



# TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

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## Board Meeting Agenda

1106 Clayton Lane, Suite 125E

Austin, Texas

January 23, 2024

9:00 a.m.

The Texas Board of Veterinary Medical Examiners will consider and act, if necessary, on matters within the jurisdiction of the Board which are listed on this agenda. The Board may meet from time to time in closed executive session with respect to pending or contemplated litigation as authorized by the Texas Open Meetings Act. This meeting will take place at 1106 Clayton Lane, Suite 125E, Austin, Texas, via videoconference and will be broadcast on the Texas Department of Licensing and Regulation's (TDLR) YouTube channel: <https://www.youtube.com/user/TexasLicensing>. The Board will be present at the meeting location. The meeting agenda and materials are available on TDLR's webpage at <https://www.tdlr.texas.gov/> and on the Board's webpage at <https://www.veterinary.texas.gov/meetingminutes.php>.

1. Full Board call to order, roll call, and vote on absences

2. Consideration and approval of October 17, 2023, minutes

3. Public comments

*Any person wishing to address the Board in person should complete a Public Comment Form and submit it to the Board Liaison at the meeting. Public Comments may also be made via email or videoconference. Any person wishing to address the Board via videoconference must submit an email by following the Public Comment Instructions found on the last page of this agenda or located at [www.tdlr.texas.gov](http://www.tdlr.texas.gov). Emails must be submitted to the Board liaison at [board.comments@tdlr.texas.gov](mailto:board.comments@tdlr.texas.gov) by 12 p.m., Monday, January 22, 2024.*

4. Director reports

- a) Brittany Sharkey – Executive Director
- b) Wendy Womack – Licensing
- c) Mike Tacker – Enforcement
- d) Kelly Phelps – Legal
- e) Jerod Honrath – Compliance
- f) Kandace Van Vlerah – Finance

5. Board committee reports

6. Discussion and possible recommendation to the Texas Commission of Licensing and Regulation regarding the proposal of rules to be posted to the Texas Register

- a) *Rule 573.83 – Price Transparency for Emergency Care*
- b) *Rule 577.15 – Fee Schedule*

7. Discussion regarding disciplinary practices for continuing education audit violations

8. Consideration and possible recommendation to the Texas Commission of Licensing and Regulation regarding contested cases heard before the State Office of Administrative Hearings

Item	Case/ SOAH Docket Number
1.	CP20-371 & CP21-435/ 578-23-02297
2.	CP20-121 & CP22-059/ 578-22-2050

9. Consideration and possible recommendation to the Texas Commission of Licensing and Regulation regarding approval of agreed orders

Case #
CP19-024
CP19-332
CP19-349, CP19-400 & CP20-033
CP20-066
CP20-221 & CP20-222
CP20-346
CP21-004
CP21-089
CP22-005
CP22-098
CP22-237
CP22-335
CP22-345
CP22-349
CP22-362
CP23-010
CP23-107
CP23-137
CP23-166
CP23-209
CP23-224
CP23-311
CP24-001

10. Consideration and possible recommendation to the Texas Commission of Licensing and Regulation regarding dismissal of cases from informal conference

Case #
CP19-384
CP21-109
CP21-133
CP21-301

CP22-083
CP22-272
CP22-335
CP23-018
CP23-081
CP23-105
CP23-108

11. Consideration and possible recommendation to the Texas Commission of Licensing and Regulation regarding dismissal of cases from staff conference

Case #
CP19-206
CP20-144
CP21-329

12. Consideration and possible recommendation to the Texas Commission of Licensing and Regulation regarding dismissal of cases from medical review

Case #
CP17-375
CP22-070
CP22-114
CP22-124
CP22-138
CP22-143
CP22-144
CP22-149
CP22-159
CP22-177
CP22-178
CP22-186
CP22-194
CP22-211
CP22-215
CP22-217
CP22-222
CP22-235
CP22-325
CP22-353
CP22-366
CP23-122

13. Discussion of possible agenda items for future Board meetings

14. Executive session [held on the 1st Floor, Commission Executive Session Meeting Room]

- a) *Consultation with the Board's and Commission's attorneys pursuant to Section 551.071(1), Government Code, concerning pending or contemplated litigation and/or settlement offers.*

***NOTE: The Board may adjourn into executive session to consider any item listed on this agenda if a matter is appropriate for executive session discussion.***

15. Return from executive session to report or discuss further actions or recommendations to be taken following executive session. Possible action or recommendations on items discussed in executive session.

16. Adjourn.

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Persons requiring special accommodations, including the use of an interpreter, due to a disability should contact the Board office at least five working days prior to the Board meeting. **Phone: (512) 583-7152, E-MAIL: [advisory.boards@tdlr.texas.gov](mailto:advisory.boards@tdlr.texas.gov) , TDD/RELAY TEXAS: 1-800-relay-VV (for voice), 1-800-relay-TX (for TDD).**

Las personas que necesiten servicios especiales, incluyendo los de un intérprete, debido a un impedimento físico, llamen la oficina de la Junta por lo menos cinco días antes de la reunión de la Junta. **TELEPHONO: (512) 583-7152, CORREO ELECTRÓNICO: [advisory.boards@tdlr.texas.gov](mailto:advisory.boards@tdlr.texas.gov) , TDD/RELAY TEXAS: 1-800-relay-VV (for voice), 1-800-relay-TX (for TDD).**

The Texas Board of Veterinary Medical Examiners will accept public comment for the January 23, 2024, meeting.

### **Online Public Comment Instructions**

(If you are going to appear at the Board meeting in person DO NOT complete this step to provide public comment. You will complete a form in-person at the meeting.)

Written comments must be submitted to [Board.Comments@tdlr.texas.gov](mailto:Board.Comments@tdlr.texas.gov) by no later than 12:00 p.m. on Monday, January 22, 2024. Comments will be provided to the Board members for their review prior to the meeting but will not be read aloud during the public meeting.

If you wish to address the Board virtually during the public meeting, please provide your contact information to [Board.Comments@tdlr.texas.gov](mailto:Board.Comments@tdlr.texas.gov) by 12:00 p.m. on Monday, January 22, 2024. The day prior to the meeting, you will receive an email with a link to join the meeting. You will be given no more than three (3) minutes to speak. The Board President may reduce the time provided for public comments based on the number of requests received. Ensure that you have a reliable connection and clear audio. Sharing of pre-recorded audio or video is not allowed during the public comment period.

**\*\*Please email your public comment request to [Board.Comments@tdlr.texas.gov](mailto:Board.Comments@tdlr.texas.gov). \*\***

**DEADLINE FOR PUBLIC COMMENT REQUEST IS**

12:00 PM, MONDAY, JANUARY 22, 2024

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**Board Members:**

Dr. Steven C. Golla, DVM President

Sandra “Lynn” Criner, DVM, Vice President

Victoria Whitehead, JD, Secretary

Randall Skaggs, DVM

Sue Allen., LVT

Keith Pardue, JD

Raquel Olivier, CPA

**AGENDA ITEM 1**

**TAB 1**

**CALL TO ORDER, ROLL CALL AND VOTE ON ABSENCES**

*(Dr. Golla & Ms. Whitehead)*

This meeting of the Texas Board of Veterinary Medical Examiners is now called to order, the time is \_\_\_\_\_.

May I have a roll call please...

**Member Name**

**ATTENDANCE NOTATION\***

Steven Golla, DVM, President

\_\_\_\_\_

Sandra "Lynn" Criner, DVM, Vice President

\_\_\_\_\_

Victoria Whitehead, JD, Secretary

\_\_\_\_\_

Randall Skaggs, DVM, Member

\_\_\_\_\_

Sue Allen, LVT, Member

\_\_\_\_\_

Keith Pardue, JD, Member

\_\_\_\_\_

Raquel Olivier, CPA, MBA, Member

\_\_\_\_\_

**If there are any absences...**

• Do I have a motion to approve or deny the absences?

o I move that we approve the absence(s) of \_\_\_\_\_.

o I move that we deny the absence(s) of \_\_\_\_\_.

• Is there a second?

• Is there any discussion?

\*

✓ = In Attendance

X = Absent (Please indicate if Not Excused)



# TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

Texas Department of Licensing and Regulation  
**TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS MEETING**

## **Summary of Board Meeting**

Tuesday, October 17, 2023, at 9:00 a.m.

Board President, Dr. Steven Golla, called the meeting to order at 9:00 a.m.

President, Dr. Steven Golla, moved to agenda item 1., Full Board Call to Order, Roll Call Vote on Absenses. Board Secretary, Dr. Mixon called roll. Board Members Dr. Steven Golla, Dr. Lynn Criner, Dr. Samantha Mixon, Victoria Whitehead, Dr. Randall Skaggs, and Raquel Olivier were present. Board members Keith Pardue, and Sue Allen were absent. A quorum was seated. Ms. Allen arrived at the meeting at 9:28 during item 6b.

President, Dr. Steven Golla, moved to agenda item 2., General Counsel Training. General Counsel, Doug Jennings, spoke on this item.

President, Dr. Steven Golla, moved to agenda item 3., Consideration and Approval of the July 17, 2023, Minutes. Board Member, Dr. Lynn Criner, seconded by Raquel Olivier, made a motion to approve the minutes. The motion passed.

President, Dr. Steven Golla, moved to agenda item 4., Consideration and Approval of the September 20, 2023, Minutes. Board Member, Victoria Whitehead, seconded by Dr. Lynn Criner, made a motion to approve the minutes. The motion passed.

President, Dr. Steven Golla, moved to agenda item 5., Citizen Comments. Anita Ross and Heather Kutycha gave public comment. The Board also received six emailed public comments.

President, Dr. Steven Golla, moved to agenda item 6., Director Reports. Executive Director, Brittany Sharkey, presented the Executive Director Report. Program Supervisor, Wanda Bennett, presented the Licensing Report. Enforcement Director, Mike Tacker, presented the Enforcement Report. Executive Director, Brittany Sharkey, presented the Legal Report. Compliance Director, Jerod Honrath, presented the Compliance Report. Finance Director, Kandace Van Vlerah, presented the Finance Report.

President, Dr. Steven Golla, moved to agenda item 7., Board Committee Reports. Dr. Golla presented the Executive Committee and Enforcement Committee Reports. Board Member, Dr. Mixon, presented the Rules Committee Report. Board Member, Dr. Skaggs, presented the Finance Committee Report. Board Member, Dr. Criner, presented the Education Committee Report.

President, Dr. Steven Golla, moved to agenda item 8., Discussion, recommendation, and possible action regarding the practice of veterinary medication without a license. Board Member, Dr. Mixon, spoke on this item.



# TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

President, Dr. Steven Golla, moved to agenda item 9., Discussion, recommendation, and possible action regarding appointments to the Board's standing committees. Board Member, Dr. Mixon, seconded by Raquel Olivier, nominated Dr. Criner to be the vice president of the Board. The motion passed. Board Member, Dr. Mixon, seconded by Raquel Olivier, nominated Victoria Whitehead to be the secretary of the Board. The motion passed. President, Dr. Golla appointed himself, as chair, Dr. Criner and Ms. Whitehead to the Executive/Enforcement Committee. He appointed Dr. Skaggs, as chair, Ms. Whitehead, and Ms. Olivier to the Finance Committee. He appointed Ms. Allen, as chair, and Dr. Criner to the Licensing/Education Committee. He appointed Dr. Mixon, as chair, Dr. Criner and Mr. Pardue to the Rules Committee. Equine Dental Provider Committee, Licensed Veterinary Technician Committee will be appointed during the January meeting.

President, Dr. Steven Golla, moved to agenda item 10., Consideration and approval of Agreed Orders. Executive Director, Brittany Sharkey, spoke on this item. The Board members pulled CP19-332 to be discussed in Executive Session. Board Member, Dr. Criner, seconded by Dr. Mixon, made a motion to approve the remaining agreed orders. The motion passed.

Case #	Name	License #	Practice City
CP17-271	MIRCEA VOLOSEN, DVM	7279	SAN ANTONIO
CP19-002 & CP19-110	JOE ABLES, DVM	9293	DECATUR
CP19-223	DENA MCGOWAN, DVM	3792	VIDOR
CP20-052	RONALD MANGUM, DVM	3606	NIXON
CP20-147	DON RAY NORTON	-	FERRIS
CP21-298	JOHN KOTTENSTETTE, DVM	8150	CONROE
CP21-343	ARNALDO CABALLERO	-	HOUSTON
CP22-020	EVELYN MACKAY, DVM	14377	HOUSTON
CP22-073	TELEAH GRAND, DVM	7912	MCKINNEY
CP22-223	BARRY CHAIKIN, DVM	5704	IRVING
CP22-268	JASON RISLEY, DVM	10262	BEDFORD
CP22-358	ASHLEY DANE-GRESSMAN, DVM	17648	FRISCO
CP23-039	HOLLY CRAWFORD, DVM	13054	WEATHERFORD
CP23-066	CAROLINE ALDRIDGE, DVM	16185	LOVELAND
CP23-072	INGRID FEDER, DVM	11643	KINGWOOD
CP23-288	JUAN LOPEZ	-	MCALLEN
CP22-278	NICOLE NEMETZ, DVM	11619	MISSOURI CITY

*Dr. Skaggs was recused from CP22-020, CP22-073, CP22-358, CP23-066 and CP23-072*

President, Dr. Steven Golla, moved to agenda item 11., Consideration and approval of cases recommended for dismissal from Informal Conference. Executive Director, Brittany Sharkey, spoke on this item. The Board members pulled CP20-270 to be discussed in Executive





# TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

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Session. Board Member, Dr. Criner, seconded by Dr. Mixon, made a motion to approve the remaining cases for dismissal from Informal Conference. The motion passed. Around 53 minutes.

