclusion that he has violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) constitutes selective enforcement of the Horse Protection Act.

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

It is well-settled that "entering," as that term is used in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), is a process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited.

The process generally begins with the payment of the fee to enter a horse in a horse show or horse exhibition and includes the presentation of a horse for pre-show inspection by designated qualified persons or APHIS veterinarians or both.[6] Therefore, even though

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[6]*Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (stating entry of a horse in a horse show, for purposes of liability under the Horse Protection Act includes paying the entry fee, registering the horse, and presenting the horse for inspection); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 143, 145 (4th Cir.) (stating entering a horse in a horse show is a process and includes all activities required to be completed before a horse can actually be shown or exhibited), *cert. denied*, 510 U.S. 867 (1993); *In re Bowtie Stables, LLC*, 62 Agric. Dec. 580, 611-12 (2003) (stating it is well settled that "entry," within the meaning of the Horse Protection Act, is a process, not an event; the process of entry includes all activities required to be completed before a horse can be shown or exhibited; the process generally begins with the payment of the fee to enter a horse in a horse show and includes the examination of the horse by designated qualified persons or United States Department of Agriculture veterinarians or both); *In re William J. Reinhart*, 60 Agric. Dec. 241, 253 (2001) (Order Denying William J. Reinhart's Pet. for Recons.) (stating it is well settled that "entry," within the meaning of the Horse Protection Act, is a process, not an event; the process of entry includes all activities required to be completed before a horse can be shown or exhibited; the process generally begins with the payment of the fee to enter a horse in a horse show and includes the examination of the horse by designated qualified persons or United States Department of Agriculture veterinarians or both); *In re Jack Stepp*, 57 Agric. Dec. 297, 309 (1998) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and includes pre-show examination by designated qualified persons or United States Department of Agriculture veterinarian or both), *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 Danny Burks*, 53 Agric. Dec. 322, 334 (1994) (rejecting the respondent's argument that the mere act of submitting a horse for pre-show inspection does not constitute "entering" as that term is used in the Horse Protection Act); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 280 (1994) (rejecting the respondent's argument that "entering," as used in the Horse Protection Act, is limited to doing whatever is specifically required by the management of any particular horse show to cause a horse to become listed on the class sheet for a specific class of that horse show), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 206 (1994) (stating the United States Department of Agriculture has always construed entry to be a process), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Billy*

(continued...)

Jackie McConnell was merely the custodian of Regal By Generator, Jackie McConnell may be found to have violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Moreover, I find no basis for Jackie McConnell's contention that the Secretary of Agriculture's past practice has been to forgo enforcement of the Horse Protection Act against persons who are merely custodians of horses and who merely present those horses for pre-show inspections.[7] Therefore, I find no basis for Jackie McConnell's argument that the Secretary of Agriculture is selectively enforcing the Horse Protection Act against him.

C. Respondents Did Not Prove Malicious Prosecution by APHIS Against Cynthia McConnell

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[6](...continued)
Gray, 52 Agric. Dec. 1044, 1055 (1993) (stating the United States Department of Agriculture has considered entry to be a process which includes pre-show inspection for at least 13 years), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 293 (1993) (stating "entering" a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1183 (1993) (stating entry is a process that gives a status of being entered to a horse and entry includes filling out forms and presenting the horse to the designated qualified person for inspection); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1146-47 (1993) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee).

[7]In *In re A.P "Sonny" Holt*, 49 Agric. Dec. 853, 861 (1990), the Judicial Officer dismissed Richard Wall, an assistant trainer, whose sole participation in the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) was to lead the horse in question to the pre-show inspection area. However, the Judicial Officer based his dismissal of Richard Wall not only on Richard Wall's minimal involvement in the violation, but also, on the lack of any proposed findings, conclusion, or order in complainant's post-hearing brief relating to Richard Wall. I find *In re A.P. "Sonny" Holt* is not analogous to the situation presented in the instant proceeding.

Respondents contend Cynthia McConnell is the only alleged violator of the Horse Protection Act in 1998 or 1999 who accepted a National Horse Show Commission suspension and fine against whom APHIS subsequently instituted a Horse Protection Act case. Respondents contend the institution of this proceeding against Cynthia McConnell constitutes malicious prosecution.

