

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:

	)	HPA Docket No. 02-0001
Ronald Beltz, an individual, and	)	
Christopher Jerome Zahnd, an individual;	)	
	)	
	)	
Respondents	)	

**Decision as to Christopher J. Zahnd**

In this decision, I find that United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) did not meet its burden of proving, by a preponderance of the evidence, that Respondent Christopher J. Zahnd violated the Horse Protection Act by entering or showing a horse that was sore. 15 U.S.C. § 1824(2)(B). Accordingly, the Complaint against Respondent is dismissed.

**Procedural History**

On October 25, 2001, a complaint was filed by the Acting Administrator of APHIS, alleging that Respondent entered Lady's Ebony Ace in a horse show in Shelbyville, Tennessee while the horse was sore, for the purpose of showing or exhibiting the horse, in violation of the Horse Protection Act. The complaint also cited the owner of the horse, Ronald Beltz, for violating the Act. Imposition of civil penalties and disqualification from participation in horse show related activities were requested by the Complainant. Both Respondents filed answers, and a hearing was scheduled for June 3, 2004. Amended answers were filed on May 6, 2004. Complainant moved to postpone

the hearing when he discovered that one of his subpoenaed witnesses, Dr. Guedron, would be unavailable, and I cancelled the hearing on June 1, 2004. At an August 17, 2004, telephone conference, the parties and I agreed to a December 1, 2004 hearing date.

I conducted a hearing in this matter on December 1, 2004 in Huntsville, Alabama. Complainant was represented by Brian T. Hill, and Respondent was represented by Greg Shelton. At the hearing, Complainant called four witnesses, including one of the veterinarians who examined Lady's Ebony Ace, but he did not call, or even attempt to subpoena, Dr. Guedron, who was the other examining veterinarian. Respondent called two witnesses, including Respondent himself, but did not call Mr. Charles Thomas, the Designated Qualified Person (DQP) who examined Lady's Ebony Ace before the APHIS veterinarians, because Mr. Thomas did not receive the subpoena until after the hearing. Respondent's Brief, p. 1. Complainant submitted eight exhibits, including a videotape of the APHIS veterinarians inspecting Lady's Ebony Ace. Respondent submitted no exhibits.

During the hearing I was informed that Complainant had earlier reached a settlement with Ronald Beltz, and on January 18<sup>th</sup>, 2005, I signed a Consent Decision and Order concluding that matter.

Following the hearing I received briefs from both parties, and a reply brief from Complainant.

### **Findings of Fact**

1. Respondent Christopher J. Zahnd was the trainer of a horse named Lady's Ebony Ace on May 25, 2000. CX 1, CX 4, CX 6.

2. On May 25, 2000, Lady's Ebony Ace was entered at the 30<sup>th</sup> Annual Spring Fun Show Preview in Shelbyville, Tennessee. Complaint, Amended Answer.

3. Lady' Ebony Ace spent most of May 25<sup>th</sup> prior to the show in a trailer. Tr. 87-90. Both Respondent and Larry Appleton, Jr., who was assisting him as a groom, inspected her before the show, and found no response to palpation which would indicate to them that the horse was sore. Tr. 84-85, 98-99.

4. The DQP, Charles Thomas, inspected Lady's Ebony Ace and noted a response to his palpation. CX 7. He found that there was a mild reaction to the palpation on the outside of the left foot and a stronger reaction on the outside of the right foot. Id. Combined with the slight pull on the reins he noted when the horse was walked slowly, he gave the horse a score of 5, making it ineligible to be shown that night.

5. Lady's Ebony Ace was then examined by Dr. Clement Dussault, a veterinarian in the employ of APHIS. CX 1, CX 3, CX8, Tr. 35-36. He noted that the horse moved somewhat freely when being led around a cone. CX 3. He also noted that when palpating medial and lateral aspects of the horse's right and left front feet, the horse withdrew each foot. CX 1, CX 3, Tr. 35-36. He termed the responses to palpation "moderate." CX 3. He found the horse to be bilaterally sore and determined that it would feel pain in moving. CX 3, Tr. 42.

6. As per normal APHIS protocol, Dr. Dussault then asked Dr. Guedron, another APHIS veterinarian who was present at the show, to examine Lady's Ebony Ace. Tr. 18-20, 36-38. Dr. Guedron appeared to achieve even more of a reaction in the horse when palpating its front legs. CX 8, Tr. 38-39.

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

8. Dr. Guedron did not testify at the hearing. An earlier hearing had been postponed solely because Dr. Guedron, who had left APHIS, was unable to attend. No attempt was made to subpoena Dr. Guedron for the December 1 hearing, nor was there any request to allow him to testify through audiovisual telecommunications or telephone.