*Dr. Skaggs was recused from CP19-206 and CP22-104*

*Dr. Criner was recused from CP21-135 and CP21-213*

President, Dr. Steven Golla, moved to agenda item 12., Consideration and approval of cases recommended for dismissal from Medical Review. Executive Director, Brittany Sharkey, spoke on this item. Board Member, Dr. Criner, seconded by Ms. Whitehead, made a motion to approve the cases recommended for dismissal. The motion passed.

*Dr. Mixon was recused from CP19-195, CP19-343, CP22-054, CP22-055, CP22-263, CP22-264, CP22-265 and CP23-021*

*Dr. Skaggs was recused from CP22-340, CP23-094, CP23-095, CP23-098, CP23-099, CP23-100, CP23-101, CP23-111, CP23-125, CP23-127, CP23-129, CP23-148 and CP23-151*

President, Dr. Steven Golla, moved to agenda item 13., Discussion of possible agenda items for future Board meetings. Executive Director, Brittany Sharkey, spoke on this item. The next meeting will be January 23, 2024, April 16, 2024, July 16, 2024, will be the next three Board meetings.

President, Dr. Steven Golla, moved to agenda item 14., Executive Session. The Board adjourned at 9:52 a.m. The Board returned at 10:53. No action was taken on these items.

President, Dr. Steven Golla, moved to agenda item 15., Return from Executive Session to report or discuss further actions to be taken following Executive Session. Possible action on items discussed in Executive Session. Board Member, Dr. Mixon, seconded by Dr. Criner, motioned to give Dr. Golla permission to negotiate personnel matters regarding the Executive Director of the TBVME. The motion passed. Board Member, Dr. Mixon, motioned to accept CP19-332. There was no second. The motion failed. Board Member, Dr. Criner, seconded by Dr. Mixon, made a motion to approve accept CP20-270. The motion passed.

President, Dr. Steven Golla, moved to agenda item 16., Adjourn. The meeting was adjourned at 10:57 a.m.

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Dr. Steven Golla, Presiding Officer  
Texas Board of Veterinary Medical Examiner

## **AGENDA ITEM 2**

### **TAB 2**

#### **CONSIDERATION AND APPROVAL OF THE October 17, 2023 MINUTES.**

The minutes of the October 17, 2023, board meeting were sent to you for  
review.

- Do I have a motion to approve the minutes?
  - o I move that we approve the minutes as presented.
  - o I move that we approve the minutes with corrections as discussed.
- Is there a second?
- Is there any discussion?
- All in favor, say aye.
- All opposed, say nay.

**AGENDA ITEM 3**

**TAB 3**

**CITIZEN COMMENTS**

*(Dr. Golla)*

If there is anyone in the audience who wishes to address the Board and has not completed one of the Witness Cards, please do so at this time.

Individuals wishing to comment on the rules to be adopted will be recognized during the time the rules are addressed.

The Board will now recognize \_\_\_\_\_, please limit your comments to 3 minutes.

## **AGENDA ITEM 4**

### **TAB 4**

#### **EXECUTIVE DIRECTOR'S REPORT**

*(Ms. Sharkey)*

Additional Reports will be verbally provided by the following:

- Executive Director Report- *Brittany Sharkey*
- Licensing Report- *Wendy Womack*
- Enforcement Report- *Mike Tacker*
- Legal Report- *Kelly Phelps*
- Compliance Report- *Jerod Honrath*
- Finance Report- *Kandace Van Vlerah*

*This item is informational only, no vote needed.*



# TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

## Executive Director's Report

January 23, 2024

Dear Members of the Board and Public,

Happy new year! 2024 brings with it an exciting new season for the agency. We will begin working on our strategic plan and legislative appropriations request for the next legislative session. While it feels like we just wrapped up the 88<sup>th</sup> session, the 89<sup>th</sup> is just around the corner and it's vital that our preparation begins now. We will soon be calling on board and stakeholders to provide input to help shape this strategic plan that will inevitably shape our appropriations requests for this next budget cycle.

### Staff Changes:

The new general counsel, Kelly Phelps, began her tenure at the agency in early November. She comes to us from DPS with experience in administrative law and rulemaking. Also joining the legal division is Kristin Stavrou as our new staff attorney. Kristin is a recent law school graduate, and we are excited to have her begin her legal career here with us. Additionally, starting in November was a staff veterinarian whom many of you know, Dr. Samantha Mixon. Her expertise will be invaluable as she performs medical reviews and provides testimony in contested cases before the State Office of Administrative Hearings.

The week of January 8<sup>th</sup> was a very busy week for our HR team. Five new investigators started with the agency to fill our now 11- member team of investigators. The new investigators are:

- K'Shel Bell, a former veterinary technician who will be covering the Houston area
- Willie Smith, a former law enforcement officer who will be covering South Texas
- Laura Villanueva, a former DEA agent who will be covering the El Paso Region
- Carey Womack, a former veterinary technician who will be covering the Dallas region
- Kris Woods, a former Air Force inspector who will be covering the Fort Worth Region

Please join me in welcoming everyone to the team. It's great to have a full house and everyone brings such a wealth of knowledge and experience to the table.

### Database Procurement Updates

We have been working in conjunction with both the Department of Information Resources and Texas Department of Licensing and Regulation to help procure a database. In November, DIR put out a solicitation to their extensive vendor list as well as worked with an in-house contractor to review our requirements for a system based on the data needs assessment conducted by DIR last spring. We received a bid from both the in-house contractor and an outside vendor and are in the process of demoing the products and making a selection. I hope to be able to provide more updates at the next meeting.



# TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

**Attachments:**

Please find attached each department's update and a list of complaints dismissed by staff in the first quarter of FY 24 pursuant to Tex. Occ. Code 801.205.

Sincerely,

*Brittany Sharkey, JD*

Brittany Sharkey, JD

Executive Director

January 23, 2024

The licensing team is reporting for the first quarter (September – November 2023):

**NEW LICENSES ISSUED**

100 DVM licenses

1 Special licenses

1 EDP licenses

110 LVT licenses

4 Temporary licenses

**FOR A TOTAL OF 216 NEW LICENSES ISSUED IN THE FIRST QUARTER**

**THE TOTAL AGENCY LICENSE COUNTS AS OF November 30, 2023, WERE:**

9,270 DVM Regular licenses

53 DVM Special licenses

11 DVM Temporary licenses

2270 LVT Licenses

60 EDP Licenses

**FOR A First Quarter End TOTAL OF 11,664 LICENSES**

**THIS CONCLUDES THE LICENSING REPORT. ARE THERE ANY QUESTIONS?**

**AGENCY LICENSE COUNT BREAKDOWN BY STATUS**

	DVM	SPECIAL	TEMP	LVT	EDP	TOTALS
ACTIVE	8344	53	7	1876	49	10,329
EXPIRED	399	0	4	200	11	614
INACTIVE	508	0	0	191	0	699
HOLD	0	0	0	0	0	0
PROB SUSP	15	0	0	1	0	16
SUSPENDED	4	0	0	2	0	6
	9270	53	11	2270	60	11,664

**Texas Board of Veterinary Medical Examiners**

**Enforcement Division**

**January 23, 2024 Board Meeting Report**

Statistics Through December 31,2023

- Received 122 new complaints for the year
- Completed 147 Investigations
- Completed 502 Inspections



## Legal Update Report January 23, 2024

- **188 complaints** – below numbers are projections
  - Pending Board ICs – 15
  - Pending Board action – 45
  - Board orders pending signature – 25
  - ON HOLD – pending civil/criminal – 10
  - Pending legal review – 4
  - Pending staff conference – 45
  - Filed at SOAH – 12
  - Pending SOAH filing – 27
  - Pending cease and desist – 5
  - Pending ALJ’s review of Exceptions and Replies to PFD – 0
  
- **After Board Meeting** – projected complaints remaining – approximately 123

## COMPLIANCE STATISTICS FY 2024

- Criminal History Evaluations/Reviews/Calls--- 3
- CE and General Compliance Related Phone Calls Answered/Returned-- 243
- Hardships Granted for CE's--- 16
- Opioid Presentations and Course Material Reviews--- 2
- Outside Agency Requests/Assistance--- 1
- Background Investigations--- 8
- Current Open Compliance Cases--- 31
- Fingerprints Reviewed--- 179
- CE Audits Performed--- (Enforcement has stats on the majority performed)
- CE Audit Follow-Up--- 11
- Legal/Enforcement/Finance Division Requests Performed--- 65
- Failure to Report Warning Letters--- 1
- TDLR Meetings--- 4
- Audit Meetings--- 5

**Board Report for TBVME Finance Division**

The TBVME finance division has been very busy but holding steady. We've just ended the first Quarter of FY2024. We are around 41% of the way through the year and have spent around 21% of the agency's budget.

The following table shows the current budget as of **January 8, 2024**:

	<b>Licensure</b>	<b>Complaints</b>	<b>Indirect-Licensure</b>	<b>Indirect-Compliance</b>	
Appropriation Number	<b>13001</b>	<b>13002</b>	<b>13800</b>	<b>13801</b>	
Appropriations - GR	\$ 987,755.00	\$ 2,341,563.00	\$ 83,024.00	\$ 83,123.00	\$ 3,495,465.00
Excess Collected Revenue					
Appropriation Transfers Out	\$ 15,277.00	\$ 15,277.00			\$ 30,554.00
Cash Revenue	\$ 5,305.00				\$ 5,305.00
Est Col Rev Posted	\$ 5,527.00				\$ 5,527.00
Appropriation Transfers In	\$ 31,125.00	\$ 40,000.00			\$ 71,125.00
Lapsed Appropriations					
Cash Rsrvd - Payroll					
<b>Total Receipts</b>	<b>\$ 1,014,435.00</b>	<b>\$ 2,366,286.00</b>	<b>\$ 83,024.00</b>	<b>\$ 83,123.00</b>	<b>\$ 3,546,868.00</b>
Total Expenditures	\$ 144,149.81	\$ 344,498.47	\$ 17,921.28	\$ 16,217.04	\$ 522,786.60
Budget Balance	\$ 859,453.19	\$ 2,021,787.53	\$ 65,102.72	\$ 66,905.96	\$ 3,024,081.40
<b>Budget Balance Minus Capital Budget Item</b>					<b>\$ 1,895,011.40</b>
<b>APPN Cash Available</b>	<b>\$ 859,231.19</b>	<b>\$ 2,021,787.53</b>	<b>\$ 65,102.72</b>	<b>\$ 66,905.96</b>	<b>\$ 3,013,027.40</b>

**Texas Board of Veterinary Medical Examiners**  
**Budget Analysis for Fiscal Year 2024 as of January 8, 2024**

**TBVME**  
**Other Appropriations**

Appropriation Number	Licensure 13001	Complaints 13002	Indirect- Licensure 13800	Indirect- Compliance 13801	
Appropriations - GR	\$ 987,755.00	\$ 2,341,563.00	\$ 83,024.00	\$ 83,123.00	\$ 3,495,465.00
Excess Collected Revenue					
Appropriation Transfers Out	\$ 15,277.00	\$ 15,277.00			\$ 30,554.00
Cash Revenue	\$ 5,305.00				\$ 5,305.00
Est Col Rev Posted	\$ 5,527.00				\$ 5,527.00
Appropriation Transfers In	\$ 31,125.00	\$ 40,000.00			\$ 71,125.00
Lapsed Appropriations					
Cash Rsrvd - Payroll					
<b>Total Receipts</b>	<b>\$ 1,014,435.00</b>	<b>\$ 2,366,286.00</b>	<b>\$ 83,024.00</b>	<b>\$ 83,123.00</b>	<b>\$ 3,546,868.00</b>
Total Expenditures	\$ 144,149.81	\$ 344,498.47	\$ 17,921.28	\$ 16,217.04	\$ 522,786.60
Budget Balance	\$ 859,453.19	\$ 2,021,787.53	\$ 65,102.72	\$ 66,905.96	\$ 3,024,081.40
<b>Budget Balance Minus Capital Budget Item</b>					<b>\$ 1,895,011.40</b>
<b>APPN Cash Available</b>	<b>\$ 859,231.19</b>	<b>\$ 2,021,787.53</b>	<b>\$ 65,102.72</b>	<b>\$ 66,905.96</b>	<b>\$ 3,013,027.40</b>

