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COURT OF APPEALS

STATE OF NEW YORK

THE MATTER OF LUIS PENA,

Respondent,

-against-

NO. 136

NEW YORK STATE GAMING COMMISSION,

Appellant.

20 Eagle Street
Albany, New York
November 13, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 136, Matter
2 of Pena v. the New York State Gaming Commission.

3 Counsel?

4 MR. HITSOUS: Good afternoon, Your Honors.
5 Jonathan Hitsous for the Gaming Commission. May I have two
6 minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. HITSOUS: Thank you, Your Honors.

9 We're here today because the - - - a majority of
10 the Third Department misapplied the substantial-evidence
11 standard.

12 CHIEF JUDGE DIFIORE: Let me ask you a question,
13 counsel. Is our substantial-evidence standard dependent on
14 the kind of evidence that is presented for consideration?

15 MR. HITSOUS: No, Your Honor. It never has been.

16 And this court recently recognized, just one
17 month ago, in the Haug case, that whether evidence is
18 hearsay or nonhearsay, there is one substantial-evidence
19 standard for all of this evidence. The Third Department
20 majority did not make any kind of distinction between
21 hearsay versus nonhearsay. The Third Department majority
22 found that the treatment records at issue here could be
23 admitted for whatever factual inferences the Commission
24 could draw from them and that the substantial-evidence
25 standard would apply to that.



1 The problem is that - - -

2 JUDGE RIVERA: But - - - but hearsay could only
3 be substantial evidence if it's reliable and probative,
4 right? So you do have a certain different level of review;
5 do you not?

6 MR. HITSOUS: No, Your Honor. If evidence is
7 reliable, it can't be considered at all. But if it is
8 sufficient to be considered, its probative value must be
9 weighed just as any other evidence, and that is,
10 deferentially, as long as the inferences to be drawn from
11 that evidence are both reasonable and plausible.

12 Now, where the Third Department erred here is
13 despite the fact that they recognized this standard, they
14 proceeded to second-guess the treatment records at issue in
15 this case. They relied primarily on a cover letter from
16 Colts Neck Veterinary Associates that they found imputed
17 some kind of ambiguity onto all 1,717 of the violations.

18 But as the dissent recognized, one need only turn
19 past that cover letter and start looking at the records
20 themselves to realize that their contents are unambiguous.
21 Every last one of these violations can be attributed to an
22 entry in the records that refers either to a treatment or,
23 in the case of 394 violations, an injection. They mean
24 what they say.

25 JUDGE RIVERA: Say we disagree with you and - - -



1 and we don't think it's unambiguous, we think there is a
2 certain ambiguity or lack of clarity in those particular
3 records, what - - - what's the basis for your argument that
4 the inference that's drawn is - - - is that, indeed, one
5 could read that to mean the date matches the actual
6 description, right, the - - - the date matches when the - -
7 - the - - - the description of the conduct occurred?

8 MR. HITSOUS: Well, several reasons, Your Honor.
9 First is that the specific description of the service,
10 treatment, or injection is given right next to that date.
11 As the dissenting judge points out, to infer otherwise, it
12 would mean a ruling that, as a matter of law, a reasonable
13 mind couldn't find that treatment means treatment or
14 injection means injection.

15 But there's also corroboration from Pena himself.
16 Now, these records were supplied by Pena - - - or a portion
17 of these records, I should say - - - were supplied by Pena
18 in response to a request specifically for veterinary
19 records that would enable Investigator Leveson to review
20 the history of the horses' treatment. He supplies these
21 records. He doesn't give any kind of qualification. He
22 doesn't say at the time I'm not sure what these records
23 mean. He is sending them saying here you go; you asked me
24 for them.

25 Later on during the investigation, Investigator



1 Leveson calls Pena, and Pena says that he treats his horses
2 before races with two particular drugs that feature
3 prominently here, Robinul and Robaxin. He says he uses
4 them at the same time, and again, that he treats - - - not
5 that he receives a prescription, not that he receives a
6 dispensation. So these are additional building blocks.

7 And another important - - -

8 JUDGE STEIN: What about the - - - the negative
9 blood tests? Do - - - do they seriously controvert the - -
10 - the veterinary records?