9. Respondent has trained and exhibited horses of this breed for fifteen years. Tr. 97. He testified that he had never been cited before or since this inspection for a soring violation of the Act, including numerous showings of Lady's Ebony Ace. Tr. 100, CX 4. He stated that the reactions to palpation were due to the horse acting "silly" as a result of spending most of the day in a horse trailer, and as a result of the extended examination process. CX 4, Tr. 99.

### **Statutory and Regulatory Background**

The Horse Protection Act is pertinently predicated on the findings that

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

(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

15 U.S.C. § 1822.

Congress elaborated on what it meant by a "sore" horse:

(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.

15 U.S.C. § 1821(3).

Among the activities prohibited by the Act are:

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

15 U.S.C. § 1824.

Finally, “a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.”

15 U.S.C. § 1825(d)(5).

Violators of the Act are subject to severe sanctions. Civil penalties of up to \$2200 may be imposed, as well as disqualification from showing or exhibiting any horse for at least a year. 15 U.S.C. § 1825(b)(1), (c).

### **Discussion**

I find that Complainant has failed to establish, by a preponderance of the evidence, that Respondent showed or exhibited a “sore” horse as defined by the statute.

While Complainant clearly demonstrated that Lady's Ebony Ace reacted to palpation in a manner indicative of pain, and the reaction was sufficient to trigger the statutory presumption that the horse was sore, such factors such as the failure of Dr. Guedron to testify, the absence of any indicia of soring other than the reaction to palpation, the explanations offered by Respondent as to the cause of the pain reaction, Respondent's long and impressive record of compliance with the HPA, and the lack of any rebuttal evidence contradicting Respondent's explanation, support a conclusion that the statutory presumption has been overcome by Respondent.

That the DQP and Dr. Dussault achieved a pain reaction from palpating Lady's Ebony Ace is undisputed, although only Dr. Dussault was available to testify as to how much pressure was put on the horse during palpation. He testified that he used the proper technique, which involved pressing his thumb on the horse's pastern until the thumbnail blanched. Tr. 22. He noted, when observing the videotape of the examination of the horse, CX 8, that as each person examined the horse, first the DQP Thomas, then himself, and then Dr. Guedron, the apparent pain response from the horse was more severe. Tr. 38-39. However, since each of the three found a pain response in the same spot, he decided, after conferring with Dr. Guedron, that the horse should be written up. Tr. 40-41, CX 3.

It appeared from my view of the videotape that Dr. Guedron was palpating Lady's Ebony Ace with more force than either Thomas or Dr. Dussault. Without his direct testimony, it is difficult to give much weight to the statements on his examination that are contained in his affidavit, CX 2, although it is clear visually that he achieved the same but stronger reactions as were generated by Dr. Dussault. The lack of testimony on what his

observations were in regard to sight and smell could be significant, particularly in light of the statutory presumption imposed by Congress.

It has long been recognized that evidence of pain during palpation is an indication that a horse is sore. While Congress imposed a presumption that bilateral pain (“abnormal sensitivity in . . . both of its forelimbs”) in either the front or back legs is evidence that a horse is sore, the presumption is a rebuttable one. Thus, in *Landrum v. Block*, 40 Agric. Dec. 922 (1981), the court stated that “Caution in dealing with presumptions is especially appropriate in this case because a respondent in the civil proceedings in question is not protected by the standard of proof beyond a reasonable doubt that would apply in a true criminal case, despite the quasi-criminal nature of the potential sanctions.” 40 Agric. Dec. 922, 925. That court further warned against assuming that the presumption, once established, somehow shifts the burden of persuasion, emphasizing that the “burden of persuading the trier of fact that a horse was artificially sore remains with the Secretary from the beginning to the end of the administrative process.” *Id.* Thus, even if Complainant establishes, as it does here, that the horse had a bilateral reaction to palpation, I must determine, after hearing Respondent’s evidence, and evaluating the credibility of the witnesses, whether the preponderance of the evidence supports a finding that the horse was sore by artificial or chemical means. If I cannot so find, I must decide in favor of the Respondent.

Thus, in *Martin v. USDA*, 1995 WL 329255 (6<sup>th</sup> Cir. 1995) (unpublished), the Court of Appeals held that:

once the party accused of soring the horse has produced credible evidence of a natural cause for the soreness, the agency must produce evidence that the horse was made sore by artificial means. Otherwise, the USDA's detection of "abnormal sensitivity," which does not require a finding that the soreness was

caused artificially, would always control the result. Substantial evidence that indicates artificial soring is not present in this record.

Even though Dr. Dussault concluded in his affidavit that the bilateral pain reaction he observed constituted soring “by the use of mechanical and/or chemical means,” CX 3, p. 2, he testified at the hearing that he saw no objective evidence of the usage of such means, specifically indicating that he observed no scarring, smelled no chemicals, and saw no evidence of any hair loss—three of the most common indicia of the use of mechanical and/or chemical soring devices. It appears that Dr. Dussault’s conclusion that soring occurred by mechanical or chemical means was simply based on the statutory presumption. While the presumption states that a horse is presumed to be sore--which by definition means that mechanical or chemical means have been unlawfully applied to impact its gait--that there is no physical manifestation such as odor, scarring, or hair loss remains a fact that should be considered by the administrative law judge.