Peer Assistance 13006	Texas Online 13007
85,500.00	40,000.00
85,500.00	40,000.00
20,382.00	19,035.00
-	-
<b>20,382.00</b>	<b>19,035.00</b>
14,338.48	10,806.00
71,161.52	29,194.00
6,043.52	8,229.00

Expenditures	Licensure 13001	Complaints 13002	Indirect-Lic 13800	Indirect-Comp 13801		LAR Budget	Percentage Spent 41.67%	(Over)/Under Budget	Peer Assistance 13006	Texas Online 13007
<b>1001 - Salaries and wages</b>										
7001 Exempt Salaries	18,902.00	18,902.00	-	-	37,804.00					
7002 Sal-Full Time Class	107,393.88	289,947.80	-	-	397,341.68					
7003 Sal/Wages-Class&N/C-Perm fult	-	-	-	-	-					
7007 Sal/Wages-Class&N/C-Perm fult	-	-	-	-	-					
<b>Subtotal - Salaries and Wages</b>	<b>126,295.88</b>	<b>308,849.80</b>	<b>-</b>	<b>-</b>	<b>435,145.68</b>	1,858,462.00	23%	339,213.49	-	-
<b>1002 - Other Personnel Costs</b>										
7017 One-time Merits	-	-	-	-	-					
7022 Longevity	840.00	2,760.00	-	-	3,600.00					
7023 Lump Sum Termination Payment	-	-	-	-	-					
7025 Compensatory of Salary Per Diem	-	-	360.00	-	360.00					
7033 Employee Rtrmnt-Oth Emplmnt Exp	1,282.52	563.53	-	-	1,846.05					
<b>Subtotal - Other Personnel Costs</b>	<b>2,122.52</b>	<b>3,323.53</b>	<b>360.00</b>	<b>-</b>	<b>5,806.05</b>	24,060.00	24%	4,218.95	-	-
<b>2001 - Professional Fees and Services</b>										
7243 Educational/Training Services	-	-	3,000.00	3,000.00	6,000.00					
7245 Financial and accounting svc	-	-	1,180.00	1,180.00	2,360.00					
7253 Other Professional Services	89.25	-	-	-	89.25				14,250.00	
7275 Information Tech Svc	337.81	337.81	-	-	675.62					
<b>Subtotal - Professional Fees and Services</b>	<b>427.06</b>	<b>337.81</b>	<b>4,180.00</b>	<b>4,180.00</b>	<b>9,124.87</b> **	57,405.00	16%	14,793.88	<b>14,250.00</b>	-
<b>2002 - Fuels and Lubricants</b>										
7304 Fuels and Lubricants-Other	-	-	-	-	-					
<b>Subtotal - Fuels and Lubricants</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	150.00	0%	62.50	-	-
<b>2003 - Consumable Supplies</b>										
7300 Consumables	272.77	2,560.33	1,246.02	43.50	4,122.62					
<b>Subtotal - Consumable Supplies</b>	<b>272.77</b>	<b>2,560.33</b>	<b>1,246.02</b>	<b>43.50</b>	<b>4,122.62</b>	1,200.00	344%	(3,622.62)	-	-
<b>2004 - Utilities</b>										
7516 Cell Phone Charges	-	3,240.29	-	-	3,240.29					
7526 Waste Disposal	-	-	-	-	-					
<b>Subtotal - Utilities</b>	<b>-</b>	<b>3,240.29</b>	<b>-</b>	<b>-</b>	<b>3,240.29</b>	9,760.00	33%	826.38	-	-
<b>2005 - Travel</b>										
7101 Travel-In St-Pub Trans	-	1,114.67	-	-	1,114.67					
7102 Travel-In-State Mileage	-	3,456.20	-	-	3,456.20					
7105 Travel-InState Incident	-	477.15	-	-	477.15					
7106 Travel-In State Meals	-	3,672.98	612.84	-	4,285.82					
7107 Travel-In State Non-Overnight (Meals)	-	-	-	-	-					
7110 Travel In-State - Brd Mem Meals & Lodging	-	241.14	-	-	241.14					
7116 Travel Out-of-State - Meals & Lodging	-	-	-	-	-					
7135 Travel In-State - State Hotel Occ Tax	-	-	-	-	-					
<b>Subtotal - Travel</b>	<b>-</b>	<b>8,962.14</b>	<b>612.84</b>	<b>-</b>	<b>9,574.98</b>	264,080.00	4%	100,458.35	-	-

Expenditures	Licensure	Complaints	Indirect-Lic	Indirect-Comp	LAR Budget	Percentage Spent	(Over)/Under Budget	Peer Assistance	Texas Online
	13001	13002	13800	13801		41.67%		13006	13007
<b>2007 - Rent - Machine and Other</b>									
7406 Rental - Equipment	-	-	490.59	490.60				-	-
<b>Subtotal - Rent - Machine and Other</b>	-	-	<b>490.59</b>	<b>490.60</b>	6,120.00	16%	1,568.81	-	-
<b>2009 - Other Operating Expense</b>									
7040 Additional Payroll Ret. Cont.	631.50	1,544.19	-	-					
7042 Payroll Health Insurance 1%	837.36	2,245.39	-	-					
7201 Membership Dues	-	-	100.00	260.00					
7203 Registration Fees	-	-	-	-					
7210 Fees and Other Charges	-	-	-	-					
7211 Awards	-	-	-	-					
7219 Fees for Rec. Electronic	-	-	-	-				-	10,806.00
7262 Maint & Repair-Comp Software-Expensed	-	-	10,706.40	10,706.40					
7273 Preproduction/Printing	-	-	-	-					
7276 Communication Svcs	-	-	-	-					
7286 Freight Delivery	138.53	75.76	-	-					
7291 Postal Services	7,564.95	7,500.00	225.00	225.00					
7299 Purchased Contracted Services	-	-	-	-					
7334 Furn & Equip-expensed	-	-	-	-					
7335 Parts-Computer Equipment Expsd	-	-	-	-					
7377 Personal Prop-Comp Equip-Expnsd	-	-	-	-					
7380 Comp SW-5000 or less	3,967.20	3,967.20	-	311.54					
7470 Rental of Space	186.36	186.36	-	-					
7806 Interest on Late Pmts	0.01	-	0.43	-				88.48	
7947 SORM Pmt	619.03	619.03	-	-					
7961 Telecomm-Cap Compl	577.50	577.50	-	-					
7962 Cap. Cplx. Transfers	509.14	509.14	-	-					
<b>Subtotal - Other Operating Expense</b>	<b>15,031.58</b>	<b>17,224.57</b>	<b>11,031.83</b>	<b>11,502.94</b>	216,283.00	25%	35,327.00	<b>88.48</b>	<b>10,806.00</b>
<b>Grand Total</b>	<b>144,149.81</b>	<b>344,498.47</b>	<b>17,921.28</b>	<b>16,217.04</b>	<b>2,437,520.00</b>	<b>21%</b>	<b>492,846.73</b>	<b>14,338.48</b>	<b>10,806.00</b>

\*\*Appropriation 13006 and 13007 have been excluded. They do not fund the agency budget.\*\*

## Enforcement Dismissals for 1<sup>st</sup> Quarter of FY24

The cases compiled below include those that were dismissed by Enforcement in the 1<sup>st</sup> Quarter (September, October & November) of Fiscal Year 2024.

Case Number
CP21-017
CP24-013
CP24-032
CP24-033
CP24-031
CP24-046
CP24-051
CP24-036
CP24-048
CP24-027
CP24-071
CP22-173
CP24-038
CP23-061
CP22-090

## **AGENDA ITEM 5**

### **TAB 5**

#### **BOARD COMMITTEE REPORTS**

*(Dr. Golla)*

Additional Reports will be verbally provided by the following:

- Executive Committee- *Dr. Golla*
- Enforcement Committee- *Dr. Criner*
- Licensing Committee- *Dr. White*
- Finance Committee- *Dr. Skaggs*
- Rules Committee- *Dr. Golla*

*This item is informational only, no vote needed.*

**AGENDA ITEM 6**

**TAB 6**

**DISCUSSION AND POSSIBLE ACTION REGARDING THE  
PROPOSAL OF RULES TO BE POSTED TO THE TEXAS REGISTER**

*(Ms. Sharkey)*



573.83. PRICE TRANSPARENCY FOR EMERGENCY CARE.

- (a) For purposes of this section, “emergency care” means medical care rendered to an ill or injured animal that, in the reasoned opinion of the veterinarian, has a life-threatening condition and immediate medical treatment is necessary to sustain life or alleviate or end suffering.
- (b) After a reasonable opportunity to assess an animal’s medical condition and before providing medical treatment, veterinarians must disclose to the owner or caretaker that the animal requires emergency care and treatment.
- (c) The disclosure required by subsection (b) must contain:
  - 1. A description of the proposed treatment(s), with reasonable options, if any; and
  - 2. The estimated price of the proposed treatment option(s).
- (d) If the animal’s medical condition changes, before continuing treatment, veterinarians must update the disclosures required by subsection (c) of this section.
- (e) The person presenting an animal to the veterinarian for emergency care and treatment is presumed the owner or caretaker of that animal.

**Rule 577.15 – Fee Schedule**

**Attached Graphic – Proposed New Fee Schedule**

**Application:**

Veterinary Regular License	<del>\$515</del>	\$560
Veterinary Special License	<del>\$575</del>	\$630
Veterinary Temporary License	<del>\$600</del>	\$610
Veterinary Provisional License	<del>\$200</del>	\$220
Equine Dental Provider	<del>\$100</del>	\$125
LVT	<del>\$50</del>	\$65

**Renewals:**

***Timely***

Regular Veterinary License	<del>\$195</del>	\$340
Special Veterinary License	<del>\$209</del>	\$250
Inactive Veterinary License	<del>\$109</del>	\$140
EDP	<del>\$83</del>	\$120
EDP Inactive	<del>\$56</del>	\$65
LVT	<del>\$50</del>	\$80
LVT Inactive	<del>\$26</del>	\$35

***Less than 90 Days Delinquent***

Regular Veterinary License	\$280
Special Veterinary License	\$296.50
Inactive Veterinary License	\$160.00
EDP	\$124.00
EDP Inactive	\$81.50
LVT	\$75.00
LVT Inactive	\$54.00

***More than 90 days but less than 1 year delinquent***

Regular Veterinary License	\$364.00
Special Veterinary License	\$384.00
Inactive Veterinary License	\$211.00
EDP	\$164.00
EDP Inactive	\$107.00
LVT	\$99
LVT Inactive	\$47

**Specialized License Categories:**

Veterinary Reinstatement	\$250
Veterinary Reactivation	\$150

EDP Reactivation	\$25
LVT Reactivation	\$25

**Other Fixed Fees and Charges:**

Criminal History Evaluation	\$32
Returned Check Fee	\$25
Duplication of a License	\$40
Letter of Good Standing	\$25
CE Approval	\$25
CE Approval Less than 30 days before Event	\$50
EDP Certification Approval	\$1,500

**AGENDA ITEM 7**

**TAB 7**

**DISCUSSION REGARDING DISCIPLINARY PRACTICES FOR  
CONTINUING EDUCATION AUDIT VIOLATIONS**

*(Ms. Sharkey)*

**AGENDA ITEM 8**

**TAB 8**

**CONTESTED CASES- CONSIDERATION AND POSSIBLE  
ACTION (HEARD BEFORE STATE OFFICE OF  
ADMINISTRATIVE HEARINGS)**

*(Ms. Phelps)*

ACCEPTED  
578-23-02297  
12/11/2023 1:46:35 pm  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Kevin Garza, CLERK

FILED  
578-23-02297  
12/11/2023 1:36 PM  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Kevin Garza, CLERK

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

December 11, 2023

Mark Lee

VIA EFILE TEXAS

Robert Nebb

VIA EFILE TEXAS

**RE: Docket Number 578-23-02297; *Texas Board of Veterinary Medical Examiners v. Kody Kothmann***

Dear Parties:

Please find attached a Corrected Proposal for Decision in this case.

Exceptions and replies may be filed by any party in accordance with 1 Texas Administrative Code section 155.507(b), a SOAH rule which may be found at [www.soah.texas.gov](http://www.soah.texas.gov).

CC: Service List

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS,  
PETITIONER  
v.  
KODY KOTHMANN,  
RESPONDENT**

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**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

—

**TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS,  
PETITIONER  
v.  
KODY KOTHMANN,  
RESPONDENT**

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**CORRECTED PROPOSAL FOR DECISION**

The Texas Board of Veterinary Medical Examiners' Staff alleges that Respondent Kody Kothmann, D.V.M., violated the Board's rules of professional conduct while treating two canine patients. Specifically, Staff claims Respondent failed to keep adequate records for Dog 1 and Dog 2, failed to refer Dog 1 to a specialist, and provided substandard care to Dog 2—justifying a formal reprimand, seven thousand dollars in penalties, and twelve hours of Board-ordered continuing education. Ultimately, the Administrative Law Judge (ALJ) concludes that Staff only substantiated some of its recordkeeping allegations and the substandard-care claim. The ALJ also rejects the methodology and substance of Staff's proposed sanctions and offers an alternative, rule-based recommendation.

