# UNITED STATES DEPARTMENT OF AGRICULTURE

## BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 08-0007

In re: KIMBERLY COPHER BACK,
LINDA RUTH PATTON, d/b/a
SWEET REVENGE STABLES, and
RICHARD EVANS,

Respondents

### DECISION AND ORDER

#### Preliminary Statement

On October 22, 2007, Kevin Shea, the Acting Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture, ("APHIS") initiated this disciplinary proceeding against the Respondents by filing a complaint alleging violations of the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq.*) (the "Act"). On November 13, 2007, counsel for the Respondents filed an Entry of Appearance and Answer denying generally the material allegations of the Complaint, raising certain affirmative defenses, and requesting that an oral hearing be scheduled.

The case was assigned to the docket of Administrative Law Judge Victor W. Palmer and on April 23, 2008, he conducted a telephonic pre-hearing conference at which time dates were established for the exchange of witness and exhibit lists and the matter was initially set to be heard in Louisville, Kentucky on November 6 and 7, 2008. On request of Respondents' counsel, the hearing date was rescheduled for November 18 and

19, 2008. Following a second telephonic conference prompted by another scheduling conflict, Judge Palmer again continued the hearing and rescheduled it to commence on February 2, 2009. On January 16, 2009, the case was transferred to my docket.

At the oral hearing held on February 2, 2009 in Louisville, Kentucky, the Complainant was represented by Robert A. Ertman, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC[1] and the Respondents were represented by David F. Broderick, Esquire and Christopher T. Davenport, Esquire, both of the firm Broderick & Associates of Bowling Green, Kentucky.[2] Eleven witnesses testified and nine exhibits were identified and received into evidence.[3] Following the hearing, proposed findings of fact, conclusions of law and briefs in support of their respective positions were submitted by both parties and a Reply Brief was filed by the Respondents.

**Discussion**

The complaint alleges that on or about April 20, 2007, the Respondent Kimberly Copher Back violated §5(2)(A) of the Act (15 U.S.C. § 1824(2)(A)), by showing or exhibiting "Reckless Youth" as entry number 35, class number 49 at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore; that on or about April 20, 2007, Respondents, Kimberly Copher Back, Linda Ruth Patton (doing business as Sweet Revenge Stables), and Richard Evans violated §5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)) entered for the purpose of showing or exhibiting the horse known as "Reckless Youth" as entry number 35, class number 49 at the Spring Jubilee Charity

[1] The Complainant was initially represented by Frank Martin, Jr., Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC.
[2] Tad T. Pardue, Esquire, of the Broderick firm also appears as counsel of record on some of the pleadings.
[3] GX-1 through 8 and RX-1. References to the Transcript of the proceedings will be to "Tr."

Horse Show in Harrodsburg, Kentucky, while the horse was sore; and that on or about the same date, Respondent Kimberly Copher Back, violated § 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D), by allowing the entry for the purpose of showing or exhibiting the horse known as "Reckless Youth" as entry number 35, class number 49 at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore.

In addition to denying generally the allegations of the Complaint, the Respondent raised a number of affirmative defenses, including collateral estoppel, and/or judicial estoppel, any applicable statutes of limitation, and *res judicata*. The affirmative defenses may be disposed of summarily. It is well established that the United States is not bound by any state statute of limitation. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Merrick Sponsor Corp.*, 412 F.2d 1076 (2d Cir. 1970). Similarly, counsel's attempt to invoke the federal statute of limitations is without merit as the Complaint in this action was brought well within the five years set forth in 28 U.S.C. § 2462, limiting the enforcement of civil fines, penalty, or forfeiture, pecuniary or otherwise.

The general rule is that the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). Even were all the requisite threshold elements present necessary to trigger such defenses, which they are not, a

detailed discussion of the doctrines of *res judicata*, collateral estoppel and judicial estoppel is not necessary as the issue of whether any determination or disciplinary proceedings instituted by entities other than the Secretary bar a subsequent enforcement action by the Department for the same event has been previously considered and answered adversely to the Respondent by both the Judicial Officer and the Court of Appeals for the Sixth Circuit in *In re Jackie McConnell, et al.,* 64 Agric. Dec. 436 (2005), *petition for review denied sub nom. McConnell v. U.S. Department of Agriculture*, WL 2430314 (6th Cir. 2006) (unpublished) (not to be cited except pursuant to Rule 28(g)).