Dr. Guedron’s affidavit is entitled to little weight in this proceeding. As counsel for Respondent pointed out at trial and in his brief, the videotape of Dr. Guedron’s examination of Lady’s Ebony Ace, and the statements made in his affidavit, raised questions on which Respondent was entitled to cross-examination. The Rules of Procedure specify that witnesses must testify at a hearing on oath or affirmation and be subject to cross-examination. 1.141(h). Complainant made no effort to subpoena Dr. Guedron for this hearing, even though counsel requested a postponement of the previously scheduled hearing solely because of Dr. Guedron’s unavailability. Complainant had the opportunity to ask for Dr. Guedron’s testimony to be taken through audio-visual telecommunications or through telephonic means, or possibly even through



a rule 1.148 motion to take depositions where testimony would otherwise not be available. Complainant elected to not pursue any of these paths. Thus, while I allowed Dr. Guedron's affidavit into evidence, I indicated that I intended to give it very little, if any, weight. Tr. 70-72.

Respondent Christopher Zahnd appeared to be a forthright and credible witness. He testified that when he checked the horse, it was sound and showed no evidence of soreness. He stated that he had shown this particular horse numerous times both before and after this show during 2000, probably eight to ten times a month during the season that runs from March to November. In fact, the horse was the "fifteen-two world champion mare" two years after this inspection. Tr. 100. He testified that he had been showing this horse for seven years, as of the date of the hearing, that he showed about 300 horses per year in the ten years that he had become a full time trainer of Tennessee walking horses, and that this was the only time he had been cited under the Horse Protection Act. His account of his compliance record was un rebutted.

He further testified that he observed Larry Appleton, who was assisting him as a groom, inspect the horse, and that the horse was not sore when Appleton palpated her. He then examined the horse himself, and was satisfied that the horse was not sore. He proceeded to watch the examination of the horse first by DQP Thompson, then by Dr. Dussault and finally by Dr. Guedron. The horse had a stronger reaction to palpation as it went through its third, fourth and fifth examinations, and Mr. Zahnd indicated that the horse would be expected to react a little more each time it was examined. He testified that the horse stood fine, "even resting her back foot while one of the inspectors was checking her," Tr. 103, which he stated was inconsistent with the behavior to be expected

in a sore horse. Tr. 106. He also testified that the horse could be “stubborn and hateful” when irritated. Tr. 105

Both Zahnd and Appleton testified that the horse’s behavior was at least in part attributable to the fact that she had spent virtually that entire day in the horse trailer, including a considerable portion of time--two to three hours--being transported. They each testified that the more a horse is palpated, the more irritated it can get, and that she was getting palpated quite a bit. Zahnd also testified that in his experience when a horse is treated by chemical or mechanical means, that there is a visible physical manifestation in the way of scarring or observable hair loss, which was not present here. While Zahnd is obviously not a veterinarian, his lengthy experience as a horse trainer is entitled to some respect, as is his record of compliance.

Factoring in all the evidence, I conclude that Complainant has not demonstrated, by a preponderance of the evidence, that Respondent violated the Horse Protection Act as charged. While Lady’s Ebony Ace clearly had increased pain reactions to palpation as she went through repeated examinations, thus triggering the presumption of soring, several factors lead me to conclude that the presumption was rebutted. The failure of Complainant to attempt to call Dr. Guedron, whose palpations of the horse appeared to my eye to be more forceful than that of Dr. Dussault, to hear his explanations for his conclusions, is a significant detriment to Complainant’s case. In addition, Respondent’s witnesses suggested reasonable explanations for the horse’s behavior, including her long day standing in the horse trailer and her temperament. The fact that the horse bore no physical manifestations of soring, other than the reaction to palpation, is also a factor in my decision, as there was no rebuttal to the contention expressed by Respondent that 90

percent of sored horses showed scarring or hair loss, or would smell of the chemicals used. Tr. 108-109. Finally, the Respondent's long and otherwise unblemished compliance record over fifteen years of training Tennessee walking horses, while not determinative, is an indication to me that Lady's Ebony Ace's reaction to palpation was not a result of soring.

### **CONCLUSIONS OF LAW AND ORDER**

1. The bilateral reaction to pain from palpation of Lady Ebony's Ace was sufficient to trigger the statutory presumption that the horse was sore.
2. The preponderance of the evidence does not support a finding that Lady's Ebony Ace was a sored horse.

Wherefore, it is ordered that the complaint against Respondent is dismissed.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.  
this 6th day of September, 2005

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**MARC R. HILLSON**  
Chief Administrative Law Judge