

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael A. Lerman,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
	:	
State Horse Racing Commission,	:	No. 1362 C.D. 2017
	:	
Respondent	:	Submitted: March 16, 2018

BEFORE: HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ANNE E. COVEY, Judge  
HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE COVEY

FILED: July 17, 2018

Michael A. Lerman (Lerman) petitions pro se from the State Horse Racing Commission’s (Commission) July 26, 2017 Adjudication and Order<sup>1</sup> affirming the Stewards’<sup>2</sup> January 31, 2017 ruling (Ruling) not to disqualify Big Saver

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<sup>1</sup> The Commission’s July 26, 2017 Adjudication and Order was mailed August 4, 2017. Lerman Br. Ex. 1 at 1 (Commission Order).

<sup>2</sup> Stewards are among the racing officials tasked with enforcing the Commission’s Regulations at Commission-licensed race meetings in the Commonwealth. See 58 Pa. Code §§ 163.331, 163.332. They are expressly authorized to regulate and supervise the conduct of owners, trainers and jockeys during races. See 58 Pa. Code § 163.340(a). Three Commission-approved stewards must be present and on duty in the stand at each race meeting. See 58 Pa. Code §§ 163.332, 163.341(a), (e). The stewards’ duties include, *inter alia*, promptly investigating and rendering decisions on protests. See 58 Pa. Code § 163.342(b). Their orders supersede the orders of other racing officials. See 58 Pa. Code § 163.340(a).

Further, Section 163.281(k) of the Commission’s Regulations provides: “The stewards are vested with power to determine the extent of disqualification in cases of fouls. They may place the offending horse behind the horses in their judgment it interfered with, or they may place it last.” 58 Pa. Code § 163.281(k). “In all cases, the [s]tewards shall render an opinion in accordance with the generally[-]accepted customs and usages of racing in conformity with equitable standards of justice.” 58 Pa. Code § 165.201.

from the eighth thoroughbred horse race conducted at Parx Racing (Parx) in Philadelphia on January 31, 2017 (Race).<sup>3</sup> The issue before the Court is whether the Commission erred by upholding the Stewards' Ruling.<sup>4</sup> After review, we affirm.

The facts of this case are not disputed. On January 31, 2017, Lerman was the Pennsylvania-licensed trainer of S.S. Minnow, a thoroughbred horse that Big Saver competed against in the Race. Big Saver won the Race in a close finish - by a nose.<sup>5</sup> Lerman lodged a timely protest<sup>6</sup> and S.S. Minnow's jockey Carol Cedeno (Cedeno) claimed a foul<sup>7</sup> against Big Saver for bumping S.S. Minnow during the Race. The Stewards had observed the live Race but, in response to the objections, they interviewed Lerman, Cedeno and Big Saver's jockey, Angel Castillo (Castillo), and watched a video recording (DVD or video) of the Race.<sup>8</sup> Based upon their investigation, the Stewards ruled that although the horses bumped during the Race,

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<sup>3</sup> The Race was six furlongs (*i.e.*, three-quarters of a mile). Reproduced Record Tab 12, Notes of Testimony, May 2, 2017 (N.T.) at 45-46.

<sup>4</sup> Lerman's Statement of Questions Involved lists five issues: (1) whether substantial evidence supported the Commission's conclusion that Big Saver did not willfully jostle S.S. Minnow during the Race; (2) whether the Commission erred by concluding that Pennsylvania horse racing is a contact sport; (3) whether the Commission relied upon unpromulgated regulations; (4) whether the Commission capriciously disregarded evidence of willfulness; and, (5) whether the Commission's decision was consistent with the policy that Pennsylvania horse racing shall be pristine and project an image of irreproachable integrity. *See* Lerman Br. at 4. Because these issues are subsumed in the analysis of whether the Commission erred by upholding the Ruling, the issues have been combined herein.

<sup>5</sup> A nose is "an inch or two maximum." N.T. at 50. Lerman asserts that the inch in this case cost S.S. Minnow \$12,000.00. *See* N.T. at 83.

<sup>6</sup> A "protest" is defined in Section 161.3 of the Commission's Regulations as "[a] formal complaint filed after a race with the [s]tewards in accordance with the rules, protesting the right of any horse to a place, purse, award . . . in a race . . ." 58 Pa. Code § 161.3.

<sup>7</sup> A "foul" is defined in Section 161.3 of the Commission's Regulations as "an infraction of the rules of racing involving physical conduct occurring during the actual running and course of a race." 58 Pa. Code § 161.3.