Congress passed the Horse Protection Act in 1970, finding that the practice of deliberately injuring show horses to improve their performance was "cruel and inhumane." 15 U.S.C. § 1822(1). Known as "soring," the technique employed included fastening action devices, such as chains or padded shoes to the horses' limbs or forefeet and/or applying caustic or irritating chemicals or solutions to their forefeet. The term "sore" is defined in both the Act and the regulations as:

> 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. 15 U.S.C. § 1821(3); 9 C.F.R. §11.1

In 1976, Congress amended the Act "to stop an inhumane and harmful practice that the Congress thought would end when it enacted the Horse Protection Act of 1970 (Pub. Law 91-540), but which has not in fact ended." S. Rep. 418, 94th Cong., 1st Sess. 1 (1975). Not only did Congress seek to put an end to the unnecessary cruelty of soring, it also sought to eliminate the competitive disadvantage faced by horse owners who do not practice soring techniques. *American Horse Protection Association, Inc. v. Lyng,* 812 F. 2d 1, at 7 (D.C. Cir. 1987).

In this case, as in most cases brought under the Horse Protection Act, the Complainant relies primarily upon the statutory presumption found in 15 U.S.C. § 1825(d)(5) which provides:

> 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.

In *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (1981), the Court ruled that in order to be constitutional, the §1825(d)(5) presumption must be interpreted in accordance with Rule 301 of the Federal Rules of Evidence, even though that rule does not directly apply to this type of administrative proceeding.

Fed. R. Evid. 301, **Presumptions in General in Civil Actions and Proceedings**, provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of

> the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

In most pre 1993 cases brought under the Act, the statutory presumption does have a direct connection between the presence of bilateral sensitivity and the ultimate fact of soreness and it is logical that an inference of soreness may well be drawn from evidence of bilateral sensitivity, even were there no presumption. *Thornton v. U.S. Department of Agriculture*, 715 F.2d 1508, 1511 (11th Cir. 1983). In 1992, Congress manifested its desire to require greater proof than merely failure of a Veterinary Medical Officer (VMO) digital palpation test.[4]While the case law is replete with examples of affidavits and testimony from examining "veterinarians" concerning a horse's reaction to palpation alone being sufficient to constitute substantial evidence of violations of the Act, if not meaningfully controverted, the statutory presumption is not irrebuttable and cannot be used to shift the ultimate burden of persuasion. *Vlandis v. Kline*, 412 U.S. 441 (1972); *In re: Larry Edwards*, 49 Agric. Dec. 188, 198 (1990).

In applying the statutory presumption, the Department's Judicial Officer and other Administrative Law Judges have consistently noted that "it is the Secretary's belief that the opinions of its veterinarians[5] as to whether a horse is sore is more persuasive than the opinion of DQPs." *In re: Timothy Fields, et al.*, 54 Agric. Dec. 215 at 219 (1995) (citing *In re: Bill Young and Floyd Sherman*, 53 Agric. Dec. [1232] (slip op at 64, August 31, 1994));[6] *In re: C. M. Oppenheimer*, 54 Agric. Dec. 221 (1995); *In re: William*

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[4] *See*, Pub. L No. 101-341, 105 Stat. 873, 881-82 (1992) ….*Provided further,* That none of these funds shall be used to pay the salary of any Departmental veterinarians or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

[5] Although the cases routinely interchange the term veterinarian and VMO, the evidence in this case establishes that not all Veterinary Medical Officers are licensed veterinarians.

[6] The Judicial Officer's decision in the *Young* case was reversed on appeal, 53 F. 3d 728 (5th Cir. 1995).

*Dwaine Elliott,* 51 Agric. Dec. 334 (1992), *aff'd.* 990 F.2d 140 (4th Cir.), *cert. den.* 510 U.S. 867 (1993); *In re: Pat Sparkman,* 50 Agric. Dec. 602 (1991); *In re: Larry Edwards,* 49 Agric. Dec. 188 (1990), *aff'd. per curiam,* 943 F. 2d 1318 (11th Cir. 1991), *cert.den. 503 U.S. 937 (1992).* As was the case in *Young,* even though possibly misplaced, the same greater weight and preference has been afforded the testimony of VMOs even where there has been testimony from veterinarians who are equine specialists employed by Respondents. *Young* at 1277[7]. Despite the fact that the holding in *Landrum* makes it clear that the possibility exists that the presumption may be rebutted by a Respondent, even a casual reading of the recent cases tends to belie such a notion, strongly suggesting instead that rebutting the presumption is an all but impossible burden in any case where a Veterinary Medical Officer employed by the Department opines that the horse is sore after being palpated.[8] While it now appears from the testimony at the hearing that the

[7] *See also, In re: Perry Lacy,* 66 Agric. Dec. 488 (2007); *aff'd.* 278 Fed Appx. 616 (6th Cir. 2008) In *Lacy,* the Administrative Law Judge relied upon testimony of a licensed equine practioner with years of significant experience treating West Nile cases. The Judicial Officer relied instead upon the testimony of VMO Bourgeois as being entitled to greater weight despite the fact that his testimony made it clear that he had little familiarity with the disease. The testimony in that case did not disclose the fact that the VMO was not licensed.