Respondents filed a Freedom of Information Act request with APHIS on or about October 5, 2000, requesting the disclosure of other Horse Protection Act cases with fact patterns similar to the instant proceeding. Respondents then proposed that instituting an administrative proceeding against Respondents was unique because no response was supplied by APHIS satisfying their Freedom of Information Act request. (Tr. II at 802-10.) Respondents' confidence in the inference to be drawn from APHIS' failure to respond to their Freedom of Information Act request is misplaced. The lack of a search result cannot be conclusive. Further, even if Cynthia McConnell is the only violator to face both a private National Horse Show Commission sanction and an administrative proceeding, it may be that this situation was the only situation that warranted an administrative action where a private National Horse Show Commission sanction had been imposed. The totality of the circumstances must be considered. Respondents have not shown that APHIS' discretion in choosing to institute the instant proceeding against Cynthia McConnell constitutes malicious prosecution.

D. Respondents Did Not Prove an APHIS Authorized Mechanism Shielding Respondents from Administrative Action

When Regal By Generator was found to have been sored at the pre-show inspection on September 3, 1998, Dr. Guerdon informed Jackie McConnell that an administrative proceeding would be initiated (Tr. I at 204-05). On or about September 4, 1998, Cynthia McConnell accepted an 8-month National Horse Show Commission suspension and $500 fine, believing she could avoid the institution of an administrative proceeding. Cynthia McConnell received the official National Horse Show Commission suspension notice on or about September 16, 1998 (RX 18). The APHIS investigator did not complete his work on this case until at or near the date he left employment at APHIS in May 1999. Cynthia McConnell paid her $500 fine in December 1998 (Tr. II at 307). Her 8-month National Horse Show Commission suspension period ended in May 1999, and APHIS could not have known until then, even if APHIS had been considering forbearance in instituting the instant proceeding, whether Cynthia McConnell satisfied all the National Horse Show Commission suspension criteria. (Such a suspension, by a private organization, is not the same as a disqualification under the Horse Protection Act. *See* the testimony of Craig Evans, who said, "And recognize that there was a difference in 1998 between the National Horse Show Commission suspension versus a USDA suspension." (Tr. II at 209-10.)) As the administrative case evolved, violations of the Horse Protection Act were alleged not only against Cynthia McConnell, but also against Jackie McConnell and Whitter Stables for "entering" a sore horse, against those responsible for shipping a sore horse, and against the owners for allowing a sore horse to be entered. Dr. DeHaven explained the lengthy process involved in the preparation of an

administrative case, together with the multiple levels of review (Tr. II at 998-99). Complainant filed the Complaint on September 7, 1999. APHIS' case development process appears to have been rigorous and reasonable in nature and implemented with a view toward meeting APHIS' objectives. Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that APHIS relinquished its prosecutorial discretion to institute an administrative proceeding against Respondents. Cynthia McConnell was mistaken in her belief that she was finished with the matter, when she complied with National Horse Show Commission requirements.

II. Substantive Law Issues

A. Whitter Stables Is Not a Legal Entity That Can Be Found to Have Violated the Horse Protection Act

The record supports a conclusion that Whitter Stables is merely a name under which Cynthia McConnell does business. Complainant, as the proponent of an order, has the burden of proof in this proceeding,[8] and the standard of proof by which this burden is met is the preponderance of the evidence standard.[9] While the record contains some

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[8]*See* 5 U.S.C. § 556(d).

[9]*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 Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. ___, slip op. at 31 (Nov. 15, 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

(continued...)

evidence that Whitter Stables is a legal entity which may be found to have violated the Horse Protection Act, I do not find Complainant's evidence is sufficiently strong to conclude that Whitter Stables is such a legal entity.

B. Cynthia McConnell Shipped a Sore Horse to a Horse Show in Violation of 15 U.S.C. § 1824(1)

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[9](...continued)
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 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).

Cynthia McConnell stated that on or about August 23, 1998, she contracted with an independent contractor to haul horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration for $300 (Tr. II at 124-25, 130, 180-81; CX 4).

Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16). The period of time (August 23, 1998, through September 3, 1998) from the arrangements for transporting Regal By Generator until the pre-show inspection was only 11 days.