11 MR. HITSOUS: No, Your Honor. A negative drug
12 test is not necessarily going to be proof against a
13 violation. It's not going to necessarily disprove it.
14 Pena is using the presence of a handful of negative drug
15 tests as his defense. However, he's not tying any of these
16 negative drug tests to a particular violation in this
17 record.

18 And that's important, because we have - - -

19 JUDGE WILSON: That's what I wanted to ask you.
20 Is there anything in the record from which we can match up
21 any one of the fifty drug tests to any one of the 1,717
22 violations, or we just don't know if they match up, or we
23 know that they don't match up?

24 MR. HITSOUS: It would be a rather painstaking
25 review, Your Honor. There is a regulation, it is 4120.8,



1 Title 9 - - - that horses that finish first and typically
2 horses that finish second would receive drug tests. But
3 again, this is Mr. Pena's defense. He's - - - if he wants
4 to make this defense, it is on him to explain to the
5 Commission that a drug test doesn't match a particular
6 violation, because we know that there are - - -

7 JUDGE RIVERA: But isn't his point that every
8 time they're tested, they always come up negative? It
9 doesn't really matter the dates, as long as it's within the
10 period. His point is any time you've tru - - - tested my
11 horses, they always come up negative. Or did I
12 misunderstand his argument?

13 MR. HITSOUS: That appears to be his argument,
14 Your Honor. And the reason that that argument is mistaken
15 is because we know that not all of the drugs here are even
16 detectable by drug tests. We know that another number of
17 these drugs have drug tests, but the drug tests are
18 unreliable. And we know that for other - - - the other
19 drugs, where there are reliable drug tests that there are
20 ways that a false negative could arise.

21 CHIEF JUDGE DIFIIORE: What's the typical practice
22 with respect to drug testing?

23 MR. HITSOUS: The typical practice is that if a
24 horse wins and one other horse - - - usually the second-
25 place one - - - they would be drug tested. But the



1 Commission - - -

2 JUDGE STEIN: That's - - - I'm sorry, go ahead.

3 MR. HITSOUS: - - - the - - - the Commission
4 lacks the resources, Your Honor, to be drug testing every
5 single horse in every single race. And - - -

6 JUDGE STEIN: So if - - - if you could match
7 something up here, would that be enough to seriously
8 controvert the hearsay?

9 MR. HITSOUS: No, Your Honor. Even if we could
10 have a direct match, that would still just give rise to a
11 credibility determination; because Dr. Maylin, our expert,
12 testifies that there are reasons to produce a false
13 negative. Even with the most detectable drugs, those are
14 based on an assumption that the standard therapeutic dose
15 is what was administered. And there are ways to administer
16 drugs without doing the standard therapeutic dose. One is
17 a practice known as titrating, where you reduce the amount
18 of the drug to the point that it's past detectable levels.
19 Another possibility for this is that these drugs got
20 purchased from something known as a compounding pharmacy.

21 JUDGE RIVERA: Counsel, other than the negative
22 drug tests or the failure to have a positive drug test,
23 what - - - what's the basis for even speculating that that
24 might have been the reason for why these are negative drug
25 tests?



1 MR. HITSOUS: Well, we have evidence in the
2 record that titrating is a practice in this industry, and
3 we have the records themselves. So the records are already
4 showing that an administration occurred.

5 JUDGE RIVERA: Um-hum.

6 MR. HITSOUS: And we already have undisputed
7 evidence that titrating is a real practice. We know that -
8 - -

9 JUDGE RIVERA: Well, what - - - what connects
10 what occurred here to the possibility that it was done in
11 accordance with that methodology?

12 MR. HITSOUS: The two piece of - - - the two
13 pieces of evidence that I discussed, Your Honor. And given
14 the burden of proof, we satisfied our burden by putting
15 forth the records. We satisfied our burden with the
16 corroborating evidence. It is not our burden to disprove a
17 potential defense - - -

18 JUDGE WILSON: Does Mr. Pena have available to
19 him some sort of compulsory process if he wanted to present
20 the testimony of the veterinarian but that person was
21 unwilling to come voluntarily? Is there - - - is that
22 available to him?