[8] *See: In re: Ronald Beltz and Christopher Jerome Zahnd,* 64 Agric. Dec. 1438 (2005), *rev.,*64 Agric. Dec. 1487 (2005); *Motion for reconsideration denied,* 65 Agric. Dec. 281 (2006); *Aff'd. sub nom. Zahnd v. Sec'y of the Dep't of Agric.,* 479 F. 3d 767 (11th Cir. 2007). In *In re: Perry Lacy,* 65 Agric. Dec. 1157 (2006), the Administrative Law Judge found that evidence that the horse suffered from West Nile virus was sufficient to rebut the findings of the DQPs and VMOs that the horse was sore. On appeal, the Judicial Officer disagreed, reversed the ALJ's findings, found the statutory presumption was not rebutted and imposed a civil penalty and suspension upon Mr. Lacy. 66 Agric. Dec. 488 (2007). On appeal, the Sixth Circuit affirmed the decision of the Judicial Officer, indicating that the decision of the Department was entitled to significant deference under the *Chevron* doctrine (*Chevron, USA, Inc. v. Nat'l Resources Defense Council , Inc.,* 467 U.S. 837 (1984)). 278 Fed. Appx. 616 (6th Cir. 2008). In that case, contrary to the instant case, the veterinary licensure status of Lynn P. Bourgeois, the VMO who was the principal government witness (who is also one of the witnesses in this case) was not called into question. Had the Court been aware of the fact that the VMO was not licensed as a veterinarian in any state, it remains to be seen as to whether the Court would have reached the same result in affording his opinion testimony any serious consideration or weight as an expert when his testimony was in diametrical opposition to that coming from a highly experienced licensed veterinarian having superior qualifications and 35 years of specialized equine practice, including the experience of handling numerous West Nile cases. The witness's (Bourgeois) blanket conclusion in the Lacy case that there was no naturally occurring condition, no disease condition, and no kind of injury which would cause bilateral sensitivity other than the deliberate application of either caustic chemicals or the use of chains was legally incorrect in light of the holding in *In re: Horenbein,* 41

Department will be transitioning to the use of thermography to determine soreness in future cases, digital palpation was the sole diagnostic means employed to prove the existence of soreness in this case.[9]

The evidence in this case indicates that the Respondent Kimberly Copher Back is the owner of the horse known as "Reckless Youth" and that the horse was entered as entry number 35, class 49 (the Novice Amateur class) in the Spring Jubilee Charity Horse Show held in Harrodsburg, Kentucky on April 20, 2007. "Reckless Youth" is a stallion and had been trained by the Respondent Richard Evans for approximately two years before this particular show. Prior to being allowed to compete in the class, "Reckless Youth" was presented by Evans for a pre-show inspection which was performed by Designated Qualified Person (a "DQP") Greg Williams. (Tr. 215). The pre-show inspection was unremarkable and the horse was moved to the warm up area for last minute preparations and pre-competition warm up by the Respondents Richard Evans and Kimberly Copher Back, the latter of whom would be riding the horse in the event. (Tr. 266-269). "Reckless Youth" ridden by Respondent Back tied for third place in the competition and was taken back to the inspection area and subjected to a post-show inspection.

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Agric. Dec. 2148 (1982). By way of contrast, the Office of Personnel Management (OPM) requires that incumbent Administrative Law Judges must be licensed to practice law or be in good standing, despite the fact that they are generally precluded from practicing law while performing duties as a judge. *See*, 5 C.F.R. § 930.204(b). A similar requirement exists for military attorneys who are serving as judge advocates or who are detailed to perform legal duties. 10 U.S.C. §3065(e); Article 27, Uniform Code of Military Justice, 10 U.S.C § 827; and DA Pam 600-3, ¶39-2(b)(1). Similarly, the Army also requires all members of its Veterinary Corps to be licensed. DA Pam 600-4, ¶13-1(a).

[9] *See*, http://www.aphis.usda.gov/animal_welfare/hp/ ; http://www.aphis.usda.gov/animal_welfare/hp/downloads/thermography_presentation.pdf ; http://www.aphis.usda.gov/animal_welfare/hp/downloads/faq_use ofthermo.pdf ; and http://www.aphis.usda.gov/animal_welfare/hp/downloads/stakeholder/ac_su_04-08-09.pdf.