<sup>8</sup> The DVD contains three viewpoints of the Race: a pan, head-on and from behind. *See* N.T. at 40. It was admitted into the record without objection. *See* N.T. at 61-62.

the contact was mutual and did not affect the outcome, so Big Saver was not disqualified.

On February 5, 2017, Lerman appealed from the Stewards' Ruling to the Commission. The Commission granted the appeal and Lerman's request for supersedeas to stay distribution of the Race winner's purse. A hearing was conducted on May 2, 2017 before a hearing officer. Based upon the evidence presented, including the DVD, the hearing officer recommended that the Commission adopt the Stewards' Ruling. On July 26, 2017, the Commission adopted the hearing officer's recommendation and issued the Adjudication and Order upholding the Ruling. Lerman appealed to this Court.<sup>9</sup>

The parties agree upon the applicable law. Section 163.234 of the Commission's Regulations states: "During the running of a race, . . . a horse may not cross or weave in front of other horses in such a way that would *impede them or constitute or cause interference* or intimidation." 58 Pa. Code § 163.234 (emphasis added). Moreover, "[a] horse or jockey may not *willfully* jostle another horse." 58 Pa. Code § 163.235 (emphasis added). Further, "[d]uring a race, a jockey may not *willfully* strike or touch another jockey or the horse or equipment of another jockey *for the purpose of interfering with* that horse or jockey." 58 Pa. Code § 163.236 (emphasis added).

At the hearing, Michael Melendez (Melendez) testified that he has been a Commonwealth thoroughbred horse racing steward since 2009<sup>10</sup> and was one of the three Stewards who observed the Race and conducted the investigation in response to

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<sup>9</sup> "This Court will only disturb an order of the Commission where constitutional rights have been violated, where an error of law has been committed, or where necessary findings of fact are not supported by substantial evidence." *Racing GAMbit, LLC v. State Horse Racing Comm'n*, 184 A.3d 192, 195 n.5 (Pa. Cmwlth. 2018).

<sup>10</sup> Melendez explained that he has been a racing official for over 30 years and has officiated tens of thousands of races. *See* N.T. at 30.

Lerman's and Cedeno's objections.<sup>11</sup> Melendez explained that the Stewards "decide whether the infraction is severe enough or merits a disqualification. And if it affects the outcome of the race, we certainly would [] grant[] a disqualification." Reproduced Record Tab 12, Notes of Testimony, May 2, 2017 (N.T.)<sup>12</sup> at 53. Melendez recalled that, despite having determined that there was contact between Big Saver and S.S. Minnow during the Race, the Stewards "didn't feel that there was a foul or that the incident was sever[e] enough that it required disqualification." N.T. at 35; *see also* N.T. at 64.

According to Melendez's testimony:

[Commission's counsel Carly J. Wismer (Wismer):] . . .  
[I]s a bump mid-stretch, in your opinion always - does that  
require the disqualification of a horse?

[Melendez:] Not always, no.

[Wismer:] And what, when would such a thing require  
disqualification, in your opinion?

[Melendez:] In my opinion, if I feel that it has something to  
do with the outcome of the race, . . . if it's severe[] enough  
where such horse was prevented from running the race, if . . .  
. it affected the outcome of the race, it's what we're looking  
at, in our judg[.]ment. Because what we do is judg[.]ment  
calls a lot of times.

. . . .

[Wismer:] And did you feel that that contact [between S.S.  
Minnow and Big Saver during the Race] was [the cause] of  
S[.]S[.] Minnow not winning that race?

[Melendez:] No, I do [sic] not.

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<sup>11</sup> The hearing examiner overruled Lerman's objection that only one of the three stewards attended the hearing. *See* N.T. at 8-13.

<sup>12</sup> Lerman's reproduced record is not consecutively numbered with Arabic numerals followed by a small "a," as required by Pennsylvania Rule of Appellate Procedure 2173 (relating to numbering of pages). Therefore, this Court will herein make reference to the pages in the Commission hearing notes of testimony.

....

[A]fter the contact was made, [S.S. Minnow] was still in front of Big Saver. And it wasn't until the last few jumps before the wire<sup>[13]</sup> that Big Saver put her nose in front, basically a head bob<sup>[14]</sup> if you want to call that, to win the race by a photo [finish].

N.T. at 38-39; *see also* N.T. at 50.