23 MR. HITSOUS: Not that I'm aware of, Your Honor.

24 And - - - but Mr. Pena could, if he wants,
25 testify on his own behalf and say, no, I was not engaging



1 in titrating. Or he could say I tried to get my
2 veterinarian to come here and my veterinarian is - - - is
3 not complying with that.

4 Another thing that he could have done - - - and I
5 think this is important, as far as pieces of evidence go
6 because it relates to common sense. Pena's veterinarian
7 was in his very barn. Pena was such an important client of
8 Colts Neck, that they worked hand-in-hand. We know from
9 these records that Pena was paying him upwards of 35,000
10 dollars a month. That is a tremendous financial incentive
11 for Pena to make sure that these records are accurate.

12 He also has a tremendous professional incentive,
13 because there's no dispute here that these drugs affect the
14 horses' performances. If they're not given accurately,
15 that could affect his performance as - - - as a racer. And
16 of course, Pena being a trainer, is well aware of these
17 rules - - -

18 JUDGE RIVERA: What - - - what's inaccurate about
19 a record that indicates when a treatment is prescribed as
20 opposed to when it is actually administered? What's
21 inaccurate about that?

22 MR. HITSOUS: Well, Your Honor, when a - - - when
23 a record says that a treatment occurred, when it says,
24 "treatment with", a reasonable reading of that is that it
25 means a treatment occurred on that date. It doesn't mean



1 that the Commission is compelled to find that it's
2 ambiguous. This is the substantial-evidence standard.

3 Even assuming that a court could reasonably read
4 that letter to say the same thing, it doesn't mean that
5 that reading is - - - is compelled. Because when you have
6 the court and the agency both reaching reasonable
7 conclusions, that is what this court has referred to
8 repeatedly as room for choice. Here, the Commission made
9 its choice and that choice belonged exclusively with the
10 Commission.

11 Thank you.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 Counsel?

14 MR. TURRO: Good afternoon, Your Honors.

15 CHIEF JUDGE DIFIORE: Good afternoon.

16 MR. TURRO: This case - - - this case is about my
17 client, Luis Pena, and trying to salvage a life.

18 JUDGE FEINMAN: So I'd - - - I'd like to start
19 right where your adversary left off. Why isn't this a case
20 about the Commission made its choice and the Appellate
21 Division has sort of basically turned it over, because it
22 might have reached a different choice?

23 MR. TURRO: Because this - - -

24 JUDGE FEINMAN: Why isn't that what this case is
25 about?



1 MR. TURRO: Okay. And I think the - - - the best
2 way I can approach that is to look at your recent case in -
3 - - in the Haug matter - - - v. Potsdam. It's a very
4 different case here. There are not competing factual
5 accounts here as to what happened. This is not a he-
6 said/she-said where you're - - - you're picking credibility
7 determinations. This is all about documents - - -
8 documents and how reliable these documents are. Because
9 these documents are the things that - - -

10 JUDGE FEINMAN: Well, is it about the reliability
11 or what the documents mean?

12 MR. TURRO: Well, the documents themselves;
13 because - - - and I think this goes back to - - - I'm not
14 sure which judge had talked about - - - what it means to be
15 substantial evidence. And substantial evidence is - - - by
16 its definition, has to be reliable. And the reviewing
17 court, part of its obligation is to look at the - - - the
18 evidence, whether it's hearsay or not, but especially when
19 it's hearsay - - -

20 JUDGE STEIN: But - - - but once the Appellate
21 Division allowed this evidence in to be considered, didn't
22 that indicate that it was found to be reliable, and then it
23 was a question of interpreting the evidence?