Respondents argue the evidence shows that Regal By Generator had already passed through the inspection process at the 1998 Tennessee Walking Horse National Celebration with three pre-show inspections and at least one post-show inspection without being found in violation of the Horse Protection Act (Tr. I at 123). Respondents argue the United States Department of Agriculture inspection process is inherently unreliable since the Complainant's evidence that the horse's condition would have developed "over weeks," conflicts with the evidence that Regal By Generator passed both

pre-show and post-show inspections within a few days of September 3, 1998. Even so, evidence of prior inspections is not worthy of great weight.[10]

C. Jackie McConnell Did Not Ship a Sore Horse to a Horse Show in Violation of 15 U.S.C. § 1824(1)

Complainant urges that I find Jackie McConnell to be a general partner with Cynthia McConnell in Whitter Stables and thus liable under the Horse Protection Act for acts of the partnership. Despite the firmly held conviction of APHIS investigator James Odle that Jackie McConnell was the trainer of Regal By Generator, Complainant's effort to prove Jackie McConnell was in partnership did not succeed in rising above suspicion (Tr. I at 684). The evidence presented by Complainant is relevant and material to the partnership question, but does not reach the level of a preponderance of the evidence to show Jackie McConnell was a partner of Whitter Stables or that he participated in any conduct prohibited by section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

During her cross-examination, Cynthia McConnell maintained that she alone owned and controlled Whitter Stables. Her testimony is credible. Additionally, there is no evidence that Jackie McConnell acted individually or directed any person to ship Regal By Generator to the 1998 Tennessee Walking Horse National Celebration.

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[10]*See In re Richard L. Thornton*, 41 Agric. Dec. 870, 876 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992); *In re Joe Fleming,* 41 Agric. Dec. 38, 44 (1982), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1939-40 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

James Odle had left United States Department of Agriculture employment approximately 15 months prior to the hearing (Tr. I at 467). He had not seen the case file since May 1999 (Tr. I at 499). He did not have contemporaneous notes or tape recordings of his conversation with Jackie McConnell wherein Jackie McConnell was alleged to have acknowledged ownership of Whitter Stables (Tr. I at 478, 491, 493-95, 503, 521).

The affidavit of Whitter Stables customer Camille C. Akin (CX 10) is not dispositive as to the form of ownership of Whitter Stables in August and September 1998. Ms. Akin's affidavit does not reveal the time period covered by the alleged partnership status. Ms. Akin's business relationship with Jackie McConnell and Cynthia McConnell spanned 8 years prior to the time of her affidavit and covers the time during which Jackie McConnell Stables was in operation training Tennessee Walking Horses (into 1994) and also the period during which Jackie McConnell Stables was conducting a horse buying and selling business (in 1996 and after) at the same location as Whitter Stables (Tr. II at 728-29). James Odle agreed that he may have been the one to have inserted "(Cyndi and Jackie Mconnell [sic])" for clarity during his preparation of the affidavit for Ms. Akin to sign (Tr. I at 567).

Complainant offered CX 11 through James Odle to show that Jackie McConnell was more than just an employee and was, in fact, a manager of Whitter Stables. But Mr. Odle did not know who paid for the advertisement, directed the placement of the advertisement, or who approved the advertisement (Tr. I at 703-04, 707-08). Mr. Odle

also did not know how the advertisement became available to the United States Department of Agriculture (Tr. I at 705).

Complainant's CX 28, which was published before the 1998 Tennessee Walking Horse National Celebration, tends to prove that Jackie McConnell was a trainer in 1997 (Tr. II at 652-57). That Jackie McConnell was a trainer in 1997 was not a contested issue, but it is not probative regarding whether he was a partner in Whitter Stables in August and September 1998.

A "News & Stories" article written in May of 2000 by Tanya Hopper (CX 29) is not dispositive as to whether Jackie McConnell owned any part of Whitter Stables in August and September 1998.

The 1989 warranty deed and the 1998 property tax receipt for the property on which Whitter Stables is located (CX 1) shows joint ownership by "JACKIE McCONNELL and wife, CYNDI McCONNELL." Complainant argues CX 1 tends to prove that Whitter Stables, which began in 1994, was a partnership, but I do not find that joint ownership of the real estate indicates joint ownership of Whitter Stables. Additionally, Cynthia McConnell testified credibly that, after Jackie McConnell's disqualification in the spring of 1994, he re-opened Jackie McConnell Stables in 1996 in the business of buying and selling horses (Tr. II at 728-29). Regarding CX 1 at 7, the 1998 property tax receipt, there was no evidence of how the bank account was titled on which check number 5860 was drawn to pay the 1998 taxes, whether from an account belonging to Jackie McConnell or otherwise. The most definitive evidence regarding