## I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

This case was originally scheduled for hearing on January 12, 2023, but Staff twice moved for a continuance, thrice amended its complaint, and subsequently moved to abate the case—all without objection from Respondent. In July 2023, the parties jointly moved to lift the abatement and reset the hearing on the merits. This hearing was thus conducted by Zoom videoconference on October 24, 2023, before ALJ Joshua C. Fiveson with the State Office of Administrative Hearings.

Attorney Mark Lee represented Staff, and Attorney Robert Nebb represented Respondent. The record closed after the parties filed their admitted exhibits on October 25, 2023. Neither notice nor jurisdiction were disputed and are thus discussed only in the Findings of Fact and Conclusions of Law below.

## II. APPLICABLE LAW<sup>1</sup>

The Veterinary Licensing Act authorizes the Board to take disciplinary action against veterinarians that, *inter alia*, violate the governing rules of professional conduct.<sup>2</sup> Chief among these guidelines is the mandate that veterinarians “exercise the same degree of humane care, skill, and diligence in treating patients as are ordinarily used . . . by average members of the veterinary medical profession in good standing in the locality or geographic community in which they practice, or in similar

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<sup>1</sup> Many of the regulations cited in this Proposal for Decision were recently amended, to varying degrees. Unless otherwise noted, all citations are to the version in effect at the time of Respondent’s alleged misconduct—*i.e.*, the controlling framework.

<sup>2</sup> Tex. Occ. Code § 801.402(6).

communities.”<sup>3</sup> Veterinarians also carry a related “duty . . . to suggest a referral to a specialist, or otherwise more qualified veterinarian, in any case where the care and treatment of [an] animal is beyond the veterinarian’s capabilities.”<sup>4</sup> Finally, of particular relevance in this case, the rules of professional conduct additionally require a veterinarian to maintain a variety of patient records—ranging from basic client and patient information to detailed information substantiating or documenting a patient’s diagnosis and treatment.<sup>5</sup>

If a veterinarian is found to have violated one of these rules, the Board’s “Schedule of Sanctions shall be used to assess the appropriate sanction.”<sup>6</sup> First, “the finder of fact shall classify the severity of the violation.”<sup>7</sup> Afterward, “the finder of fact shall . . . consider the aggravating and mitigating factors to determine the appropriate sanction within the range provided.”<sup>8</sup> But “[i]n cases where more than one provision of . . . the Board’s Rules have been violated, the most severe minimum sanction recommended . . . for any one of the individual violations shall be

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<sup>3</sup> 22 Tex. Admin. Code § 573.22 (“Professional Standard of Care”).

<sup>4</sup> *Id.* § 573.24(a) (explaining further that “[a] veterinarian’s decision on whether to accept or continue care and treatment of an animal, which may require expertise beyond the veterinarian’s capabilities, shall be based on the exercise of sound judgment within the prevailing standard of care”).

<sup>5</sup> *Id.* § 573.52(a)(1)–(3), (10), (12), (16) (mandating reference to “name, address, and phone number of the client;” “identification of patient, including name, species, breed, age, sex, and description;” “patient history;” “diagnosis and/or treatment, if applicable;” “other details necessary to substantiate or document the examination, diagnosis, and treatment provided, and/or surgical procedure performed;” and “the date and substance of any referral recommendations, with reference to the response of the client”).

<sup>6</sup> *Id.* § 575.25.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (noting also “[t]he finder of fact may choose one or more sanctions from within the appropriate range”).

the minimum sanction considered.”<sup>9</sup> Furthermore, though the Board has pronounced in its procedural rules that “sanction recommendations in the form of findings of fact and conclusions of law are . . . an improper application of applicable law,”<sup>10</sup> this does not belie the plain language of the ALJ’s regulatory directives discussed above.<sup>11</sup>

Finally, as in most contested-case hearings, Staff has the burden of proving its case by a preponderance of the evidence.<sup>12</sup>

### III. EVIDENCE

Staff offered, and the ALJ admitted, four exhibits. Exhibits 1 and 2 contained Respondent’s medical records for Dogs 1 and 2, respectively; Exhibit 3 contained Dog 1’s medical records with another veterinarian, who treated the animal after Respondent; and Exhibit 4 contained the Board “Sanctions Table” and documents pertaining to Respondent’s earlier violations. Staff also offered sworn testimony,

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 575.8(d)(2).

<sup>11</sup> Even beyond the regulatory directive to make certain findings and conclusions in cases like this, legion precedent reveals the title or location of an ALJ’s sanction recommendation is less important than how the Board chooses to disagree with that reasoned conclusion—should it so desire. *See, e.g., Froemming v. Tex. State Bd. of Dental Examn’rs*, 380 S.W.3d 787, 792 (Tex. App.—Austin 2012, no pet.) (“We disagree that the labeling of the ALJ’s proposed sanction as a ‘recommendation’ rather than as a ‘finding of fact’ or a ‘conclusion of law’ ultimately determines its binding effect.”). *See generally Granek v. Tex. St. Bd. of Med. Examn’rs*, 172 S.W.3d 761, 781 (Tex. App.—Austin 2005, no pet.) (“We agree with the Board that it is not required to give presumptively binding effect to an ALJ’s recommendations regarding sanctions in the same manner as with other findings of fact and conclusions of law.”).

<sup>12</sup> 1 Tex. Admin. Code § 155.427.

which is in relevant part summarized below,<sup>13</sup> from five witnesses: Respondent, Cathy Gonzales, Janie Riojas, Perry Goggins, and Dr. Steven Golla.

Respondent offered, and the ALJ admitted, two exhibits.<sup>14</sup> Exhibit 1 contained an expanded set of medical records for Dog 1, and Exhibit 2 contained the same for Dog 2. Respondent also provided sworn testimony of his own.

### **A. UNCONTESTED BACKGROUND**

Respondent has served as a licensed veterinarian (License No. 4337) for over four decades. He runs Caprock Veterinary Clinic, which serves a variety of different animals in Lubbock, Texas.

Respondent was previously disciplined by the Board twice. In 2012, the Board found that Respondent provided substandard care and committed a recordkeeping violation.<sup>15</sup> The Board then issued a formal reprimand of Respondent, imposed an administrative penalty of nearly five thousand dollars, and ordered him to complete

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<sup>13</sup> Mr. Goggins’s testimony, for example, pertained only to successfully authenticating Staff Exhibit 3. This leaves no need to recount his testimony in the sections that follow.

<sup>14</sup> Though not offered as an exhibit, Respondent filed an unsolicited “Personal Position Statement” (through counsel, about a week prior to his hearing on the merits) in which he levied a host of ethical allegations, *inter alia*, against the Board and its staff. Additionally, nearly a month and a half after the record closed, Respondent filed a “Notice of Grievance” in which he stated (again through counsel) that “Petitioner individually . . . filed a grievance against Petitioner’s expert witness, Dr. Golla, alleging that [he] gave false testimony.” But the ensuing, ALJ-ordered letter briefing revealed that (a) Respondent—not Petitioner—filed this grievance, which was supported by two articles that were not offered during his hearing; (b) Counsel for Respondent does “not necessarily” endorse his client’s serious allegations; and (c) Respondent does not seek to reopen the record. As such, the ALJ did not consider *anything* in either unsolicited filing and neither merits further discussion.

<sup>15</sup> Staff Ex. 4 at 15–20.

continuing-education classes in small-animal surgery and recordkeeping.<sup>16</sup> In 2015, too, the Board found that Respondent provided substandard care and committed a recordkeeping violation.<sup>17</sup> Again, the Board formally reprimanded Respondent, assessed him a one thousand dollar administrative penalty, and ordered him to complete another three hours of coursework in recordkeeping.<sup>18</sup>

## B. DOG 1

Dog 1 was an eleven-year-old Boston Terrier adopted by Ms. Gonzales. Shortly after adoption, Dog 1 started experiencing seizure-like symptoms. Someone in the Gonzales family brought the dog to Respondent for treatment in 2020,<sup>19</sup> and Respondent confirmed Dog 1 was experiencing seizures.<sup>20</sup> Respondent's examination also revealed "bloody enteritis," which Respondent testified is a "bad" sign and directly related to anemia; "very pale" gums, which also corresponds to anemia; and "hard" breathing.<sup>21</sup> Furthermore, Respondent diagnosed Dog 1 with "grade 4 congestive heart failure," which he discovered by listening to Dog 1's heart—revealing a "whooshing" noise that Respondent believed unrelated to the

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<sup>16</sup> *Id.* at 19.

<sup>17</sup> *Id.* at 21-25.

<sup>18</sup> *Id.* at 24-25.

<sup>19</sup> Ms. Gonzales originally stated that she brought Dog 1 to Respondent, though she later became uncertain as to whether it was actually her father and son. *Compare* Hearing Audio at 00:32:40-32:55 ("I brought him in . . ."), 33:11-33:19 ("I took him back in May."), *with id.* at 00:38:17-38:40 ("My father and my son took [Dog 1] . . . the first time."), 39:22-39:35 ("This has been years, I can't just remember . . ."), 52:27-51:32 ("I don't remember exactly.").

<sup>20</sup> Someone reported Dog 1 experienced daily seizures for six months, though Ms. Gonzales testified that Dog 1 was treated after its first seizure. *Compare* Staff Ex. 1 at 1, *and* Respondent Ex. 1 at 1, *with* Hearing Audio at 00:57:41-59:05.

<sup>21</sup> Respondent also described Dog 1 as a small, eleven-year-old, neutered-male Boston Terrier weighing eight pounds. Staff Ex. 1 at 1; Respondent Ex. 1 at 1 (same).

seizures because heart disease is a “slow process.”<sup>22</sup> Though Respondent testified that he can treat heart failure, he explained that he normally recommends a “second opinion”<sup>23</sup> and intentionally focused only on the seizures (and as a corollary, the bloody enteritis and anemia) that prompted Dog 1’s visit.<sup>24</sup> To that end, Respondent administered some in-office medicine and prescribed a take-home dosage of antibiotics and antiseizure medication.<sup>25</sup>

One week later, Ms. Gonzales became upset because Dog 1 was “swollen,” “wasn’t moving,” and appeared “very” sick—though the dog did not endure any other seizures. She testified that she contacted Respondent’s office to share her frustration, which in her estimation was not well received,<sup>26</sup> “so [she] contacted Ark hospital [*i.e.*, the veterinary office she used for other animals in the past] to see if

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<sup>22</sup> Respondent also testified that, in his estimation, the heart issue must have “been there for over a year.” Hearing Audio at 04:15:15-40.

<sup>23</sup> *Id.* at 04:03:00-03:50, 04:28-33, 14:57-15:12. Respondent explained that while his records do not reflect his “standard” suggestion, he started to make such notations after this case arose. *Id.* at 04:04:35-05:14, 06:40-06:55.

<sup>24</sup> Respondent also explained that he does not “like treating things that are going to wind up being lifelong treatments” and “was not going to treat the heart disease with any kind of medication while . . . trying to treat bloody enteritis, anemia, [and] seizures.” *Id.* at 04:26:26-27:00.

<sup>25</sup> Staff Ex. 1 at 1-2; Respondent Ex. 1 at 1-2. Eventually, however, Ms. Gonzales on her own decided to stop giving Dog 1 the antiseizure medication. Hearing Audio at 00:48:00-48:23. When asked to specify when she did so, Ms. Gonzales became audibly angry and stated “I don’t remember.” *Id.* at 00:48:35-48:45, 49:17-49:24. Upon further questioning, however, Ms. Gonzales testified that she “stopped medicine the day [she] contacted [Respondent] the last time [*i.e.*, May 5, 2020] . . . because [Dog 1] was deteriorating.” *Id.* at 00:50:30-50:47.

<sup>26</sup> Initially, Ms. Gonzales stated that she spoke with Respondent over the phone and that “he hung up” on her after stating she could take Dog 1 to another veterinarian if she preferred. *Id.* at 49:06-49:14. Upon further questioning, however, Ms. Gonzales suggested that she spoke with Respondent’s staff—not Respondent—and that “we hung up for the way they were talking to me because I was upset.” *Id.* at 01:05:15-05:22. But she again changed her account when asked if she was implying she hung up, at that point claiming she could not remember. *Id.* at 01:05:23-05:43.

they could give [her] another opinion.”<sup>27</sup> But, Ms. Gonzales explained, Respondent “never referred [her] to a cardiologist” or suggested “a second opinion.”<sup>28</sup>

Respondent’s veterinary records nonetheless reveal that Dog 1 returned to Respondent’s office on May 4, 2020—before Ms. Gonzales went to Ark hospital—and Dog 1 received another round of treatment.<sup>29</sup> Respondent testified that, during this visit, Dog 1 appeared happy and had only some redness on its leg, which was hard to locate. Respondent still administered an anti-inflammatory and antibiotics.