As the hearing examiner watched the DVD of the Race, Melendez recounted why the Stewards ruled that the contact between Big Saver and S.S. Minnow was mutual:

If you look at some of the tracks, you can see how the tracks of S[.]S[.] Minnow are slightly going out. And that causes them to – they're together. They're close. And they were close the entire race from the half-mile pole down to the stretch. And they're both paddling fairly, what we felt all the way to the wire. And at some point, the rumps of the horses, their rear-ends kind of get together. And in our opinion, they, both hind-ends sweep out simultaneously. And then they continue.

N.T. at 55; *see also* N.T. at 65, 73.

Melendez opined that Cedeno was leaning left during the Race because “[t]hat’s what jockeys do when they’re close to each other. One will lean out. The other one will lean into the other one to try to urge the horse.” N.T. at 57. Based on the DVD footage, Melendez described:

So [] Cedeno is sitting left-handed. And still appears as slightly coming out into Big Saver. And it’s a nice, fair battle. And, you know, they’re going to lean into each other.

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<sup>13</sup> The wire is the finish line. *See* Commission Adj. at 10.

<sup>14</sup> Melendez explained: “A head bob is . . . one horse’s head is going down. The other one is coming up to the finish.” N.T. at 49. “[I]t’s a very close finish.” N.T. at 49.

One goes out. . . . Then [] Cedeno is leaning to her outside and getting ready to hit, strike her horse. All right. As the horse's hind-end kind of come together. And that's why she seems like she's off-balance. That was our opinion. . . . So the pole's coming up. So they're coming near the wire. Probably 200 yards prior to the wire, finish line. And as I pointed out earlier, even at this point, S[.]S[.] Minnow has not lost a lead. It was always a head or half a head in front. So they'll get close again. One more time after separating, they'll get close again. I still see, you know, [Cedeno] leaning. You can see how her body's turned toward [Castillo] on Big Saver[], in my opinion, straighter than the other rider.

. . . .

Our opinion was that what any other rider would do is try to get away from this inside horse. . . . So that's probably why [Cedeno] commences to lean out a little bit, try to ease her way. Perhaps entice the other rider of Big Saver, [to] kind of fan out a little bit so she could stay away from the horse inside of her. And any rider would do that. So that's why we felt that she decided to lean out from the top of the stretch.

. . . .

And at that point, she's trying to switch, take her whip out from her right hand to her left.

N.T. at 58-61; *see also* N.T. at 64-65, 77-78.

Melendez interpreted: “[T]hey were in close quarters. And [Cedeno] probably knew that she wouldn't be able to . . . hit right[-]handed. Same as [Castillo]. He couldn't switch left[-]hand because if they hit the other horses [or] that jockey with the whip, that would be a foul.” N.T. at 78-79. Melendez expounded:

I would expect that the jockey on the outside hitting right[-]handed, that the horse is going to drift in a little bit. And the jockey on the inside hitting left[-]handed, that the horse is going to drift out a little bit. Especially if the rider of an inside horse is leaning towards the outside. Riders use their weight to shift a horse and make them switch leads, to steer

them, to try to lean out or in. And in this particular case, I believe that that's what [ ] Cedenó was doing at the time.

N.T. at 74. Accordingly, Melendez represented that the Stewards' Ruling "was unanimous that . . . [the bumping] was miniature, . . . didn't affect the outcome of the race[,] . . . [a]nd . . . never had a negative effect on S[.]S[.] Minnow[ ] that would have prevented . . . him from winning the race." N.T. at 53; *see also* N.T. at 64.

Based upon the same evidence, Lerman declared that the contact between the horses during the last twelve to fifteen seconds of the Race "doesn't fall within the general standards that are accepted," N.T. at 84, and clearly affected the Race's outcome. *See* N.T. at 82-83. Relying on the DVD, Lerman explained:

[I]t's [around the eight pole] where Big Saver first makes contact with S[.]S[.] Minnow's hind-end. And then continues an inward path all the way to the wire. The moment you see Cedenó, is because S[.]S[.] Minnow's been knocked off stride and she's trying to keep her balance.

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And from this point on, Big Saver continues his path, not in anything resembling a straight line or maintaining his lane as you described it. And as they went for the wire, . . . Big Saver, is clearly impeding [S.S. Minnow's] momentum impact.

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And that certainly, unquestionably, undoubtedly made a differen[ce] of an inch, as opposed to victory and loss. There's no way you can dispute it.

.....