payment of the real property tax bill was Cynthia McConnell's testimony that she paid it. The record contains no evidence whether Fayette County, Tennessee, listed ownership or tax records in the name of the male first in a husband-wife relationship and whether that might account for the entry "Rcv of: MC CONNELL JACKIE." See CX 1 at 7. Jackie McConnell and Cynthia McConnell being husband and wife provides sufficient explanation for their joint ownership of the real property where the entity of Whitter Stables was situated. Relationships between them do not include a partnership in Whitter Stables, which has been proven to be merely a name under which Cynthia McConnell does business.

James Odle did not request or obtain, for Jackie McConnell or Cynthia McConnell, copies of income tax returns (Tr. I at 526). Mr. Odle stated that he knew how to gather information about business entities from different sources, either from the state or from the Secretary of State if it is a corporation, or the Internal Revenue Service (Tr. I at 525). Complainant did not present any such evidence to prove the existence of a partnership during August 1998 or September 1998 between Cynthia McConnell and Jackie McConnell.

D. Cynthia McConnell Entered a Sore Horse in a Horse Show in Violation of 15 U.S.C. § 1824(2)(B)

Regal By Generator was entered as entry number 685 in class 110 in the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for competition in the horse show (CX 7). Cynthia McConnell stipulated she personally

participated in completing the 1998 Tennessee Walking Horse National Celebration entry forms (Tr. I at 284; CX 7).

"Entry" or "entering" is a process that includes a variety of actions, including, but not limited to, completing the entry forms, paying the entry fee, preparing the horse for exhibition, and presenting the horse for pre-show inspection to designated qualified persons or to United States Department of Agriculture's representatives.[11]

The result of a horse being "sore" or "sored" includes circumstances in which a horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving."[12] The testimony and affidavits of the veterinary medical officers, Drs. Guedron and Kirsten, were persuasive that Regal By Generator was sore at the time of the pre-show inspection and that she would suffer pain if exhibited in the show (CX 9). Respondents offered no evidence to refute the testimony and affidavits of Drs. Guedron and Kirsten, except to show that Regal By Generator had successfully completed three pre-show and at least one post-show inspection during the 1998 Tennessee Walking Horse National Celebration.

E. Jackie McConnell Entered a Sore Horse in a Horse Show in Violation of 15 U.S.C. § 1824(2)(B)

On September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in

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[11]See note 6.

[12]15 U.S.C. § 1821(3).

Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

Jackie McConnell urges that the Secretary of Agriculture's policy and practice is that custodians of a horse, who are not shown to have been otherwise connected with the sored horse, have not been included as persons charged with "entering" a sored horse. Jackie McConnell has narrowed the issue by stating that he understands "the position of the USDA [is] that the mere fact of presenting the horse constitutes 'entry' for the purposes of the HPA."[13]

A case in which the Complainant did not urge that the "custodian" be found in violation, and the Judicial Officer granted the custodian's motion to dismiss, is not persuasive here.[14]

If the remedial purpose of the Horse Protection Act is to be achieved, the Horse Protection Act must be construed liberally, so as to give effect to its provisions. "Entering," within the meaning of the Horse Protection Act, is a process that generally begins with the payment of an entry fee and includes presentation of a horse for pre-show examination by designated qualified persons or United States Department of Agriculture veterinarians. The entry of a horse within the meaning of the Horse Protection Act is also

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[13]See Jackie McConnell's proposed findings of fact and conclusions of law at 9.

[14]*See In re A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 861 (1990).

a status, such that once a person does any one or all of the steps in the process of entering a horse, it remains entered until it has finished showing or exhibiting.[15] "The Act was passed to end the practice of making horses sore and to quash the competitive advantage gained by cruelly making a horse 'sore.' Congress stated that its purpose was to 'make it impossible for persons to show sored horses in nearly all horse shows.' *See* H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871." *In re John Allan Callaway,* 52 Agric Dec. 272, 293 (1993), citing *Elliott*. In a case contemporary to *Callaway*, the Judicial Officer found "For the same reasons, I held in *In re Callaway*, . . . that the custodian who presents a horse to the DQP for the pre-show inspection 'enters' the horse, within the meaning of the Act. Accordingly, Complainant proved that Respondent Roy E. Wagner also entered 'Sir Shaker,' as alleged in the Complaint." *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 316 (1993).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Jackie McConnell's Appeal Petition

Jackie McConnell raises two issues in his Petition for Appeal. First, Jackie McConnell contends the ALJ erroneously determined that he (Jackie McConnell) participated in "entering" a sore horse in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). In support of this contention, Jackie McConnell

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[15] *In re William Dwaine Elliott*, 51 Agric. Dec. 334, 344 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

cites his proposed findings of fact and conclusions of law, portions of the transcript, RX 17, RX 18, RX 33, RX 35, and *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993). (Pet. for Appeal at 1-2.)