During the course of the post-show inspection, "Reckless Youth" was examined initially by VMO Miava Binkley who after digitally palpating the horse concluded that the animal exhibited bilateral sensitivity and thus was sore. VMO Binkley did not observe any abnormality of gait, problem with locomotion, swelling, redness, scarring, blisters, or chemical odors. Tr. 59 at 1-5, 77 at 15-18. The horse then was re-examined by DQP Greg Williams who testified that his post-show examination produced no sensitivity on the left and inconsistent responses upon digital palpation on the right; as a result, in his opinion, the horse was not sore. Tr. 217. The horse was then examined by VMO Lynn P. Bourgeois who agreed with VMO Binkley's findings.[10] VMO Bourgeois also failed to observe any abnormality of gait, problem with locomotion, swelling, redness, scarring, blisters, or chemical odors. Tr. 153 ay 7-13, 18-20. The two VMOs conferred as to their findings, an APHIS Form 7077 was prepared by VMO Binkley, the form was first signed by her, and then countersigned by VMO Bourgeois.[11]

While as noted previously the exclusive reliance upon the use of digital palpation to determine whether a horse has been sored has in the past been upheld in numerous cases, including both the Sixth and District of Columbia Circuits,[12] despite at

[10] Richard Evans, who was present with the horse throughout the post-show examination, testified the reactions the VMOs received were not in the same areas. Tr. 290.

[11] In many prior cases, each of the VMOs would mark the form, with one using "x"s and the other using "o"s so that the findings of each individual VMO were distinguishable as to where they found sensitivity. In this case, only the "x"s were placed on the form by VMO Binkley and VMO Bourgeois signed the form indicating that he agreed with what had been marked. According to VMO Bourgeois, all that is needed is that "we agree on some spots." Tr. 152.

[12] *See, e.g., In re: William J. Reinhart,* 59 Agric. Dec. 721, 751 (2000), *aff'd. per curiam,* 39 Fed. Appx. 954 (6th Cir. 2002), *cert. den.* 123 S. Ct. 1802 (2003); *In re: David Tracey Bradshaw,* 59 Agric. Dec. 228 (2000); *In re: Gary Edwards,* 55 Agric. Dec. 892 (1996); *In re: John T. Gray,* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re: Mike Thomas,* 55 Agric. Dec. 800, 836 (1996); *In re: Kim Bennett,* 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re: C.M. Oppenheimer,* 54 Agric. Dec. 221, 309 (1995); *In re: Kathy Armstrong,* 53 Agric. Dec. 1301, 1319 (1994), *aff'd. per curiam,* 113 F. 3d 1249 (11th Circ. 1997) (unpublished); *In re: Danny Burks,* 53 Agric. Dec. 322 (1994); *In re Eddie Tuck,* 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed,* No. 94-1887 (4th Cir. Oct. 6, 1994); *In re: Ernest Upton,* 53 Agric. Dec. 239 (1994); *In re: William Earl Bobo,* 53 Agric. Dec. 176, 201 (1994), *aff'd.* 52 F.3d

least one invitation to do so (which was rejected), the Department's continued use of the "scientific" technique has never been subjected to evaluation standards using the criteria set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).[13] In *Daubert,* the Supreme Court imposed upon trial judges the task of ensuring that an expert's testimony both rests upon a reliable foundation and is relevant to the task at hand. The Court set forth four factors to be considered in deciding whether a scientific technique or theory is sufficiently reliable as to allow expert testimony based upon it. There, the Court noted:

> Proposed testimony must be supported by appropriate validation- *i.e.*, "good grounds," based upon what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability. *Id.* at 590

In enumerating the factors to be considered in determining reliability, the Court indicated that:

"a key question to be answered was whether a …technique is scientific … will be whether it can be (and has been) tested." …

"Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication." …

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1406 (6th Cir. 1995); *In re: Jack Kelly,* 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed,* 38 F. 3d 999 (8th Cir. 1994); *In re: Charles Sims,* 52 Agric. Dec. 1243, 1259-60 (1993); *In re: Cecil Jordan,* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd. sun nom. Crawford v. United States Department of Agriculture,* 50 F. 3d 46 (D.C. Cir.), *cert. den.,* 516 U.S. 824 (1995); *In re: Paul A. Watlington,* 52 Agric. Dec. 1172, 1191 (1993); *In re: Glen O. Crowe,* 52 Agric. Dec. 1132, 1151 (1993); *In re: Billy Gray,* 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd.,* 39 F. 3d 670 (6th Cir. 1994); *In re: Linda Wagner,* 52 Agric. Dec. 298 (1993); *In re: John Allan Callaway,* 52 Agric. Dec. 272, 287 (1993); *In re: Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re: A. P. Holt, et al.* (Decision as to Richard Polch and Merie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd. per curiam,* 32 F. 3d 569 (6th Cir. 1994); *In Re: Larry E. Edwards, et al.,* 49 Agric. Dec. 919 (1990); *In re: A. P. Sonny Holt, et al.,* 49 Agric. Dec. 853 (1990); *In re: A.S. Whitcomb,* 36 Agric. Dec. 1165 (1976).