Two months later, Ms. Gonzales took Dog 1 to an animal hospital “requesting euthanasia but wanted an exam first to see if anything could be done for [Dog 1].”<sup>30</sup> Dr. Lee served as the treating veterinarian and, in her notes, she explained that Dog 1 was diagnosed with liver failure and noted that she observed its legs and abdomen were swollen.<sup>31</sup> Though Ms. Gonzales opted to euthanize and cremate Dog 1, Dr. Lee explained in a post-treatment letter—written a month later—that she would have taken a number of initial-visit steps that Respondent did not.<sup>32</sup>

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<sup>27</sup> *Id.* at 00:35:30–36:00. But Ms. Gonzales later explained that she took Dog 1 to Ark hospital two months later. *Accord* Staff Ex. 3 at 9–10 (contemporaneous hospital record and post-dated letter from attending veterinarian).

<sup>28</sup> Hearing Audio at 00:33:21–33:33 (claiming that Respondent’s staff said Ms. Gonzales could “just take [Dog 1] somewhere else”); *see also id.* at 00:34:27–34:57 (testifying that Respondent provided no referral).

<sup>29</sup> Staff Ex. 3 at 9–10; *accord* Respondent Ex. 1.

<sup>30</sup> Staff Ex. 3 at 9–10.

<sup>31</sup> In a letter written a month after treatment, however, Dr. Lee explained that “owner stated . . . [Dog 1] had been diagnosed with liver disease by [Respondent].” *Id.* at 10. *But see* Staff Ex. 1 (revealing no liver diagnosis); Respondent Ex. 1 (same); Hearing Audio at 02:42:17–42:25 (Staff’s expert concurring that no such diagnosis exists).

<sup>32</sup> Staff Ex. 3 at 10 (detailing what steps she would have taken that Respondent did not).



## C. DOG 2

Dog 2 was a thirteen-year-old Chihuahua owned by Ms. Riojas. Respondent had been treating Dog 2 for years when, in 2019, he presented with a growth on his anus.<sup>33</sup> Respondent gave Ms. Riojas a quote to remove the growth,<sup>34</sup> but she did not pursue that surgery until two years later.<sup>35</sup>

During that visit in 2021, Ms. Riojas testified, Respondent expressed no unique concerns with Dog 2's age, did not mention any need for pre-operative bloodwork or testing,<sup>36</sup> and did not identify any associated risks other than generally noting that, things “can happen” during surgery.<sup>37</sup> Respondent eventually placed Dog 2 under anesthesia—without actively memorializing its temperature, pulse, or respiratory functions because, in Respondent's view, these things are an “after thought” when in the middle of surgery.<sup>38</sup> The surgery proved “a bit of a

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<sup>33</sup> See, e.g., Respondent Ex. 2 (June 24, 2019 entries).

<sup>34</sup> *Id.*

<sup>35</sup> Staff Ex. 7 at 8; Respondent Ex. 2 at 24.

<sup>36</sup> Respondent, however, testified that he believes Ms. Riojas declined any pre-operative bloodwork when she signed Dog 2's “treatment consent” form. See generally Respondent Ex. 2 at 26 (“Dr. Kothmann welcomes second opinions and any outside testing that the undersigned may desire to obtain.”). Respondent also made clear that he does not consider pre-operative bloodwork useful, explaining “by the time you do bloodwork[,] . . . you could have . . . surgically remove[d] the problem.” Hearing Audio at 04:40:55–41:27, 53:58–54:04.

<sup>37</sup> Respondent did, however, record a description of Dog 2, which he identified by name and described as a “small,” “13” year old, “brwn/blk . . . male chihuahua” weighing “7 lb[s].” Respondent Ex. 2 at 5; Staff Ex. 2 at 3.

<sup>38</sup> Respondent indicated that even if the Board had such a rule, which he contested both in substance and in terms of Lubbock-area practice, he would not comply. Hearing Audio at 4:55:17–55:33 (“If the Board wants me to stop doing surgery every five minutes and take the temperature, pulse, and respiration of a dog that's under anesthesia, I'm not going to do it. . . . It's malpractice to do that.”).

challenge,”<sup>39</sup> and after waking from the anesthesia, Dog 2 “passed some dark feces” so Respondent cleaned the dog and its cage. Respondent also administered Dexamethasone, a steroid that he believed would address post-operative pain.<sup>40</sup>

Ms. Riojas eventually picked up Dog 2 but was given no take-home, post-operative medication or any post-operative care instructions. According to Respondent, but unbeknownst to Ms. Riojas, no such instructions or prescriptions were necessary because (1) the “treatment consent” form addresses post-operative care, and (2) Respondent believed the in-office dosage of Dexamethasone was sufficient. Later, Ms. Riojas noticed that Dog 2 could not walk and kept falling over; she therefore tried to contact Respondent, but she was not able to leave a message on his after-hours voicemail. As a result, Ms. Riojas attempted to keep Dog 2 comfortable rather than taking him for emergency care. The dog passed away later that evening.

At some point afterward, Ms. Riojas sought a refund from Respondent. Ms. Riojas testified that Respondent stated he could not provide a full refund because the surgery was already completed—suggesting that a 50% refund was more reasonable and would not “break him.” In the end, Ms. Riojas received a \$190

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<sup>39</sup> When asked to describe this surgery based on his notes, Respondent could not. But Respondent suggested that the “challenge” he referred to was generalized, stating that it’s “always a challenge” to conduct surgery around a non-sterile location—*i.e.*, a dog’s anus. *Id.* at 04:45:13–45:37.

<sup>40</sup> This, Respondent explained, is his preferred method of post-operative pain management because some take-home medications do not reduce inflammation. He also rejected Dr. Golla’s statement that steroids do not treat pain. *Id.* at 04:50:08–50:32 (“I know it works and . . . he’s wrong about that.”).

refund from Respondent and thus paid \$193 (of the total \$383) for Dog 2's treatment.

#### **D. EXPERT TESTIMONY**

Dr. Golla is the Director of Veterinary Operations for Innovative Pet Care and oversees the clinical work of roughly eighty-two clinics. He has vast experience with small-animal surgery, and he serves as chairman of the Board—reviewing hundreds of cases each year. Dr. Golla is also familiar with the standards for veterinary treatment in Lubbock based principally on visits with colleagues and conversations with Lubbock-area veterinarians.<sup>41</sup>

Regarding Dog 1, Dr. Golla concluded that Respondent kept inadequate records and failed his referral mandate. He explained that Respondent's records were "devoid of the pertinent information necessary to complete the medical record," highlighting the lack of information about the dog's history or detail regarding the heart-failure diagnosis,<sup>42</sup> the anemia diagnosis, the "hard" breathing observation, or general considerations such as the dog's femoral pulse.<sup>43</sup> This, Dr. Golla went on, violates the Board's recordkeeping mandate. Additionally, Dr. Golla explained that Respondent was required to make a referral upon

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<sup>41</sup> *Id.* at 02:15:20–15:40, 59:15–59:55.

<sup>42</sup> In this regard, Dr. Golla also explained that Respondent failed to provide "a complete list of differential diagnoses." *Id.* at 03:23:47–24:01.

<sup>43</sup> Dr. Golla also explained, at Respondent's invitation during cross examination, that Respondent's records failed to state that Dog 1 was a dog or describe its color, size, and frame. *Id.* at 02:52:19–52:38.

discovering (and documenting) that Dog 1 was experiencing heart failure.<sup>44</sup> Dr. Golla also stated that simply suggesting a “second opinion” or noting that a client “may want to see a different veterinarian” would not satisfy the referral obligation because Dog 1 needed to be seen by a veterinarian capable of treating heart failure.<sup>45</sup>

As for Dog 2, Dr. Golla concluded that Respondent kept inadequate records and provided substandard care. Dr. Golla first testified that Dog 2’s medical records “do not substantiate [Respondent’s] findings,” explaining that Respondent made no entries regarding the surgical procedure (*e.g.*, there was no information regarding the size of the mass, the nature of the incision, the surgical approach, the suture material used, or even the dog’s condition under anesthesia) and mentioned only that the procedure was “a bit of a challenge.” This, Dr. Golla testified, left him unsure as to what happened during the procedure—*i.e.*, whether the “challenge” was related to anesthesia, excessive bleeding, expelled feces, or something else. Dr. Golla also explained that Respondent breached his standard of care in two regards: (1) he should have done blood work on Dog 2 given its advanced age to assess whether it could survive anesthesia, and (2) he failed to provide any post-operative care instructions or pain medicine.<sup>46</sup> Both steps, Dr. Golla continued, are

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<sup>44</sup> Upon inquiry by the ALJ, Dr. Golla explained that Respondent had an obligation to suggest referral to a specialist—even if the seizures were unrelated to Dog 1’s heart failure, which was a possibility—so that the owner could consider the option, even if she ultimately declined. *Id.* at 03:18:39–03:21:19 (“The dog came in for seizures, it was recognized that the dog was in heart failure, there should have been a referral at that point to say, you know what, this is more than I can handle or treat, you need to go see somebody that can do this.”).

<sup>45</sup> Dr. Golla believed Respondent was incapable of treating heart failure because Respondent himself told the Board’s investigator that “he doesn’t treat congestive heart failure.” *Id.* at 03:04:45–04:53.

<sup>46</sup> Dr. Golla made clear that Dexamethasone “is not a pain medication.” *Id.* at 02:40:12–40:47 (explaining further that “it is [a steroidal] anti-inflammatory, but . . . research shows that Dexamethasone is not a pain medication, never has been a pain medication, and is only an anti-inflammatory”).

standard for an average veterinarian. But Dr. Golla conceded that he could not tie Dog 2's death to the violations, in part due to the dearth of information in Respondent's records.

Finally, in terms of general testimony, Dr. Golla described the veterinary maxim "if you don't document it, it didn't happen." This, he explained, is taught in veterinary school because documentation is essential for other veterinarians to properly care for an animal. Dr. Golla also indicated that recordkeeping requirements help protect veterinarians, too, when the need to defend their conduct arises—as in this case.

#### **IV. ANALYSIS**

This case distills into three component parts: recordkeeping allegations, substantive allegations, and sanctions recommendations. At base, Staff paints a picture of a veterinarian who has little interest in following the Board's rules and who merits middle-of-the-road sanctions. Respondent, on the other hand, stands behind each of his veterinary decisions and suggests that the Board is imposing unwritten, unrealistic expectations on rural practitioners like him. But Respondent does concede that he continues to fall short of his recordkeeping expectations. In the end, a careful review of the evidence and testimony reveals that Respondent failed to keep adequate records for Dogs 1 and 2—though not to the degree Staff suggests—and he provided substandard care to Dog 2. Staff did not, however, demonstrate that Respondent failed a referral obligation for Dog 1. Neither did Staff substantiate the full scope of requested sanctions and, as such, the ALJ recommends a modified set of penalties.

## A. RECORDKEEPING ALLEGATIONS

Staff alleges a variety of recordkeeping violations. As itemized by Staff during closing, the respective allegations under 22 Texas Administrative Code § 573.52 are:

	Dog 1	Dog 2
(a)(2) (patient information)	X	X
(a)(10) (differential diagnosis and/or treatment)	X	
(a)(12) (other details necessary to substantiate or document)	X	X
(a)(16) (referral documentation)	X	

Two points, however, belie the full spectrum of Staff’s claims. The first pertains to notice under the Administrative Procedure Act.<sup>47</sup> Staff’s Third Amended Complaint does not allege that Respondent failed to memorialize the referral of Dog 1. To the contrary, the Complaint alleges that Respondent’s *failure to refer* Dog 1 was a rule violation. Read alongside the separate allegation that “Respondent’s patient records were not complete or sufficient,” this makes clear that the Board did not alternatively plead these allegations—however broadly worded the latter may be. Staff instead attempted to widen its allegations as a real-time response to Respondent’s arguments.<sup>48</sup> The ALJ will not join this venture.

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<sup>47</sup> See generally Tex. Gov’t Code § 2001.051-.52.

<sup>48</sup> Nor was this the only instance in which Staff demoted the Administrative Procedure Act’s notice requirements in favor of an insupportably broad conception of “prosecutorial” authority. At one point, in response to Respondent’s offer of exhibits that Staff believed irrelevant, Mr. Lee invoked the unfettered ability to *sua sponte* add new, unpleaded allegations—should the ALJ overrule his objection—without notice or consent. *But see* Tex. R. Civ. P. 66-67; Tex. Gov’t Code § 2001.051-.52. In the end, however, Staff did not attempt to exercise this forecasted authority and the issue proved moot.