I have carefully reviewed the portions of the record and the case cited by Jackie McConnell. I do not find the ALJ erred. Complainant established by a preponderance of the evidence that on September 3, 1998, Jackie McConnell led Regal By Generator to the pre-show inspection area at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and presented her for inspection (Tr. I at 50-51, 82-86, 373; Tr. II at 150, 205; CX 9, CX 13). Additionally, Jackie McConnell stipulated he led the horse through the inspection station (Tr. I at 237).

It is well-settled that "entering," as that term is used in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), is a process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The process generally begins with the payment of the fee to enter a horse in a horse show or horse exhibition and includes the presentation of a horse for pre-show inspection by designated qualified persons or APHIS veterinarians or both.[16]

[16]See note 6.

Moreover, *Elliott*, cited by Jackie McConnell, does not support Jackie McConnell's position that his leading Regal By Generator to the pre-show inspection area does not constitute entering the horse in a horse show. To the contrary, the United States Court of Appeals for the Fourth Circuit expressly upheld the Secretary of Agriculture's position that "entering," as used in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), is a process, which includes presenting a horse for pre-show inspection, as follows:

> Elliott asserts that "entering," as used in 15 U.S.C. § 1824(2)(B), constitutes only registration of the horse and payment of the entry fee. The time period between such time and the actual show, he asserts, is not included within the meaning of "entering." We cannot agree that "entering" means simply paying the fee and registering the horse for showing, which oftentimes is done by mail without the requirement for presenting the horse. Inspection of the horse is a prerequisite to the horse being eligible to show and the horse is not fully qualified to show until the inspection is passed. The plain meaning of "entering" a horse in a horse show would seem to encompass all the requirements–including inspection–and the time necessary to complete those requirements.
>
> Even if we were to agree, however, that the plain meaning of the Act is not clear, the USDA's interpretation is entirely reasonable and consistent with Congressional intent and thus must be upheld. We think it stretches credulity to argue that Congress intended only to prohibit a horse being "sore" at registration or when being shown and between that time the horse is permitted to be "sore." The Act was passed to end the practice of making horses sore and to quash the competitive advantage gained by cruelly making a horse "sore." Congress stated that its purpose was to "make it impossible for persons to show sore horses in nearly all horse shows." *See* H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Elliott's reading of the Act would defeat this purpose by effectively making meaningless pre-showing inspections which are not contemporaneous with the registration and payment of the entry fee. We conclude that the USDA's interpretation of "entering" is reasonable and

> not contrary to Congressional intent and thus we are not bound to give it effect.

Elliott v. Administrator, Animal and Plant Health Inspection Service, 990 F.2d 140, 145 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

I find Complainant proved by a preponderance of the evidence that, on September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Second, Jackie McConnell contends the ALJ erroneously failed to find that Jackie McConnell was subjected to "selective prosecution" and "malicious prosecution" by Complainant. In support of this contention, Jackie McConnell cites his proposed findings of fact, portions of the transcript, RX 20, "Fed. Reg. 11.7(d)," and *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1991). (Pet. for Appeal at 2.)

I have carefully reviewed the portions of the record cited by Jackie McConnell. I do not find the cited portions of the record support Jackie McConnell's contention that ALJ erred by failing to find "selective prosecution" and "malicious prosecution."

Moreover, I am uncertain as to Jackie McConnell's reference to "Fed. Reg. 11.7(d)." Generally, "Fed. Reg." is an abbreviation used to reference the Federal Register, but a proper citation would include a volume number, page number, and date. Therefore, I am unable to locate the material in the Federal Register referenced by Jackie

McConnell to determine what support, if any, the cited Federal Register material lends to Jackie McConnell's contention that the ALJ erroneously failed to find "selective prosecution" and "malicious prosecution."