24 MR. TURRO: I think - - - I think not. And I
25 think - - - I think - - -



1 JUDGE STEIN: Well, how could the court ad - - -
2 admit it as evidence without making that determination - -
3 -

4 MR. TURRO: Well - - -

5 JUDGE STEIN: - - - that it was reliable?

6 MR. TURRO: Well, the - - - well, the - - - the
7 court - - - it was - - - it was actually the hearing
8 officer, over objection - - -

9 JUDGE STEIN: But - - -

10 MR. TURRO: - - - is the one who admitted it - -
11 -

12 JUDGE STEIN: I'm sorry.

13 MR. TURRO: - - - over volumin - - - over
14 repeated objections. And - - - and it did come to - - -

15 JUDGE STEIN: But the Appellate Division said it
16 was admissible.

17 MR. TURRO: And it was - - - it - - - but - - -
18 but - - -

19 JUDGE STEIN: It agreed.

20 MR. TURRO: And it said, for whatever that is
21 worth. And just because it is admissible does not mean,
22 Your Honor, that it is reliable in the - - - in the way
23 it's being used to be reliable.

24 In this case - - - I mean, quite frankly, these
25 are - - -



1 JUDGE STEIN: Well, I think you're using - - - it
2 sounds to me like you're using reliable with - - - to mean
3 the same thing as credible. And to me, those are two
4 different things.

5 MR. TURRO: No, I - - - I think I'm trying not to
6 do that. But I - - - the - - - what I - - - what I mean by
7 reliable is basically the definition of substantial
8 evidence, that its - - - you know, by its character, you
9 know, it is something that should be - - - that can be
10 relied on.

11 JUDGE RIVERA: Well, let's take a step back.

12 MR. TURRO: Yeah.

13 JUDGE RIVERA: Let's take a step back.

14 MR. TURRO: Yes, ma'am.

15 JUDGE RIVERA: Reliable regarding what? Reliable
16 as an actual chronology of various types of treatments, or
17 reliable with respect to the day the treatment was
18 administered?

19 MR. TURRO: Well, I think it's - - - it's - - -

20 JUDGE RIVERA: Or both?

21 MR. TURRO: No. I - - - I think that they're not
22 - - - they've been proven not to be reliable as to the date
23 of administration. In fact, there's no proof whatsoever as
24 to how - - -

25 JUDGE WILSON: But how - - - how were they - - -



1 how - - -

2 MR. TURRO: - - - any single administration.

3 JUDGE WILSON: I'm sorry. How were they proven
4 not be reliable?

5 MR. TURRO: Well, if you go through Dr. Maylin -
6 - - Dr. Maylin's testimony, the Commission's own expert - -
7 - he's one of the most highly regarded labs in this
8 country. He has, in fact, in one of the cases cited in - -
9 - in - - - in the briefs is the Fusco case, which - - -
10 which I'm sure Your Honors are familiar with. The notion
11 that there's possibly here titration that hasn't been
12 detected, or that there's been compounding, or that there
13 are some traces of these drugs, or that Robinul and
14 Robaxin, which make up over - - - over 20 - - - I'm sorry,
15 1,300 of the charges - - - 1,300 charges - - - that they -
16 - - and they're both easily detectable according to our
17 expert and according to Dr. Maylin - - - the fact that
18 there were no positives, the fact that there was no
19 evidence of titration from Dr. Maylin - - -

20 JUDGE WILSON: But so let me - - - let me ask the
21 same question that I asked before. Is there a way to match
22 up any of the fifty tests with any of the 1,717 violations?

23 MR. TURRO: They never provided any evidence of
24 that, Your Honor.

25 JUDGE WILSON: And - - - and you didn't either?



1 MR. TURRO: They're not our tests.

2 JUDGE WILSON: Well, I understand - - -

3 MR. TURRO: They're - - - Dr. Maylin - - -

4 JUDGE WILSON: - - - but there's nothing in the
5 record - - -

6 MR. TURRO: No, we did not.

7 JUDGE WILSON: - - - from - - - we could match
8 those up?

9 MR. TURRO: We - - - we - - - no, there isn't.
10 There isn't. There is not.

11 JUDGE FAHEY: Well, let's - - - as - - - as Judge
12 Rivera just said, I want to take a - - - just a step back
13 for a minute. Is it - - - is it fair to say that the
14 entire case turns, in your mind, on - - - on how the - - -
15 the treatment records are - - - are reviewed, and we have
16 to look at, basically, what the Appellate Division did with
17 both the cover letter describing the records and then the
18 records themselves? You'd agree with that, right?