[A]s they cut the corner here, you can see that [ ] Castillo on the outside of the green, is waring right on her, and intimidating her virtually from this point on, all the way to the wire. He's got the whip in his left hand, all he's trying to do is race around or intimidate [S.S. Minnow]. As they straighten, he first makes contact with the back-end there turning . . . S[.]S[.] Minnow, slightly outside. It appeared

that he came in and went all the way to the wire, he's veering in at any angle towards the inside. Almost striking his horse right in. Whereas if you made any effort to correct that and straighten this horse out, there wouldn't have been any contact there. And the momentum from S[.]S[.] Minnow wouldn't have been taken away. And he surely would have been the victor.

N.T. at 87-89.

Lerman pronounced that Castillo's repeated right-handed whipping caused Big Saver to continue on an inward path toward S.S. Minnow, resulting in "more than an . . . inch of momentum loss due to fouling," N.T. at 90, so "[a]ny objective standard . . . would dictate that there's an absolute disqualification in this case." N.T. at 91. Lerman further opined:

I think that Big Saver continually carried, intimidated, and impeded S[.]S[.] Minnow in the last eighth of a mile. [] Cedeno, our rider did not move around on the horse and shift Big Saver's rider came in, bumped first the back-end of [S.S. Minnow], which gave the appearance on the video of [S.S. Minnow] turning slightly outward. And when we made contact the second, third, fourth, and fifth times, you know, practically knocked [Cedeno] out of the saddle. [Castillo] continued hitting right[-]handed all the way down the stretch, carrying [S.S. Minnow] in multiple paths. And certainly cost him more than an inch, which was a marginal victory, our loss I mean, to call it, like you said, excessive and repeated contact which clearly affected the momentum and the outcome of the race, there is absolutely no doubt.

....

And certainly the contact wasn't mutual. It wasn't even close, you know. And for three [S]tewards who have watched thousands and thousands of races to say that that was incidental contact or mutual contact is patently absurd. And this is why we object.

N.T. at 81-82; *see also* N.T. at 84-85, 91.

Based upon the evidence, the Commission held, in relevant part:

There is no dispute that . . . ‘Big Saver’ made contact with Lerman’s horse, ‘S.S. Minnow.’ However, as the language of the rules suggests, horse racing is a contact sport. This Commission has long understood that during the running of a race, horses do occasionally cross and weave in front of other horses. Likewise, **horses and/or jockeys do occasionally bump, push and shove other horses during the conduct of the race. The critical inquiries for the Stewards and, ultimately this Commission, are whether the crossing or weaving caused interference or intimidation and whether the jostling of another horse was willful.**

According to Melendez, one of three [S]tewards who unanimously made a decision in this matter, **the standard for a foul requires that the incident must be severe enough to prevent the fouled horse from running the race and affect the outcome of the race.** ([N.T. at 38[])[.] **We agree.**

....

According to the testimony and video of the [R]ace, S.S. Minnow held a slight lead to the left or inside of Big Saver and at the stretch, Big Saver and S.S. Minnow made ‘mutual’ contact. ([N.T. at] 38-39, 53; Exhibit C-4)[.]

Melendez described the contact as a ‘bump.’ In his opinion, a horse ‘bumped’ mid-stretch does not always require disqualification. ([N.T. at] 38). Melendez testified that the [] Cedenno (aboard S.S. Minnow) was whipping left[-]handed and [] Castillo (aboard Big Saver) was whipping right[-]handed and that riders often use their weight by shifting a horse to steer them. ([N.T. at] 73-74). Melendez described that the horses’ rear-ends came together, but in his opinion, ‘felt that [n]either one of [the horses] was[] affected by it’ ([N.T. at] 55). According to Melendez and as the video bears out, S.S. Minnow never relinquished the lead until just prior to the wire (finish line). ([N.T. at] 49, 52)[.]

....

Upon review, the [S]tewards did not disqualify Big Saver based upon their conclusion that there was no violation of the Commission's [R]egulations at [S]ections 163.234 or 163.235 and thus no 'foul.' Furthermore, the Stewards concluded that the bump/contact between the horses was not severe enough to warrant a disqualification as it did not affect the outcome of the race.

[] Lerman disagrees with the Stewards' decision. According to Lerman, . . . Big Saver 'continually carried, intimidated and impeded S.S. Minnow in the last eighth of a mile.' He further asserts that there were numerous contacts which 'certainly cost [S.S. Minnow] more than an inch.' ([N.T. at] 81-82). Finally, Lerman also asserts that the 'contact wasn't mutual.'