Finally, *Anderson*, cited by Jackie McConnell, does not support Jackie McConnell's position that the ALJ erroneously failed to find "selective prosecution" and "malicious prosecution." The United States Court of Appeals for the Sixth Circuit expressly held that certain factors, not present in the instant proceeding, must be present to find "selective prosecution" or "vindictive prosecution," as follows:

> . . . A prosecutor selectively prosecutes someone when three things occur. First, he must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. . . . Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to. . . .
>
> A prosecutor vindictively prosecutes a person when he or she acts to deter the exercise of a protected right by the person prosecuted. . . . A person who claims he has been vindictively prosecuted must show that the prosecutor has some "stake" in deterring the petitioner's exercise of his rights, and that the prosecutor's conduct was somehow unreasonable.

United States v. Anderson, 923 F.2d 450, 453-54 (6th Cir. 1991) (citations omitted) (emphasis in original). Jackie McConnell has not established a prima facie case under either doctrine, and I find his contention that he was improperly prosecuted has no merit.

Cynthia McConnell's and Whitter Stable's Appeal Petition

Cynthia McConnell and Whitter Stables raise three issues in their Petition for Appeal.[17] First, Cynthia McConnell and Whitter Stables contend the ALJ erroneously determined they "shipped " a sore horse, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)). In support of this contention, Cynthia McConnell and Whitter Stables cite "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" and portions of the transcript. (Pet. for Appeal at 1.)

I have carefully reviewed "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof" and the portions of the record cited by Cynthia McConnell and Whitter Stables. I do not find erroneous the ALJ's conclusion that Cynthia McConnell shipped, transported, moved, and delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

Cynthia McConnell stated that on or about August 23, 1998, she contracted with an independent contractor to haul horses, including Regal By Generator, to the 1998

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[17]I do not address these issues as they relate to Whitter Stables because, as discussed in this Decision and Order, *supra*, I find Whitter Stables is merely a name under which Cynthia McConnell does business and not a legal entity which can be found to have violated the Horse Protection Act.

Tennessee Walking Horse National Celebration for $300 (Tr. II at 124-25, 130, 180-81; CX 4). Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16). The period of time (August 23, 1998, through September 3, 1998) from the arrangements for transporting Regal By Generator until the pre-show inspection was only 11 days.

Second, Cynthia McConnell and Whitter Stables contend the ALJ erroneously determined they had not served an appropriate penalty for their violations of the Horse Protection Act and erroneously found there was no agreement between APHIS and the National Horse Show Commission. In support of these contentions, Cynthia McConnell and Whitter Stables cite portions of the transcript, the 1998 Strategic Plan, RX 17, RX 18, and RX 20. (Pet. for Appeal at 1-2.)

I agree with the ALJ's conclusion that Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that APHIS relinquished its prosecutorial discretion to institute an administrative proceeding for a violation of the Horse Protection Act against a respondent who has previously been sanctioned by a Horse Industry Organization for the same violation.

Third, Cynthia McConnell and Whitter Stables contend the ALJ erroneously failed to find that Cynthia McConnell and Whitter Stables were subjected to "selective prosecution" and "malicious prosecution" by Complainant. In support of this contention, Cynthia McConnell and Whitter Stables cite "Respondents Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof," portions of the transcript, CX 9, CX 13, RX 17, RX 18, and RX 20. (Pet. for Appeal at 2.)

I have carefully reviewed Cynthia McConnell and Whitter Stables Proposed Findings and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof and the portions of the record cited by Cynthia McConnell and Whitter Stables. I do not find the ALJ erred by failing to find "selective prosecution" and "malicious prosecution" of Cynthia McConnell.

Complainant's Appeal Petition

Complainant raises two issues in "Complainant's Petition for Appeal of Decision and Order" [hereinafter Complainant's Appeal Petition]. First, Complainant contends the ALJ erroneously assessed Cynthia McConnell and Whitter Stables a $2,200 civil penalty and disqualified Cynthia McConnell and Whitter Stables for 1 year for their violations of the Horse Protection Act. Complainant contends Cynthia McConnell and Whitter Stables should each have been assessed a $4,400 civil penalty and should each have been disqualified for a 2-year period. (Complainant's Appeal Pet. at 2-19.)

As discussed in this Decision and Order, *supra*, I find Whitter Stables is merely a name under which Cynthia McConnell does business and not a legal entity against which a sanction may be imposed under the Horse Protection Act.