19 MR. TURRO: Well, I'd agree - - - I'd agree that
20 you look at what - - - what the basis is for the - - - what
21 the evidence was for the admission, which was that it was
22 consistent with custom of the - - -

23 JUDGE FAHEY: The way I - - -

24 MR. TURRO: - - - of the formats of evidence.

25 JUDGE FAHEY: - - - the way I read - - - the way



1 I read the cover letter, it seems to expressly describe the
2 significance of the dates and the dates, themselves, as - -
3 - as the date that the horse got the medication. Is - - -
4 is - - - am I reading it wrong?

5 MR. TURRO: Well, I think it's vaguer than that,
6 number one, Your Honor. But number two, the - - - the - -
7 - there's no foundation whatsoever. In - - - in - - - in
8 our - - - in our legal lives, reliability is usually borne
9 out when it comes with records, with a business-record
10 exception. When the certification brought by - - - by - -
11 - by the prosecution was brought to the veterinarian, it
12 specifically set forth it wanted to affirm and confirm that
13 these were, in fact reliable - - -

14 JUDGE FAHEY: All right.

15 JUDGE RIVERA: Well, let's try it a different
16 way.

17 JUDGE FAHEY: I wanted - - -

18 JUDGE RIVERA: Let's try it a different way.

19 MR. TURRO: Okay.

20 JUDGE RIVERA: The - - - the - - - the cover
21 letter says it's either the treatment, prescription, or - -
22 - I can't remember what the third category is.

23 All right. So now they put on their experts who
24 say these are records that in the custom of this particular
25 - - - let's call it industry, for the moment - - - means



1 the following. Why isn't that enough for substantial
2 evidence - - -

3 MR. TURRO: Because - - -

4 JUDGE RIVERA: - - - if your expert could not
5 controvert that?

6 MR. TURRO: Because what was testified to - - -

7 JUDGE RIVERA: Yeah.

8 MR. TURRO: - - - wasn't - - - was that - - -
9 that typically, records show that next to the date is the
10 date of a treatment or next to the date is a date of
11 administration. There's nothing that goes beyond that and
12 there's nothing - - - and you have here records that are
13 not inherently reliable, that are, time and again, not - -
14 you know, are refuted - - - flatly refuted.

15 JUDGE RIVERA: Well, all - - - all I'm saying is
16 you've got records - - - let - - - let's go for one moment
17 with - - - because if there wasn't a cover letter, I don't
18 know how much of an argument you'd have. But let's say the
19 cover letter somehow suggests that there's uncertainty
20 about what this date means.

21 And they have their experts who say: we look at
22 it; we've got all these years of expertise; we understand
23 exactly how these veterinary records are kept; Colts Neck
24 keeps them in the same way that the - - - the custom in
25 this particular racing industry keeps them, and this is



1 what they mean. The date reflects the date of
2 administration.

3 Why isn't that - - - his position is, sure, you
4 might reject that and view this differently, but that's
5 enough to get past the hump for the Commission to have met
6 its substantial-evidence burden here.

7 MR. TURRO: Because it's not - - - because it - -
8 - it's - - - so it - - - because it's not - - - that - - -
9 that evidence is not the kind of evidence that inspires
10 confidence the way this court stated - - -

11 JUDGE FAHEY: But that's - - -

12 MR. TURRO: - - - forty years ago.

13 JUDGE FAHEY: - - - that's not the standard. The
14 standard is - - - is - - - a rationality standard is we
15 would have to both - - - the Appellate Division and this
16 court would have to say that it was irrational to decide
17 when the word "treatment" appeared next to the date that -
18 - - that - - - that that was the date of treatment. We'd
19 have to say that it's - - - that's an irrational conclusion
20 for the - - - both the board and the hearing officer to
21 have made.

22 MR. TURRO: Well, based on the record in the
23 whole, where you have test after test after test disproving
24 that the - - - that these - - - that they are accurate
25 administration dates - - -



1 JUDGE FAHEY: Are you talking about - - - are you
2 taking about the fifty drug tests?

3 MR. TURRO: Yes, the fifty drug tests.

4 JUDGE FAHEY: All right.

5 MR. TURRO: Yes.

6 JUDGE FAHEY: So the fifty tests out of 1,717 - -

7 -

8 MR. TURRO: Any test - - - test for more - - -
9 it's like a blood test we all go to. It doesn't test for
10 just one drug.