[13] The Judicial Officer considered *Daubert* not to apply because the Federal Rules of Evidence do not normally apply to the Department's disciplinary proceedings. *In re: Carl Edwards & Sons Stables, et al.,* 56 Agric. Dec. 529, 582 (1997). In light of *Landrum,* however, it would appear that in order for the statutory presumption to pass constitutional muster, there is at least limited applicability of the Federal Rules of Evidence and an obligation to determine whether there is sufficient reliability to the technique when prior reliance appears to have been based upon the testimony of USDA "veterinarians" who had superior qualifications and decades years of significant experience with horses.

"in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error," …

"Finally, "general acceptance" can yet have a bearing on the inquiry."
*Id.* at 593-594

In its decision to transition to the use of thermography as the basis for enforcement actions, despite contrary earlier positions that the Auburn and Ames studies were obsolete,[14] the Department appears to have finally vindicated and accepted as valid the comprehensive body of studies pioneered by Dr. Ram C. Purohit, Associate Professor, Department of Large Animal Surgery and Medicine at the Auburn University School of Veterinary Medicine in Auburn, Alabama between 1978 and 1982 (Auburn Study) along with those of numerous others which have consistently found thermography and other available diagnostic tools to provide a more accurate and objective means of determining whether a horse had been sored than relying exclusively upon palpation.[15] The reliability of the exclusive use of palpation as a diagnostic tool was questioned and the possible adoption of the use of thermography was recommended by United States

[14] Departmental Decision of Judicial Officer Donald A. Campbell in *In re: Bill Young and Floyd Sherman,* 53 Agric. Dec. 1232 at 1268 (1994). Both the Ames Study and the Auburn Study were done before the Scar Rule was promulgated in 1979. (9 C.F.R. § 11.3). *See also*: *American Horse Protection Association, Inc. v. Lyng,* 681 F. Supp. 949 (D.D.C. 1988). In that case, the Department attempted to characterize the Auburn Study as a study of the use of thermography as a diagnostic tool, rather than its actual scope as a study of soring methods and techniques. The Auburn Study is actually a series of 18 separate studies.

[15] R. Purohit, D.V.M., Ph.D., *Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors,* (Summary of Research from September 1978 to December 1982), School of Veterinary Medicine, Auburn University, 1982; T. Turner, D.V.M. , M.S. *Utilizing Thermography to Assess Compliance with the Horse Protection Act,* School of Veterinary Medicine, 2009; *See also,* H.A. Nelson, D.V.M. and D.L. Osheim, B.A., *Soring in Tennessee Walking Horses: Detection by Thermography,* (USDA, National Veterinary Services Laboratories, Ames, Iowa, 1975 (Ames Study); *Thermographic Enforcement of the Horse Protection Act,* Vol 172, J.A.V.M.A. (1978); L.vanHoogmoed, J.R. Snyder, A.K. Allen and J.D. Waldsmith, *Use of Infrared Thermography to Detect Performance-Enhancing Techniques in Horses,* University of California at Davis School of Veterinary Medicine, 2001. USDA previously took the position that the Auburn Study was a study of the use of thermography as a diagnostic tool, rather than a study of soring methods and techniques. *American Horse Protection Association, Inc. v. Lyng,* 681 F. Supp. 949, 953 (D.D.C. 1988).