Second, Staff failed to demonstrate why Respondent’s written observations fell short of the Board’s vague mandate to record a “description” of patients. Respondent noted, *inter alia*, that Dog 1 was a “small,” “11yr. old [neutered male] Boston Terrier” weighing “8 lbs,” and Dog 2 was a “small,” “13” year old, “brwn/blk . . . male chihuahua” weighing “7 lb[s].”<sup>49</sup> Even excising the details that correspond to enumerated aspects of “identification” in the rule, Respondent still noted Dog 1’s size and weight and Dog 2’s size, weight, and color. These are descriptions. Suffice it to say that Staff’s belief otherwise cannot rest on Dr. Golla’s well-credentialed testimony that the word description, by definition, requires more.<sup>50</sup> This is nothing less than *ipse dixit*,<sup>51</sup> and Staff invokes no rule, statute, or precedent that endorses the clarity-by-enforcement undertaken here.<sup>52</sup> Neither did Staff introduce anything to support the argument that Respondent’s records should have also addressed the dogs’ “activity level,” which was articulated by Staff—not Dr. Golla—during closing argument.<sup>53</sup> Again, the Board’s rule imposes no such requirement. Respondent’s description of both patients was thus sufficient.

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<sup>49</sup> Staff Exs. 1 at 1 (Dog 1), 2 at 5 (Dog 2); Respondent Exs. 1 at 1 (Dog 1), 2 at 3 (Dog 2).

<sup>50</sup> Dr. Golla testified that “the word ‘description’” is what demands specificity regarding a patient’s “color,” “size,” and “frame.” Hearing Audio at 02:52:23–53:00. But Dr. Golla’s position as Chairman of the Board does not grant his syntactic opinion the imprimatur of law. *See generally* Tex. Gov’t Code § 2001.003(6)(C) (discussing notice-and-comment procedures). The Board’s rules require a “description,” and unless specifically defined or treated as a term of art, that term carries its ordinary meaning. *See id.* § 312.002.

<sup>51</sup> *See, e.g., City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) (“[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.” (cleaned up)).

<sup>52</sup> *Cf., e.g., Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999) (“Adjudicative rulemaking may be appropriate, for example, when the agency is construing a new rule or when a dispute deals with a problem that requires ad hoc resolution because the issue cannot be captured within the bounds of a general rule.”).

<sup>53</sup> Hearing Audio at 06:34:23–34:37 (“With regard to the description element on the recordkeeping, . . . Dr. Golla testified that his overall characteristics like his size, his frame, and his activity level [were missing] so it wasn’t simply just the color.”). *Contra id.* at 02:13:06–03:24:47 (Dr. Golla’s entire testimony, making no such claim).

In the end, however, Staff substantiated recordkeeping violations for both Dog 1 and Dog 2. There is little question that Respondent violated the Board’s mandate by failing to memorialize (1) that both dogs were, in fact, dogs;<sup>54</sup> (2) a complete list of Dog 1’s differential diagnoses; or (3) the details necessary to substantiate the treatment of both Dog 1 and Dog 2.<sup>55</sup> Not only did Respondent generally concede these recordkeeping errors,<sup>56</sup> but Dr. Golla also provided detailed, corroborated testimony regarding the shortcomings in both dogs’ records.

## **B. SUBSTANTIVE ALLEGATIONS**

Staff also alleges two substantive violations of the Board’s rules. In this regard, Staff argues that Respondent failed to refer Dog 1 to a specialist and provided substandard care to Dog 2. But a studied review of the record, as discussed in further detail below, reveals that Staff only carried its burden as to the latter charge.

### **1. Dog 1: Failure to Refer**

Three points demonstrate that Staff did not substantiate the referral allegation. First is the plain text of the rule, which reveals that the duty applies only in cases where “care and treatment . . . is beyond the veterinarian’s capabilities,”

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<sup>54</sup> In fairness, Respondent’s records do state that Dog 1 was a Boston Terrier and Dog 2 was a Chihuahua—both of which are associated with nothing but *Canis familiaris*, *i.e.*, domesticated dogs. *Cf.* 22 Tex. Admin. Code § 573.52(a)(2) (*eff.* Nov. 3, 2023) (eliminating this arguably redundant requirement in the new rule). But the governing rule required Respondent to memorialize both species and breed, and it is not the ALJ’s role to second-guess the wisdom of the Board’s lawfully promulgated, binding rules. Respondent thus fell short of his mandate.

<sup>55</sup> *See* 22 Tex. Admin. Code § 573.52(a)(2), (10), (12).

<sup>56</sup> Respondent admitted that his records “are . . . a violation of Board rules[,] if you want to get technical.” Hearing Audio at 05:04:44–04:57. His counsel, too, conceded “we’re not saying there were no recordkeeping errors.” *Id.* at 06:08:20–08:27 (explaining that “they’re not nearly as pervasive” as Staff claims).



*i.e.*, where a veterinarian is *incapable* of treating something. In this regard, Staff fixated on its mistaken belief that Respondent admitted “he couldn’t treat” Dog 1’s heart condition. Yet Staff’s witness instead testified that Respondent reported “he *doesn’t* treat congestive heart failure.”<sup>57</sup> Neither is there any basis to argue that Respondent does not because he cannot. Respondent testified that he “can” treat heart failure but chooses not to engage “things that are going to wind up being lifelong treatments.”<sup>58</sup> Suffice it to say that there is a fundamental difference between *unwillingness* and *incapability*. The plain text of the Board’s referral mandate applies only to the latter,<sup>59</sup> and the ALJ declines to venture beyond the rule’s text in practical pursuit of the former.

Second, with great respect to Dr. Golla’s experience and service as Chairman of the Board, his well-credentialed belief that Respondent violated his referral mandate does not alter any of the foregoing. The Board can lawfully amend or refine the scope of its rules through notice and comment.<sup>60</sup> But the Board cannot circumvent this process by having its Chairman take the witness stand to

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<sup>57</sup> Compare *id.* at 06:34:07–34:19 (Staff characterizing Dr. Golla’s testimony), *with id.* at 03:04:44–04:53 (Dr. Golla’s actual testimony) (emphasis added).

<sup>58</sup> *Id.* at 04:02:58–03:02, 26:26–27:00.

<sup>59</sup> Of course, this is not to say that a veterinarian can evade liability by openly refusing to provide care for patients with serious, newly diagnosed conditions that the veterinarian is otherwise capable of treating. Doing so without fully informing the client and gaining their express authorization to treat only some of the patient’s conditions could, in theory, run afoul of a veterinarian’s obligation to “exercise the same degree of humane care, skill, and diligence in treating patients as are ordinarily used . . . by average members of the veterinary medical profession.” See 22 Tex. Admin. Code § 573.22. But that is not the question at bar. Here, Staff pleaded and argued that Respondent violated his *referral obligation* by declining to treat Dog 1’s heart failure. So the ALJ will venture no farther.

<sup>60</sup> Tex. Gov’t Code § 2001.003(6)(C) (discussing lawful notice-and-comment procedures); *cf. also, e.g., Rodriguez*, 997 S.W.2d at 255 (addressing when adjudicative rulemaking is appropriate).

communicate atextual regulatory directives.<sup>61</sup> At bottom, Dr. Golla’s belief that Respondent failed the Board’s referral mandate is little more than *ipse dixit*.<sup>62</sup>

Third, even assuming the referral mandate applies in the face of both incapacity and unwillingness, the outcome in this case would remain the same. A preponderance of the evidence does not support Staff’s claim that Respondent did not “suggest” a referral to Ms. Gonzales. Respondent testified that his standard practice is to recommend getting a second opinion, as is also reflected on his “treatment consent” form.<sup>63</sup> And while Ms. Gonzales testified that Respondent never made this suggestion, Ms. Gonzales was not the model of credibility.<sup>64</sup> Neither would it matter if her testimony was better received given that Respondent himself

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<sup>61</sup> Furthermore, though the Legislature has apparently endorsed the notion of Dr. Golla serving as both the Board’s Chairman and an expert witness, it remains unclear whether the Texas Department of Licensing and Regulation’s newfound oversight of the Board means that they (not Dr. Golla and his colleagues on the Board) are charged with reviewing this Proposal for Decision. *See generally* Acts 2023, 88th Leg., Ch. 1103 (S.B. 1414), § 2, *eff.* Sept. 1, 2023. Anything less could raise serious constitutional questions. *See, e.g., Rogers v. Tex. Optometry Bd.*, 609 S.W.2d 248, 250 (Tex. App.—Dallas 1980, writ ref’d n.r.e.) (“[I]t is obviously difficult for members of the Board to reach a completely objective decision when the principal witnesses are other members of the same body and the issue presented involves their credibility. This unfairness is especially apparent in a case such as this, in which the agency’s decision on the facts is reviewable only for the purpose of determining whether its findings are supported by substantial evidence.”).

<sup>62</sup> *See, e.g., Pollock*, 284 S.W.3d at 816 (“[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.” (cleaned up)).

<sup>63</sup> To be clear, the ALJ rejects Respondent’s contention that this prophylactic form—used in all cases, regardless of whether referral might be appropriate—satisfies the Board’s mandate. This form does, however, corroborate Respondent’s sworn testimony that his standard practice is to recommend a second opinion.

<sup>64</sup> Ms. Gonzales was, at many times, more interested in being combative than accurately sharing her recollection. Though strong emotions are expected in a case of this nature, Ms. Gonzales offered a wide range of inconsistent assertions—*e.g.*, whether she took Dog 1 to Respondent’s office and could even attest to the lack of a referral, the details surrounding her phone conversation with Respondent’s office, etc.—and her testimony therefore merits little, if any, weight. *See generally Undheim v. Barnhart*, 214 Fed. App’x 448, 451 (5th Cir. 2007) (“An ALJ is not required to follow formalistic rules when articulating the reasons for his credibility determination.”); *Selders v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990) (considerable deference should be afforded an ALJ’s credibility assessment). Compounding the ALJ’s concern with Ms. Gonzales’s credibility is the fact that Staff’s own evidence suggests she also reported inaccurate information to others. *Compare* Staff Ex. 3 at 10 (noting “owner stated . . . [Dog 1] had been diagnosed with liver disease by [Respondent]”), *with* Staff Ex. 1 (no liver diagnosis), *and* Respondent Ex. 1 (same).

credibly testified that he suggested getting a “second opinion,” resulting in a factual stalemate. The ALJ is thus left with nothing to resolve this impasse—even assuming one exists, *arguendo*—and Staff’s burden must turn on more than a guess.<sup>65</sup>

## 2. Dog 2: Substandard Care

Three points reveal Staff successfully demonstrated that Respondent provided substandard care to Dog 2. First, most of the relevant facts are undisputed. Everyone agrees that Respondent’s treatment of Dog 2 did not involve pre-operative bloodwork or a take-home prescription for post-operative pain management. Similarly, though Respondent argues his standard pre-operative consent form communicates post-operative care instructions, no one suggests that Ms. Riojas read that form, received a copy, or was told of its contents after Dog 2’s procedure. The question thus becomes whether these facts fail the expected standard of care.

Second, Dr. Golla compellingly testified why these uncontested facts constitute substandard care in the veterinary field. Not only did Dr. Golla testify that an average veterinarian would have conducted bloodwork to determine whether Dog 2 could survive anesthesia,<sup>66</sup> but he also explained that average veterinarians would prescribe take-home pain medication and clearly educate the owner on post-operative care—*i.e.*, what to expect, what to look out for, etc.<sup>67</sup> This, combined

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<sup>65</sup> *Cf.*, e.g., *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (“Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence.”).

<sup>66</sup> Hearing Audio 02:32:08–32:00.

<sup>67</sup> *Id.* at 02:33:00–33:23, 35:00–35:33.

with Dr. Golla’s knowledge of Lubbock-area practices,<sup>68</sup> suffices to demonstrate that Respondent’s care fell below that of an average veterinarian.

Finally, none of Respondent’s counterarguments prove availing. Respondent first argued that Ms. Riojas declined bloodwork by signing the pre-operative consent form. But it strains reason to suggest that Ms. Riojas could decline a patient-specific procedure by signing a form that generally notes “Dr. Kothmann welcomes second opinions and any outside testing that undersigned may desire.”<sup>69</sup> Not only does nothing in that form reference the utility of bloodwork for older patients undergoing surgery, but there is no reason to believe Respondent might have taken it upon himself to orally convey as much—let alone that the option exists—when he does not conduct pre-operative testing because he believes it results in needless delay.<sup>70</sup>

Respondent also claimed that his in-office administration of Dexamethasone was sufficient to manage Dog 2’s pain.<sup>71</sup> But Respondent’s assurance that he “knows [Dexamethasone] works” does not persuasively rebut Dr. Golla’s invocation of scientific literature suggesting Dexamethasone—the steroidal anti-inflammatory administered before Dog 2 was discharged—is “not a pain medication” and “never has been.”<sup>72</sup> Furthermore, even assuming an anti-inflammatory can treat pain that is

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<sup>68</sup> *Id.* at 2:15:20–15:40, 49:30–49:55.

<sup>69</sup> Respondent Ex. 2 at 26.

<sup>70</sup> Hearing Audio at 04:40:55–41:27, 53:58–54:04.

<sup>71</sup> *Id.* at 04:50:08–50:32 (according to Respondent, he “knows [Dexamethasone] works” and Dr. Golla is simply “wrong about that”).