Lerman's disappointment in the outcome of this race is understandable. Nonetheless, **this Commission concludes that the evidence of record, including Exhibit C-4 (DVD), supports the Stewards' decision.** The unanimous opinion of the [Stewards] was **that disqualification of Big Saver was not warranted.** The Stewards are vested with power to make this determination. 58 Pa. Code § 163.281(k). . . . [T]he evidence proffered by Lerman is insufficient to overturn the non-disqualification decision of the Stewards.

Commission Adj. at 9-11 (emphasis added).

This Court has held:

It is clear that matters of evidence taking, and the admission of testimony and exhibits, are matters committed to the sound discretion of the hearing body. [When t]he matter to be adjudicated [is] of a technical nature, [] this Court may not substitute judicial discretion for administrative discretion in matters involving technical expertise and which are within the special knowledge and competence of the [Commission].

*Pa. Game Comm'n v. Dep't of Env'tl. Res.*, 509 A.2d 877, 887 (Pa. Cmwlth. 1986) (citation omitted), *aff'd*, 555 A.2d 812 (Pa 1989). Accordingly, "[q]uestions of evidentiary weight and resolutions of evidentiary conflicts are for the [Commission],

not the reviewing court.” *Pinero v. Pa. State Horse Racing Comm’n*, 804 A.2d 131, 135 (Pa. Cmwlth. 2002). Moreover, in reviewing a Commission decision, “[this C]ourt must give considerable weight and deference to [the Commission’s] interpretation of its own regulations. . . . [which] is controlling unless clearly erroneous, inconsistent with the regulation or statute, or unreasonable.” *Racing GAMbit, LLC v. State Horse Racing Comm’n*, 184 A.3d 192, 195 n.5 (Pa. Cmwlth. 2018) (citation omitted). Ultimately, this Court is “required to affirm an order of the Commission unless it is not in accordance with the law or is an arbitrary, capricious or unreasonable determination lacking substantial evidence in support of its findings.”<sup>15</sup> *Kulick v. Pa. State Harness Racing Comm’n*, 540 A.2d 620, 623 (Pa. Cmwlth. 1988); *see also Bocachica v. Pa. State Horse Racing Comm’n*, 843 A.2d 450 (Pa. Cmwlth. 2004). Lerman’s disagreement with the Commission’s conclusion is not a basis on which the Adjudication and Order may be reversed.

Here, the applicable Regulations make clear that willful and/or intimidating or interfering contact during the Race was prohibited. Although contact occurred between Big Saver and S.S. Minnow during the Race, there was no record evidence that Big Saver “cross[ed] or weave[d] in front of [S.S. Minnow] in such a way that [] *impede[d] [S.S. Minnow] or constitute[d] or cause[d] interference[,]*” 58 Pa. Code § 163.234 (emphasis added); “*willfully jostle[d] [S.S. Minnow],*” 58 Pa. Code § 163.235 (emphasis added); or, “*willfully str[uck] or touch[ed] [Cedeno or S.S. Minnow] . . . for the purpose of interfering with [them],*” 58 Pa. Code § 163.236 (emphasis added), and thus violated the Commission’s Regulations.<sup>16</sup> Rather, based

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<sup>15</sup> “Substantial evidence necessary to support an administrative finding of fact is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Belote v. State Harness Racing Comm’n*, 688 A.2d 264, 268 (Pa. Cmwlth. 1997).

<sup>16</sup> Contrary to Lerman’s claim, neither the Stewards nor the Commission based their decisions upon unpromulgated regulations. Rather, both expressly relied upon language in the Regulations in reaching their decisions.

upon a review of the record, including the DVD, and “giv[ing] considerable weight and deference to [the Commission’s] interpretation of its [] regulations” as we must, this Court concludes that substantial evidence supports the Commission’s determination that the bumping between Big Saver and S.S. Minnow was generally-accepted contact incidental to horse racing that did not alter the Race’s outcome. *Racing GAMbit, LLC*, 184 A.3d at 195 n.5. Accordingly, the Commission’s determination was not “arbitrary, capricious or unreasonable. . . .” *Kulick*, 540 A.2d at 623.

Based on the foregoing, the Commission’s Adjudication and Order is affirmed.

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ANNE E. COVEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael A. Lerman,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
State Horse Racing Commission,	:	No. 1362 C.D. 2017
	:	
Respondent	:	

ORDER

AND NOW, this 17<sup>th</sup> day of July, 2018, the State Horse Racing Commission's July 26, 2017 Adjudication and Order is affirmed.

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ANNE E. COVEY, Judge