District Judge Gasch in his 1988 decision in *American Horse Protection Association, Inc. v. Lyng*, 681 F. Supp. 949, 956-958 (D.D.C. 1988).[16] Congress has also expressed reservations and some concern on the use of palpation as the sole basis for determining whether a horse had been sored.[17] Thus far however, only the Fifth Circuit has found the use of palpation alone to determine whether a horse has been sored to be unacceptable. *Young v. United States Department of Agriculture,* 54 Agric. Dec. 208, 53 F. 3d 728 (5th Cir. 1995); *Bradshaw v. United States Department of Agriculture,* 254 F. 3d 1081 (5th Cir. 2001) (Table).[18]

Applying the *Daubert* factors to the use of palpation as the sole diagnostic tool to determine whether a horse has been sored, it appears that its exclusive use fails each of the criteria required provide the degree of reliability deemed appropriate and necessary under the four factors. Palpation is subjective in nature[19] and not susceptible to being objectively tested; it has been found wanting in publications; due to its subjectivity, error rates are not quantifiable, and its general acceptance is no longer universal, a matter apparently now conceded by the Department with its promulgation of the use of

[16] This action was originally brought as *American Horse Protection Association, Inc. v. Block*, No. 84-3298 memo op (October 30, 1985), *rev and remanded, sub. nom. American Horse Protection Association, Inc. v Lyng*, 812 F. 2d 1 (D.C. Cir. 1987); *on remand*, 681 F. Supp. 949 (D.D.C. 1988)

[17] Restrictive and precatory language were inserted in the Animal Plant and Health Inspection Service (APHIS) appropriations for the fiscal years 1993 and 1994 which were critical of the continued use of digital palpation as the exclusive means of determining whether a horse had been sored. For a brief summary and discussion of those provisions, *See: Young,* 53 Agric. Dec. at 1283-1286.

[18] The Court noted the testimony of several highly qualified expert witnesses who testified that soring could not be diagnosed through palpation alone and also that Congress had expressed its disapproval of soring diagnoses based solely upon palpation in an appropriation bill. *Young* at 54 Agric. Dec. 208, 211-212; *See*, Pub. L. No. 102-341, 106 Stat. 873, 881-882 (1992); *see also*, H.R. Rep. No. 617, 102d Cong., 2d Sess. 48 (1992); S. Rep. No. 334, 102 Cong. 2d Sess. 49 (1992).

[19] VMO Binkley conceded that palpation was subjective. Tr. 77. Bourgeois while acknowledging that thermography was an objective test producing objective findings, indicated "Yeah, that's why I don't like it." Tr. 135. In describing the scientific technique of palpation, he testified "…you touch an ouchy spot and you get a response. " *Id.* The fact that three individuals got different results with the same procedure would tend to strongly indicate the subjectivity of the method.

thermography on April 9, 2009 as an additional and more objective tool in the detection of the soring of horses.

Given my conclusion that despite precedent palpation is not sufficiently "scientific" as to be a reliable diagnostic means under the *Daubert* standard, I find that in light of the conflict between the opinion of the DQP that the horse gave inconsistent responses and that of the VMOs that the responses were consistent enough,[20] that the Department failed to establish that "Reckless Youth" had been "sored" by either chemical or mechanical means and accordingly, the statutory presumption was not triggered. Neither VMO Binkley nor VMO Bourgeois found evidence that any illegal device had been used, nor did they find any evidence of the use of caustic chemicals. Tr. 27, 29, 34, 142-3, 145. Although in the past, the testimony of VMOs has been afforded unquestioned and nearly unanimous weight and acceptance on the basis of their being highly qualified "veterinarians,[21]" the practice of unconditional acceptance of their opinion as to the ultimate facts of a case without supporting acceptable scientific evidence would appear to make the purpose of any hearing nugatory, if not totally meaningless.[22] Moreover, acceptance of the testimony of VMOs as that of "veterinarians" appears misplaced as the term "veterinarian" is defined by Websters as "one qualified and authorized to treat

[20] The manner in which the APHIS Form 7077 was completed made it impossible to verify the extent of consistency between the two VMOs. VMO Bourgeois testified that the two of them did not have to agree on all reaction points, but only that they had to agree on some spots. Tr. 152. Richard Evans felt the examinations of the VMOs produced reactions in different spots. Tr. 290.

[21] To refer to VMOs as veterinarians might be considered a catachresis.

[22] Although both VMOs are graduates of a school of veterinary medicine, neither at the present time would meet the requirements of 9 C.F.R. § 11.7(1) to be licensed as a DQP as that paragraph incorporates the accreditation provisions under part 161 of chapter I of title 9. 9 C.F.R. § 161.2(a)(2)(ii) requires that the veterinarians be licensed or legally able to practice in the state in which he or she wishes to be accredited.

diseases and injuries of animals."[23] In this case, neither VMO was able to testify as to the means by which the horse had been sored, i.e., whether done by chemical or mechanical means. Although APHIS Form 7077 contains separate boxes specifically designed to indicate the method of soring, in this case, only the ultimate conclusion of the VMOs that the horse was sore was entered on the APHIS Form 7077 without further elaboration. None of the boxes indicating what method was used in making the horse "sore" were marked and on cross examination, neither VMO found fault with the horse's locomotion or could determine what method had been used, only that they were of the opinion that the horse was "sore."[24]