11 JUDGE FAHEY: No, I understand.

12 MR. TURRO: Okay. So we're talking about - - -

13 JUDGE FAHEY: No, I understand.

14 MR. TURRO: - - - hundreds. We're talking about
15 hundreds.

16 JUDGE FAHEY: I sort of understand now, anyway.

17 MR. TURRO: Well, I mean - - -

18 JUDGE FAHEY: I can't say that I really
19 understand - - -

20 MR. TURRO: Okay. But - - -

21 JUDGE FAHEY: - - - it as well as I should. But
22 - - - all right.

23 MR. TURRO: I - - - I understand. But I - - -

24 JUDGE GARCIA: Counsel - - - counsel - - -

25 MR. TURRO: - - - you understand.



1 JUDGE GARCIA: - - - could I ask you something?

2 MR. TURRO: Yes.

3 JUDGE GARCIA: Just on a policy matter, as I
4 understand it, these horses are stabled in New Jersey,
5 right? This is a Jersey veterinarian. So the New York
6 commission has to go through the Jersey side of the house
7 to try to get these records. The veterinarian won't even
8 certify them, right?

9 MR. TURRO: Right.

10 JUDGE GARCIA: So now you come into New York and
11 you claim, oh, well, these are not reliable. But you chose
12 to stable the horses in New Jersey, right? Your client
13 also used a Jersey veterinarian. And isn't there something
14 of a policy problem with then standing back and saying,
15 well, you know, these aren't reliable records because we
16 can't compel the Jersey veterinarian to come over to New
17 York, so the New York commission is kind of out of luck?

18 MR. TURRO: Well - - - well, Your Honor,
19 certainly, one could go to another state and get - - -
20 through a court and get a subpoena, if you really wanted to
21 do that. It's not something that's impossible. And we - -
22 - we do - - - it happens - - -

23 JUDGE GARCIA: If it's a New York - - -

24 MR. TURRO: - - - as a matter of course.

25 JUDGE GARCIA: - - - veterinarian, what would



1 happen?

2 MR. TURRO: I'm sorry, Your Honor?

3 JUDGE GARCIA: If it was a New York veterinarian,
4 would the Commission be able to compel them to certify the
5 records?

6 MR. TURRO: I don't know if it can compel them to
7 certify, but certainly you can subpoena them to a hearing.

8 JUDGE GARCIA: Is there a way for the Commission
9 to prohibit that veterinarian from treating horses in New
10 York in the future if they don't cooperate?

11 MR. TURRO: I don't know the answer to that, Your
12 Honor. I do know that he trains horses that race in New
13 York. So it seems to me they - - - they can probably, in -
14 - - in - - - in one shape or form, prevent those horses
15 from running if they wished to take that kind of a
16 sanction.

17 But again, Your Honor - - - and one thing I do -
18 - - I - - - I - - - I think it's important to understand is
19 when Dr. Maylin was being cross-examined - - - the
20 Commission's expert was being cross-examined about this
21 case, and - - - and he was specifically asked about
22 commencing this action of prosecution based on documents -
23 - - on documents that have, time after time after time - -
24 - his tests, his - - - his lab continually could not find
25 any evidence of any of these substances, the - - - the



1 comment he said and the comment he affirmed was somebody
2 ought to make sure that the records are accurate before
3 they commence any such prosecution. And they've taken my
4 client's life away with records that do not bear out and do
5 not substantiate a single administration here at all, not
6 one.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 Mr. Hitsous, on the issue of certification of the
9 records, what would certification add to those records?

10 MR. HITSOUS: Your Honor, certification would add
11 nothing here. My - - - the New Jersey veterinarian didn't
12 need to certify them under any kind of legal obligation.
13 But what he did need to do - - - and I would direct this to
14 the court's attention - - - it's New Jersey Administrative
15 Code 13:44-4.9(a) - - - he needed to keep accurate records
16 and to produce them on request. And that's what he did.
17 So later on, when they - - - when New Jersey authorities -
18 - - not New York authorities - - - ask for certification
19 and he doesn't provide it, it doesn't matter, because he
20 has already discharged his legal duty.