As for Cynthia McConnell, I agree with Complainant that the ALJ should have assessed Cynthia McConnell a $4,400 civil penalty and should have disqualified Cynthia McConnell for a 2-year period for her two violations of the Horse Protection Act.

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.[18] 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

[18]7 C.F.R. § 3.91(b)(2)(vii).

less than 1 year for a first violation and not less than 5 years for any subsequent violation.[19]

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:

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

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[19]15 U.S.C. § 1825(c).

> 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, and 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 Cynthia McConnell a $4,400 civil penalty. The extent and gravity of Cynthia McConnell's prohibited conduct are great. Two United States Department of Agriculture veterinary medical officers found Regal By Generator sore. Dr. Guedron found that digital palpation of Regal By Generator's left and right leg and foot elicited strong, consistent, and repeatable pain responses and noted several thick, firm abraded ridges of tissue on the posterior pastern of the left leg and several firm, raised, red "button" lesions on the posterior pastern of the right leg. Dr. Kirsten stated that Regal By Generator exhibited strong leg withdrawal in response to digital palpation of the left leg and mild leg withdrawal to digital palpation of the right leg and observed lesions on Regal By Generator's right pastern and raised and thickened ridges on Regal By Generator's left pastern. (CX 9 at 2-4.) Dr. Guedron testified the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to develop (Tr. I at 72-73). Dr. Kirsten testified the button lesions (round, raised, granulomatous, hairless lesions) on the posterior of the right pastern and the raised and

thickened ridges on the posterior of the left pastern would occur chronically over a long period of time, in response to chronic, repeated inflammation or irritation (Tr. I at 309-16).

Despite Regal By Generator's condition, Cynthia McConnell contracted with an independent contractor to haul Regal By Generator to the 1998 Tennessee Walking Horse National Celebration and personally participated in completing Regal By Generator's 1998 Tennessee Walking Horse National Celebration entry forms (Tr. I at 284; Tr. II at 124-25, 130, 180-81; CX 4, CX 7). Weighing all the circumstances, I find Cynthia McConnell is culpable for the violations of section 5(1) and (2)(B) of the Horse Protection Act (15 U.S.C. § 1824(1), (2)(B)).

Cynthia McConnell presented no argument that she is unable to pay a $4,400 civil penalty or that a $4,400 civil penalty would affect her ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[20] Based on the factors that are required to be considered when

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[20]*See, e.g.*, *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.

(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 each violation of the Horse Protection Act. Therefore, I assess Cynthia McConnell a $4,400 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 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

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[20](...continued)
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).

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.[21]

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 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.[22]

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

[22]*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.

(continued...)

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).

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

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[22](...continued)
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. 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).

disqualification period for Cynthia McConnell's first two violations of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

Second, Complainant contends the ALJ erred in Finding of Fact 7 (Complainant's Appeal Pet. at 19).

As an initial matter, the ALJ's Initial Decision does not contain Finding of Fact 7; however, the ALJ's Initial Decision contains a paragraph identified as "7" in the discussion of the procedural history in which the ALJ states:

> [7] On September 17, 1999, Respondents filed a claim sounding in tort against the United States Department of Agriculture (USDA) and certain of its employees in Federal District Court for the Western District of Tennessee - Civil Action No. 00-2434. On or about June 22, 2000, the Federal Court granted Defendant's (USDA's) motion to dismiss.

Initial Decision at 3-4.

Complainant asserts Cynthia McConnell and Whitter Stables were not plaintiffs in the case referenced by the ALJ; Jackie McConnell was the sole plaintiff. Complainant attaches to Complainant's Appeal Petition the "Complaint and Motion For Stay, Or In The Alternative, For Injunctive Relief" filed September 17, 1999, and the "Order Granting Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment" filed June 21, 2000, in *McConnell v. United States Dep't of Agric.*, Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000), in support of Complainant's assertion.

Based on my review of the "Complaint and Motion For Stay, Or In The Alternative, For Injunctive Relief" and the "Order Granting Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment" filed in *McConnell v. United*

States Dep't of Agric., Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000), I agree with Complainant's assertion that the ALJ's erroneously stated that Cynthia McConnell and Whitter Stables were plaintiffs in *McConnell v. United States Dep't of Agric.*, Civil Action No. 00-2434 (W.D. Tenn. June 21, 2000); however, I find the ALJ's error harmless.