In light of my finding that the horse was not sore, it is unnecessary to determine to discuss or make findings as to whether there was inappropriate or questionable interaction with the DQP's fiancé by one of the VMOs[25] which could possibly have provided motivation to commit calumny or at least cast the DQP in a less than favorable light, or to have to consider what, if any, inference to draw from the absence of evidence

[23] Websters Ninth New Collegiate Dictionary, Merriam Webster, Springfield , Massachusetts, 1990, p. 1312. The requirement "authorized" implicitly requires licensure. *See*, http://www.aphis.usda.gov/animal_health/vet_accreditation/apply.shtml

[24] Only Item 28 Is Horse Sore was marked "Yes." No entries were made on Item 22 Action Devices; VMO Binkley indicated that she did weigh the chains and found them to be within the regulatory limits of 6 ounces, but did not record the weights. Tr. 23, 26-27, 96-97. Neither was any entry was made on Item 24 Prohibited Substances. If the chains were within regulatory limits, Phase XI of the Auburn Study indicates that chains of up to and including 6 ounces will not produce harmful effects, other than possible hair loss.

[25] Both the DQP and his fiancé, Kim Angel, testified about their interaction with VMO Bourgeois. Tr. 208-11, 234-5. VMO Binkley noted that there had been a "heated discussion" and described it as a "confrontation." Tr. 49, 54.

> Q. But there was a confrontation.
> A. There was.
> Q. And in fact Dr. Bourgeois was told very pointedly in your presence that the DQP would not tolerate his wife being talked to the way she was.
> A. I remember something to that effect. Tr. 54 at 6-13

VMO Bourgeois testified that he had a "problem" with the DQP's wife (actually his fiancé), but in contrast to his recall of the specifics of his examination of the horse, indicated that he didn't remember that night "that well." Tr. 122. *See also,* Para. 7, Code of Ethics for Veterinarians.

of the DQP having been disciplined for of substandard performance at the show[26] despite what was characterized by VMO Binkley as his "general pattern of poor performance." Tr. 48. Suffice it to say that after viewing the excerpt of the video of the examinations and the lighting conditions at the time of the examinations,[27] it is difficult to fully accept as credible the testimony of VMO Binkley that she was capable of observing whether the DQP's thumb was "blanched" during his examination of the horse, particularly in view of her admission that her eyesight was not that good. Tr. 14-17, 67-68; GX-8. VMO Bourgeois testified that he did observe the DQP's examination. Tr. 132.

In assessing the credibility of the witnesses, I found the testimony of the DQP to be credible and based upon a genuine belief that his examination on digital palpation produced inconsistent responses from the horse. Tr. 217, 224. Although VMO Binkley faulted his examination technique as she felt that the DQP was not exerting sufficient pressure, she admitted that her eye sight "is not that good" and agreed that his examination did not elicit a pain response. Tr. 68. As the owner of Tennessee Walking horses who from time to time exhibited his horses himself in shows where he was not involved as a DQP,[28] rather than having any predisposition to be lenient to other exhbitors, the DQP would have significant incentive to fairly examine the horses at the shows at which he was employed to preclude unfair competition by others in the industry.

Even had I found "Reckless Youth" to have been sore, which I do not, I would not have found Linda Ruth Patton to have violated the §5(2)(B) of the Act by reason of entering the horse. In this action, although such documents are typically introduced, no effort was made to enter documentary evidence such as any of the entry forms or

[26] Both VMOs indicated that their duties included monitoring the performance of the DQP. Tr. 47, 105.
[27] GX-8.
[28] Tr. 197.

cancelled checks paying entry fees. While admissible as having been prepared in the course of preparation of the case, Government Exhibit 4 was given little weight given the failure of the investigator to obtain Ms. Patton's signature or initials as to its accuracy and the exhibit's paraphrasing style[29] rather than the question and answer format typically taught at the Federal Law Enforcement Training Center at Glyncoe, Georgia or other law enforcement training facilities. When called by the Government as a rebuttal witness,[30] while she acknowledged that Sweet Revenge Stables was located on land that she owned, she indicated that she did not operate the horse training business. Tr. 313.