21 Now, my adversary began by saying that this - - -

22 JUDGE RIVERA: And - - - and accurate records are
23 defined as the description next to the date of the
24 administration?

25 MR. HITSOUS: No, Your Honor. Those - - - the



1 New Jersey Code simply says "accurate". It doesn't sub-
2 define - - -

3 JUDGE RIVERA: So - - -

4 MR. HITSOUS: - - - it more.

5 JUDGE RIVERA: - - - so the records could be
6 accurate, but they could fit in one of the other categories
7 that the cover letter says, right?

8 MR. HITSOUS: Well, it - - -

9 JUDGE RIVERA: The day it's prescribed, not the
10 day it's actually administered?

11 MR. HITSOUS: Well, the cover letter says that
12 these records could refer to one of three. However, you
13 look at the records themselves, they will tell you which
14 one of the three that is. They say "treatment". There are
15 other areas in the records where they actually say
16 "dispensation". So the records are parsing through them
17 already. And it's eminently reasonable for the conclusion
18 - - - for the Commission to conclude that they mean what
19 they say.

20 JUDGE GARCIA: Could the Commission compel a New
21 York veterinarian to testify?

22 MR. HITSOUS: Yes, but not a New Jersey
23 veterinarian, because they're not subject to our
24 jurisdiction. And that could lead to situations - - -
25 because the sport of harness racing is a multistate sport.



1 As Your Honor noted, Mr. Pena has chosen to
2 stable in New Jersey and use a New Jersey veterinarian.
3 And this would severely hamper the Commission's ability to
4 regulate in - - - in multistate contexts.

5 JUDGE RIVERA: Could you clarify the testimony of
6 the experts related to the custom, with respect to
7 maintaining these kinds of records - - -

8 MR. HITSOUS: Yes, Your Honor.

9 JUDGE RIVERA: - - - or the testimony that these
10 are the kinds of records that show when the - - - the drugs
11 are administered?

12 MR. HITSOUS: Your Honor, all three of our
13 witnesses said that these records are consistent with
14 thousands of records that they've seen, and that they treat
15 them as accurate, and that they take them "at face value".

16 JUDGE RIVERA: All right.

17 MR. HITSOUS: We understand face value to mean
18 that they mean what they say. And here, they say
19 "treatment" and they say "injection".

20 JUDGE RIVERA: Okay. But - - - but did any or
21 all of them say that that date refers to when the horse was
22 treated?

23 MR. HITSOUS: It - - - Your - - -

24 JUDGE RIVERA: Do any of them say that's the
25 inference they drew from these records based on their



1 experience?

2 MR. HITSOUS: Oh, yeah - - - yes, Your Honor.
3 They - - - we would understand - - - when they say that
4 they're taking that at face value, they're appearing in
5 support of our case, Your Honor. They all were testifying
6 that they understood these records to be proof of the
7 treatment dates. Absolutely, Your Honor.

8 Now, if - - - if I could wrap up about the
9 substantial-evidence standard. I think it's an important
10 point that all of the factors that you heard my adversary
11 talk about are factors that made it before the Commission.
12 For every factor that they brought up during their case
13 before the Commission, our witnesses had rebuttal evidence.

14 And so the Commission was faced with a situation
15 where they were weighing Mr. Pena's defense versus our
16 prosecution, so to speak. The Commission, here, is the
17 fact-finder, not the court. And the Commission made its
18 determination. The Third Department could not second-guess
19 that unless it was so implausible, as to be irrational.

20 We have provided numerous reasons why it is
21 easily plausible and eminently reasonable. Therefore we
22 would ask this court to reverse the Third Department
23 majority and uphold the Commission's determination in its
24 entirety.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. HITSOUS: Thank you.

CHIEF JUDGE DIFIORE: You're welcome.

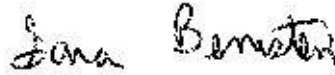
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C E R T I F I C A T I O N

I, Sara Bernstein, certify that the foregoing transcript of proceedings in the Court of Appeals of Steven The Matter of Luis Pena v. New York State Gaming Commission, No. 136 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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