FINDINGS OF FACT

1. Regal By Generator was reasonably expected to suffer pain in the pastern areas of her front legs and feet if she were shown on September 3, 1998, as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration.

2. Regal By Generator exhibited abnormal sensitivity, lesions, and ridges on September 3, 1998, which were the response to chronic inflammation and irritation from chemicals and/or mechanical devices used on the pasterns of Regal By Generator's front legs and feet, according to two well-qualified, experienced APHIS veterinary medical officers who observed her in motion and examined her on September 3, 1998.

3. Regal By Generator's lesions and ridges would have occurred chronically over a long period of time, in response to chronic, repeated inflammation or irritation, according to one of the two well-qualified, experienced APHIS veterinary medical officers.

4. Regal By Generator's abnormal sensitivity, lesions, and ridges would have taken weeks to develop, according to the other of those two well-qualified, experienced APHIS veterinary medical officers.

5. Regal By Generator was sore, within the meaning of the Horse Protection Act, during pre-show inspection on September 3, 1998.

6. Regal By Generator's sore condition was chronic and would have taken weeks to develop. Thus, Regal By Generator was sore on September 2, 1998, when the entry form was completed for her entry as number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration; and Regal By Generator was sore on August 23, 1998, when arrangements were made to transport and deliver her to the 1998 Tennessee Walking Horse National Celebration.

7. Jackie McConnell is an individual whose business mailing address is P.O. Box 490, Collierville, Tennessee 38027. At all times material to this proceeding, Jackie McConnell was a licensed horse trainer. On September 3, 1998, by presenting Regal By Generator for inspection at the pre-show inspection area, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

8. Cynthia McConnell is an individual whose business mailing address is P.O. Box 205, Collierville, Tennessee 38027. At all times material to this proceeding, Cynthia McConnell was a licensed horse trainer. On or about August 23, 1998, through August 26, 1998, Cynthia McConnell shipped, transported, moved, or delivered Regal By Generator to a horse show with reason to believe that the horse may be shown or exhibited in a horse show, by personally contracting with an independent contractor to

transport and deliver horses, including Regal By Generator, to the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

9. Whitter Stables is a sole proprietorship which has a mailing address of P.O. Box 205, Collierville, Tennessee 38027. At all times material to this proceeding, Whitter Stables was wholly owned and controlled by Cynthia McConnell.

10. On September 2, 1998, by personally completing an entry form, Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

11. This administrative proceeding is the first proceeding in which Cynthia McConnell has been found to have violated the Horse Protection Act.

12. Jackie McConnell has one prior violation, found in a hearing on the merits, of the Horse Protection Act.

13. Jackie McConnell has undergone three prior disqualification periods: two prior 6-month periods by consent with no culpability established; followed by a 2-year disqualification period that resulted from a prior violation of the Horse Protection Act.

CONCLUSIONS OF LAW

1. On September 3, 1998, Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

2. Jackie McConnell has one prior Horse Protection Act violation.

3. On or about August 23, 1998, through August 26, 1998, Cynthia McConnell shipped, transported, moved, or delivered Regal By Generator to a horse show, with reason to believe that Regal By Generator may be shown or exhibited while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

4. On or about September 2, 1998, through September 3, 1998, Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Regal By Generator, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

For the foregoing reasons, the following Order should be issued.

ORDER

1. Jackie McConnell 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:

Colleen A. Carroll
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

Jackie McConnell's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Jackie McConnell. Jackie McConnell shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0034.

2. Jackie McConnell is disqualified for a period of 5 years 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 Jackie McConnell shall become effective on the 60th day after service of this Order on Jackie McConnell.

3. Cynthia McConnell is assessed a $4,400 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:

Colleen A. Carroll
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

Cynthia McConnell's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Cynthia McConnell. Cynthia McConnell shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0034.

4. Cynthia McConnell is disqualified for a period of 2 years 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 Cynthia McConnell shall become effective on the 60th day after service of this Order on Cynthia McConnell.

RIGHT TO JUDICIAL REVIEW

Jackie McConnell and Cynthia McConnell have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Jackie McConnell and Cynthia McConnell must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[23] The date of this Order is June 23, 2005.

Done at Washington, DC

June 23, 2005

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William G. Jenson
Judicial Officer

[23] 15 U.S.C. § 1825(b)(2), (c).