Although VMO Binkley testified that she informed the custodian (Respondent Evans) that the horse was sore after the examination was concluded (Tr. 91-2), Evans denied that was communicated to him. Tr. 291. In fact, Evans testified that he was told that he was not going to get a ticket:

> Q Now at that stage, she's asking you the number, and presumably we've seen everything that they have videotaped, at least that's the tape they provided to us to introduce as an exhibit. At any time did she or Dr. Bourgeois give you the information that they thought that you were in violation of the Horse protection Act?
>
> A. All I was ever told, I asked if I was being issued a ticket, and they said no. They said, we're going to take information on two feet. But they never told me that he was sore in two feet.
>
> They said they were taking information, and they said it would be up to someone else to decide, and they did mention a hearing officer, they said would be the one to decide. Tr. 291-2

Evans went on to indicate that had he known that they found the horse to be sore, he would have quarantined the horse in Harrodsburg and waited on the vet to get there, as it

[29] Stephen Fuller testified that when Interview Logs were prepared, they would "typically try to write up the interview where it will flow smooth." Tr. 186.

[30] Although the Government was allowed to call Ms. Patton as a rebuttal witness over objection of Respondent's counsel, the questions asked should properly have been asked during the Government's case rather than as rebuttal testimony.

was illegal to transport a sore horse. Tr. 292. If credence is given to the account related by Evans, an examination by a licensed veterinarian might have also provided either confirmation that the horse was sore or evidence which might have been exculpatory.

Upon consideration of the testimony given at the hearing the evidence of record, and the proposed findings, conclusions and briefs filed by the parties, I find that the allegations of violations contained in the Complaint brought against the Respondents should be dismissed. The following Findings of Fact, Conclusions of Law and Order will entered.

**Findings of Fact**

1. The Respondent Kimberly Copher Back is a resident of Mount Sterling, Montgomery County, Kentucky. At all times material herein, she owned "Reckless Youth," a registered Tennessee Walking Horse that was entered as entry number 35, class number 49 of the Jubilee Spring Charity Horse Show held on April 19-21, 2007 in Harrodsburg, Kentucky for the purpose of showing or being exhibited.

2. The Respondent Richard Evans is a resident of Mount Sterling, Montgomery County, Kentucky. He had trained "Reckless Youth" at Sweet Revenge Stables which is located on property owned by his mother-in-law, Respondent Linda Ruth Patton, for approximately 24 months prior to the horse being entered in the show which is the subject of this action and was the one responsible for entering the horse at the show.

3. Respondent Linda Ruth Patton is a resident of Mount Sterling, Montgomery County, Kentucky where she owns the land upon which Sweet Revenge

Stables is located, however, the training and stable operation is the responsibility of Respondent Richard Evans.

4. At the pre-show inspection for class 49 on April 20, 2007, "Reckless Youth" was found to have no evidence bilateral sensitivity by the examining DQP and was passed as being eligible to compete.

5. "Reckless Youth" was ridden by Kimberly Copher Back during the competition and was tied for third in the class. By reason of placing in the class, "Reckless Youth" was subjected to a post-show inspection, where the horse was examined in turn by means of digital palpation by VMO Binkley, DQP Williams, and VMO Bourgeois.

6. The DQP Williams has three or four years of experience as a DQP and has no record of disciplinary action ever having been taken against him for the performance of his duties as a DQP. Tr. 194, 202. More specifically, no record exists of any recommendation of disciplinary action being made against him for his performance of his duties at the show where the alleged violations occurred in this action.

7. Although both VMOs are graduates of a school of veterinary medicine, neither is currently licensed to practice veterinary medicine in any state and licensure is not a condition of employment as a VMO.

8. Although the DQP found the horse not to be sore, the VMOs concluded that the horse was sore. Although the Department is transitioning to the use of thermography as an additional technique, the more subjective test of digital palpation (as evidenced by the differing findings of the examiners) was the sole diagnostic criteria used in this case.

9. There was no testimony or documentary evidence that "Reckless Youth" exhibited any abnormality of gait, locomotion, swelling, redness, scarring, blisters or chemical odor.

10. On the basis of the evidence before me, the Department failed to meet its burden of proof in establishing that "Reckless Youth" was "sore" on April 20, 2007.

## Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. As "Reckless Youth" was not "sore" within the meaning of the Act on April 20, 2007, the Respondents did not violate the Act as alleged in the Complaint.

2. The evidence of alleged violations of the Act were based upon diagnostic techniques which were not sufficiently reliable using *Daubert* criteria as to raise the 15 U.S.C. §1825(d)(5) presumption.

## Order

For the foregoing reasons, the Complaint is dismissed on its merits.

This Decision will become final and effective 35 days after service thereof upon the Respondent unless there is an appeal to the Judicial Officer by a party to the proceeding.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
May 12, 2009

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**PETER M. DAVENPORT**
Administrative Law Judge

Copies to: Robert A. Ertman, Esquire
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