<sup>72</sup> *Id.* at 02:40:12–40:47.

not associated with inflammation but rather surgical incisions, it remains uncontested that Respondent *did not prescribe* a take-home pain medication for Dog 2. Yet Dr. Golla testified, without contradiction, that “the average veterinarian would” have done exactly that.<sup>73</sup>

Lastly, in terms of post-operative instructions, Respondent again casts his general pre-operative consent form as a panacea. But the futility of this argument is apparent on the face of that form itself. Take the provision stating that “[s]ome animals may need antibiotics, anti[-]inflammatory, and pain medication following surgery,” for example.<sup>74</sup> This means Ms. Riojas was left to speculate that Respondent’s post-operative silence meant Dog 2 was not one of those animals, which is of course untrue.<sup>75</sup> Moreover, even assuming a veterinarian can satisfy their post-operative obligation with a pre-operative prophylactic, Ms. Riojas was *never* given a take-home copy of the generalized instructions. She was simply handed a copy to sign and return before Dog 2 went into its procedure. This cannot suffice.

### C. SANCTIONS RECOMMENDATION

The sanctions analysis for the substantiated misconduct—here, two recordkeeping and one standard-of-care violation—is a two-part inquiry. But the ALJ’s studied analysis of the record reveals that Staff misapplies the Board’s

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<sup>73</sup> *Id.* at 02:33:00–33:17 (explaining that an average veterinarian would “send home pain medications . . . to prevent unnecessary pain and suffering”).

<sup>74</sup> Respondent Ex. 2 at 26.

<sup>75</sup> Not only is this untrue as a matter of Respondent’s own perspective—again, Respondent administered what he believed to be post-operative pain medication and antibiotics—but it is also inconsistent with Dr. Golla’s informed opinion that Dog 2 should have left with take-home pain medication to minimize needless suffering.

sanctions schedule at each analytical step. Not only do Respondent’s substantiated violations uniformly constitute Class A misconduct, but Staff’s recommendation relies more on unwritten, unverified “policy” than the mandatory, lawfully promulgated factors. The ALJ cannot join this venture.

In the end, as discussed in detail below, a close reading of the Board’s rules alongside the unique facts of this case counsels in favor of a one-year probated suspension and continuing-education courses, alongside tailored Board monitoring of Respondent’s compliance and progress.

### **1. Severity Analysis**

Respondent’s recordkeeping violations are properly classified as Class A misconduct. Staff correctly highlights that Respondent’s failures were pervasive and, in addition, he committed two other recordkeeping violations within ten years of the violations at bar.<sup>76</sup> This elevates Respondent’s misconduct to Class A.

Respondent’s standard-of-care violation, too, is properly classified as Class A misconduct. Though Staff argued during closing that the standard-of-care violation is a Class B offense—elevated from Class C due to Respondent’s previous sanction for the same issue—this contradicts the very foundation on which the misconduct was substantiated. As detailed in Section IV.B.2, *supra*, Respondent provided substandard care to Dog 2 because an average veterinarian would have (1) attempted to discern whether a thirteen-year-old dog *could survive* anesthesia by conducting

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<sup>76</sup> Staff Ex. 4 at 15–20 (2012 violation), 21–25 (2015 violation).

pre-operative bloodwork, and (2) provided post-operative pain medication and care instructions to minimize *unnecessary suffering*. The risk of death and needless suffering is, of course, far from minor. Yet “minor harm” is precisely the risk to which Class B misconduct pertains.<sup>77</sup> An “[a]ct or omission [that] . . . creates risk of death or harm,” on the other hand, is a Class A offense when a veterinarian has been sanctioned for the same issue within ten years.<sup>78</sup> This case embodies that paradigm.

## 2. Appropriateness Analysis

The sanction ranges for both Class A offenses are identical. The minimum sanction can include a one-year probated suspension, a formal reprimand, a one-thousand-dollar administrative penalty, and continuing education.<sup>79</sup> The maximum sanction, on the other hand, includes license revocation and a five-thousand-dollar administrative penalty.<sup>80</sup> But the question of consequence is where on that scale does Respondent’s sanction reasonably fall? Unsurprisingly, the answer turns not on opinion but the application of law to fact.<sup>81</sup>

Two bodies of authority are instructive. First is the Veterinary Practice Act, which explains that “the amount of a penalty imposed . . . must be based on” the

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<sup>77</sup> 22 Tex. Admin. Code § 575.25 (describing Class C, standard-of-care misconduct as that which “creates [a] risk of minor harm”).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (allowing statutory maximum); *see also* Tex. Occ. Code § 801.452(a) (setting statutory maximum at \$5,000 per day).

<sup>81</sup> 22 Tex. Admin. Code § 575.25 (“The finder of fact shall . . . consider the aggravating and mitigating factors to determine the appropriate sanction within the range provided.”); *see also* Tex. Occ. Code § 801.452(b) (“The amount of the penalty shall be based on the schedule of sanctions adopted under Section 801.411.”).

following factors: (1) seriousness, which contemplates “the nature, circumstances, extent, and gravity of any prohibited act” as well as “the hazard or potential hazard created to the health, safety, or economic welfare of the public;” (2) economic harm, either to property or the environment; (3) prior violations; (4) the need to deter future violations; (5) mitigation efforts; and (6) “any other matter that justice may require.”<sup>82</sup> Also relevant is the Board’s regulatory guidance, which recasts the above-noted statutory factors as mandatory aggravating and mitigating factors and adds the following mandatory factors: truthfulness is relevant to aggravation, and mitigation contemplates whether someone is “new to the practice of veterinary medicine” or if “policies and conditions beyond [a veterinarian’s] control contributed to the violation.”<sup>83</sup>

Before analyzing each of these factors, however, a threshold issue requires pause. Staff argued in favor of a seven-thousand-dollar administrative penalty based on two equally problematic methodologies. First, Staff ignored the minimum-sanction rule by using each violation’s respective minimum (rather than the most-severe minimum sanction) to calculate the aggregate penalty.<sup>84</sup> Staff’s failure to substantiate the referral allegation, however, mooted this problem. Second, Staff openly admitted that its penalty recommendation turned largely on unwritten

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<sup>82</sup> Tex. Occ. Code § 801.411(b).

<sup>83</sup> Compare 22 Tex. Admin. Code § 575.25, with Tex. Occ. Code § 801.411(b).

<sup>84</sup> It was on this basis that Staff calculated a total of seven thousand dollars in administrative penalties (*i.e.*, \$500 for the failure-to-refer allegation, \$2,500 for each of the recordkeeping allegations, and \$1,500 for the standard-of-care allegation) even though \$500 is less than the controlling \$1,000 minimum triggered by either the recordkeeping or standard-of-care violations. *Contra* 22 Tex. Admin. Code § 575.25 (“[T]he most severe minimum sanction recommended by the Schedule of Sanctions for any one of the individual violations shall be the minimum . . .”).



Board “policy.”<sup>85</sup> Not only does this unlawfully supplement the mandatory factors contained in both statute and rule,<sup>86</sup> but this fails Staff’s obligation to authenticate and demonstrate the applicability of a policy that is not contained in a formal rule.<sup>87</sup> The ALJ therefore rejects the analytical framework embraced by Staff and, instead, engages only with the lawfully promulgated factors.

Having set the methodological table, the remaining analysis is downhill. Respondent’s misconduct is, on its face, mild mannered. Though both the recordkeeping and the standard-of-care violations are foundational, there can be no claim either that Respondent was maliciously motivated, that he was untruthful, or that his failures invited any hazard to the health, safety, or economic welfare of the public.<sup>88</sup> Ms. Riojas did, however, suffer *some* economic harm—namely, the \$193 out-of-pocket cost for Dog 2’s substandard procedure.<sup>89</sup> Additionally, Respondent’s history of the precise violations at bar not only aggravates his misconduct but it also

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<sup>85</sup> Staff’s methodology for choosing a \$2,500 penalty for each recordkeeping offense reduced simply to the fact that this figure is half-way between \$1,000 and \$5,000. Hearing Audio at 04:45:25–45:54 (stating “I don’t believe [that policy] is [written down],” “not to my knowledge”). Neither did Staff attempt to explain or even justify why this calculation presumed there were *two* recordkeeping offenses—consolidated by corresponding patient—when Staff argued that Respondent committed *six* independent violations of the Board’s recordkeeping rules. *See supra* Section IV.A (consolidated allegations chart).

<sup>86</sup> Tex. Gov’t Code § 2001.003(6)(A)–(C); *cf. Rodriguez*, 997 S.W.2d at 255; *Tex. State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 528–35 (Tex. App.—Austin 2014, pet. granted), *review denied as improvidently granted* (Apr. 1, 2016).

<sup>87</sup> 1 Tex. Admin. Code § 155.419.

<sup>88</sup> Staff’s general invocation of harm to the Lubbock-area public (*i.e.*, anyone who sought care from Respondent) by way of extrapolation is neither supported in fact or law. Furthermore, the concept risks introducing unpleaded allegations with no corresponding burden of proof. The ALJ therefore declines any further discussion.

<sup>89</sup> Staff insisted that Ms. Riojas also suffered economic loss in terms of the dog’s literal value, though Staff thereafter conceded that it introduced no evidence to that effect. Hearing Audio at 05:47:57–48:29.

reveals the prior sanctions (*e.g.*, formal reprimands, continuing-education courses, and administrative penalties) proved inadequate.

On the other side of the regulatory scale lies the fact that Respondent gave Ms. Riojas a partial refund (*i.e.*, restitution) for Dog 2's procedure. Respondent also testified that he has started to keep more complete records—though he forcefully questioned the propriety of conducting and recording anesthetic monitoring, which would suggest this issue will persist. Finally, there is no basis to suggest that Respondent is “new” to veterinary practice or that “facility policies and conditions beyond” his control contributed to the violations. So neither factor has bearing here.

Taken together, the relevant factors reveal that the last two rounds of sanctions were fundamentally inadequate. It bears repeating that Respondent again finds himself in regulatory jeopardy, for identical offenses, despite having twice been formally reprimanded; twice been ordered to pay administrative penalties, which totalled six thousand dollars; and twice been ordered to complete hours of continuing-education classes in small-animal surgery and recordkeeping.<sup>90</sup> Given that appropriateness contemplates “the need to deter future violations,” it would be *inappropriate* to renew the very sanctions that have twice proven futile. Nothing in this record suggests that demanding *more* money will somehow change Respondent's behavior. It would be inappropriate to ignore this reality and arbitrarily endorse yet another administrative penalty simply because it now falls between \$1,000 and

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<sup>90</sup> Staff Ex. 4 at 15–20 (2012 violation), 21–25 (2015 violation).

\$5,000 per “offense,” which also carries methodological problems of its own.<sup>91</sup> Again, Respondent’s history teaches that financial penalties are ineffective. The same is true of formal reprimands and Board-ordered attendance at veterinary courses, without more. But what options remain?

For one, there exists a more-consequential sanction within Class A’s “minimum” category that has yet been exercised: a year-long probated suspension. Not only would this sanction better reflect the gravity of this case, mindful of the factors discussed above, but it would also allow the Board to exercise its monitoring authority in tandem with the suggested continuing-education courses. In particular, the Board can and should require Respondent to “(1) report regularly to the [B]oard on matters that are the basis of the probation; (2) limit practice to the areas [*i.e.*, procedures that *do not require* general anesthesia or post-care pain medication] prescribed by the [B]oard; [and] (3) continue or review continuing professional education until the license holder attains a degree of skill satisfactory to the [B]oard in those areas that are the basis of the probation.”<sup>92</sup> This tailored sanctions package would simultaneously open a channel for non-adversarial dialogue between the Board and Respondent (allowing him to communicate what changes are being made and, in real time, gather whether those steps are sufficient) and pre-emptively attend to the fact that Respondent disclaims the practicality of pre-operative bloodwork, openly refuses to memorialize anesthetic monitoring, and incorrectly believes that anti-inflammatory medication treats post-operative pain. Furthermore, skills-based

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<sup>91</sup> As explained earlier, it is unclear whether Staff even correctly counted the number of offenses in this case—a point that bears directly on the appropriateness of any aggregate penalty recommendation. *See supra* n.85.

<sup>92</sup> Tex. Occ. Code § 801.401(c) (detailing disciplinary authority concerning conditions of probated suspensions).

verification of Respondent’s continuing education appears to be the only means of ensuring that he does not simply attend, but truly internalizes, the courses aimed at mitigating his professional shortcomings.

## **V. FINDINGS OF FACT**

1. Respondent Kody Kothmann, DVM, holds a veterinary license (No. 4337) issued by the Texas Board of Veterinary Medical Examiners and has been a veterinarian for over forty years.
2. Respondent has twice been sanctioned by the Board. In 2012, the Board found that Respondent provided substandard care and committed a recordkeeping violation—resulting in a formal reprimand, an administrative penalty of nearly five thousand dollars, and mandatory continuing-education classes in small-animal surgery and recordkeeping. In 2015, the Board found that Respondent provided substandard care and committed a recordkeeping violation—resulting in a formal reprimand, an administrative penalty of one thousand dollars, and mandatory continuing education classes in recordkeeping.
3. In 2020, a member of the Gonzales family brought their dog (Dog 1) to Respondent for treatment because it was experiencing seizures.
4. Respondent identified Dog 1 by name and described it as a small, eleven-year-old, neutered-male Boston Terrier weighing eight pounds. But Respondent did not identify whether Dog 1 was, in fact, a dog.
5. Respondent examined Dog 1 and confirmed that it was experiencing seizures. He also diagnosed Dog 1 with bloody enteritis, anemia, and heart failure—though Respondent did not believe the heart failure related to the other conditions—and memorialized these diagnoses.
6. Respondent was capable of treating Dog 1’s heart failure but decided against doing so because (a) he does not like to treat conditions that require lifelong care, and (b) he did not want to prescribe medication for a heart condition when he was already attempting to treat bloody enteritis, anemia, and seizures.

7. Though Ms. Gonzales does not believe Respondent recommended that she get a second opinion for Dog 1, she was not a credible witness and Respondent testified that he did—consistent with his standard practice.
8. Respondent administered some in-office medication and prescribed take-home medications for Dog 1.
9. Respondent did not memorialize any information regarding Dog 1’s history or provide any detail regarding the heart-failure diagnosis, the anemia diagnosis, the “hard” breathing observation, or general considerations such as femoral pulse. Neither did Respondent include a full list of differential diagnoses or indicate that Dog 1 was, in fact, a dog.
10. Dog 1’s condition deteriorated (though his seizures stopped) over the next week, and Ms. Gonzales reached out to Respondent’s office to share her frustration. The ensuing phone call proved unproductive and, at some point, someone hung up.
11. Dog 1 later returned to Respondent’s office for another round of treatment, and Dog 1 was in good spirits but had some redness on its leg—for which Respondent administered some in-office medication.
12. Two months later, Ms. Gonzales took Dog 1 to an animal hospital to see whether she had an option beyond euthanasia.
13. The attending veterinarian believed that Dog 1 was previously diagnosed with liver failure, though nothing in this record corroborates that claim, and she observed that Dog 1 was seriously swollen. Ms. Gonzales and the veterinarian ultimately chose to euthanize Dog 1.
14. In a post-treatment letter, which was written nearly a month later, this veterinarian explained a number of initial steps that she would have taken but Respondent did not.
15. In 2021, Ms. Riojas brought her dog (Dog 2) to Respondent for surgical removal of an anal growth.

16. Respondent identified Dog 2 by its name and described it as a small, thirteen-year-old, brown/black, intact male Chihuahua weighing seven pounds. However, Respondent did not identify whether Dog 2 was a dog.
17. Ms. Riojas signed a pre-operative consent form, which, *inter alia*, noted that Respondent “welcomes second opinions and any outside testing that undersigned may desire” and provides generalized post-operative advice, some of which did not apply to Dog 2. Ms. Riojas was not given a copy of this form.
18. Respondent did not conduct pre-operative blood work to assess whether Dog 2 could survive anesthesia, given its advanced age, and Ms. Riojas did not decline this testing.
19. An average, Lubbock-area veterinarian would have conducted pre-operative bloodwork on Dog 2.
20. Respondent placed Dog 2 under anesthesia, recording the sedative used but nothing else regarding treatment—*e.g.*, information regarding the size of the mass, the nature of the incision, the surgical approach, the suture material used, or even the dog’s condition under anesthesia—other than the fact that Dog 2’s procedure was challenging.
21. After surgery, Respondent administered a steroidal anti-inflammatory—Dexamethasone—incorrectly believing it to treat post-operative pain. But Dexamethasone is not a pain medication.
22. Dog 2 was returned to Ms. Riojas without any take-home prescription for post-operative pain management or specific instructions regarding post-operative care.
23. An average, Lubbock-area veterinarian would have (a) prescribed take-home pain medication for Dog 2, and (b) clearly educated Ms. Riojas on post-operative care.
24. Dog 2 passed away later that evening and, afterward, Respondent refunded Ms. Riojas \$190 of the \$383 she paid for the procedure.

25. Later, an investigator with the Board spoke with Respondent over the phone, and Respondent stated, *inter alia*, that “he doesn’t treat congestive heart failure.” Respondent did not state that he cannot treat congestive heart failure.
26. On September 30, 2022, Staff referred this case to the State Office of Administrative Hearings (SOAH) for a contested-case hearing.
27. The case was originally scheduled for hearing on January 12, 2023, but Staff twice moved for a continuance, thrice amended its complaint, and subsequently moved to abate the proceedings—all without objection from Respondent. The parties later moved to lift this abatement in July of 2023.
28. On October 3, 2023, Staff issued a notice of hearing. This notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and either a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
29. The hearing on the merits was held via Zoom videoconference on October 24, 2023, before Administrative Law Judge Joshua C. Fiveson. Attorney Mark Lee represented Staff, and Attorney Robert Nebb represented Respondent.
30. The record closed after the parties filed their admitted exhibits on October 25, 2023.

## **VI. CONCLUSIONS OF LAW**

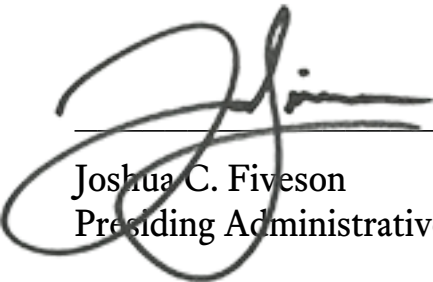
1. The Board has jurisdiction to take disciplinary action against a licensee who violates the Board’s rules of professional conduct. Tex. Occ. Code ch. 801.
2. SOAH has jurisdiction over all matters relating to a contested-case hearing, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Gov’t Code Ch. 2003; Tex. Occ. Code § 801.407.

3. Staff provided Respondent with proper, timely notice as to most claims but not the allegation that Respondent failed to memorialize the referral of Dog 1. Tex. Gov't Code §§ 2001.051–.052.
4. Staff carries the burden of proving its case by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427; *see also, e.g., Granek v. Tex. St. Bd. of Med. Examin'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).
5. Respondent's written description of Dog 1 and Dog 2 satisfied the plain text of the Board's recordkeeping mandate. 22 Tex. Admin. Code § 573.52(a)(2).
6. Respondent violated his recordkeeping obligation by failing to memorialize (1) both dogs' species, (2) a full list of Dog 1's differential diagnoses, and (3) details substantiating both dogs' treatment. *Id.* § 573.52(a)(2), (10), (12).
7. Staff did not substantiate the allegation that Respondent failed to refer Dog 1 because (1) he could, but simply chose not to, treat heart failure—meaning the treatment was not “beyond” his capabilities; and (2) even assuming the referral mandate applies, Staff did not demonstrate that it is more likely than not that Respondent failed to “suggest” referral of Dog 1. *See id.* § 573.24(a).
8. Respondent violated his standard-of-care obligation to Dog 2 by failing to take the following steps that an average, Lubbock-area veterinarian would have: (1) conduct pre-operative bloodwork, (2) prescribe take-home pain medication for post-operative pain management, and (3) provide Ms. Riojas with post-operative care instructions. *See id.* § 573.22.
9. Respondent's rule violations are Class A misconduct. *See id.* § 575.25.
10. Staff's recommended sanctions are inappropriate because they both informally supplement and do not substantively consider all mandatory factors set forth by statute and rule. *See id.* § 575.25; *see also* Tex. Gov't Code § 2001.003(6)(A)–(C); 1 Tex. Admin. Code § 155.419; *cf. also, e.g., Rodriguez*, 997 S.W.2d at 255; *Witcher*, 447 S.W.3d at 528–35.
11. Respondent's misconduct is mild mannered in terms of severity, as there is no suggestion that he was maliciously motivated, that he was untruthful, or that his failures invited any hazard to the health, safety, or economic welfare of the public. *See* Tex. Occ. Code § 801.411(b)(1); 22 Tex. Admin. Code § 575.25.



12. Ms. Riojas suffered minor economic harm—namely the \$193 out-of-pocket cost for Dog 2’s substandard procedure. *See* Tex. Occ. Code § 801.411(b)(2); 22 Tex. Admin. Code § 575.25.
13. Respondent’s recurring history of misconduct aggravates his violations. *See* Tex. Occ. Code § 801.411(b)(3); 22 Tex. Admin. Code § 575.25.
14. In terms of mitigation, Respondent (1) provided Ms. Riojas with partial restitution for Dog 2’s procedure; and (2) has started to keep more complete records—though, by his own admission, many issues will persist. But there is no claim that Respondent is “new” to veterinary practice or that “facility policies and conditions beyond” his control contributed to the violations. *See* Tex. Occ. Code § 801.411(b)(5); 22 Tex. Admin. Code § 575.25.
15. The ALJ recommends that Respondent be (1) placed on a one-year probated suspension, (2) ordered to complete continuing-education courses, and (3) undergo a year of Board monitoring—during which he must (a) provide regular reports that pertain to the conditions of his probation, (b) abstain from procedures involving general anesthesia or requiring post-care pain medication, and (c) in order to return to full practice, demonstrate to the Board that he has attained a degree of satisfactory skill in recordkeeping, general-anesthetic procedures, and post-operative care. *See* 22 Tex. Admin. Code § 575.25; *see also* Tex. Occ. Code § 801.401(c).

**Signed December 11, 2023**



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Joshua C. Fiveson  
Presiding Administrative Law Judge

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Associated Case Party: Texas Board of Veterinary Medical Examiners

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Texas Veterinary Board Legal Team		legal@veterinary.texas.gov	12/11/2023 1:36:57 PM	SENT
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Associated Case Party: KodyKothmann

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Melissa Yanis		center@carperlaw.com	12/11/2023 1:36:57 PM	SENT
Liz Klare		front@carperlaw.com	12/11/2023 1:36:57 PM	SENT
Morgan MWiebold		mwiebold@carperlaw.com	12/11/2023 1:36:57 PM	SENT

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

August 22, 2023

Jerry Bergman, Attorney for Petitioner  
Texas Board of Veterinary Medical Examiners

VIA EFILE TEXAS

Donald A. Ferrill,  
Attorney for Respondent Ashlee Watts

VIA EFILE TEXAS

**RE: Docket Number 578-22-2050; Texas Board of Veterinary Medical Examiners No. CX7716398597; Texas Board of Veterinary Medical Examiners v. Ashlee Watts**

Dear Parties:

Please find attached a Proposal for Decision in this case.

Exceptions and replies may be filed by any party in accordance with 1 Texas Administrative Code section 155.507(b), a SOAH rule which may be found at [www.soah.texas.gov](http://www.soah.texas.gov).

CC: Service List

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS,  
COMPLAINANT  
v.  
ASHLEE WATTS, D.V.M.,  
RESPONDENT**

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**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS,  
COMPLAINANT**

**v.**

**ASHLEE WATTS, D.V.M.,  
RESPONDENT**

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**PROPOSAL FOR DECISION**

The staff (Staff) of the Texas Board of Veterinary Medical Examiners (Board) seeks to revoke the license of Ashlee Watts, D.V.M. (Respondent) to practice veterinary medicine. Staff alleges that, while providing post-surgical care to a mare named Allie, Respondent failed to meet the standard of care, performed unnecessary and unauthorized treatment, and engaged in illegal animal cruelty by using a “hotshot,”<sup>1</sup> or handheld cattle prod, to repeatedly shock Allie in an effort to get her

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<sup>1</sup> The pleadings and documents in this case refer to “hotshot,” “hot-shot,” and “hot shot” interchangeably. For consistency, the ALJs have used “hotshot” unless directly quoting a record with the alternate spelling.

to stand. Staff also alleges that Respondent failed to keep adequate and truthful veterinary records documenting her use of the hotshot.

As discussed below, the Administrative Law Judges (ALJs) find that Staff proved the violations alleged in the Complaint. Other claims were raised for the first time in Staff's post-hearing briefs, and those fail both for lack of notice and because they are not supported by a preponderance of the evidence. The violations found each constitute Class A violations under the Board's schedule of sanctions. The ALJs recommend that the Board suspend Respondent's veterinary license for five years, with two years enforced and three years probated; require Respondent to complete appropriate continuing education courses; and impose administrative penalties totaling \$15,000.

## **I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY**

On March 11, 2022, Staff referred this case to the State Office of Administrative Hearings (SOAH) and filed its Complaint. Shortly thereafter, Respondent moved for a protective order and asked to postpone setting the hearing and avoid discovery "directed to her" because she was under criminal indictment for charges related to Staff's claims in this case.<sup>2</sup> Staff opposed that relief,<sup>3</sup> and the request for a protective order was denied in Order No. 2.<sup>4</sup> When Order No. 2 was

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<sup>2</sup> Respondent's Motion for Protective Order (April 11, 2022).

<sup>3</sup> Response in Opposition to Respondent's Request for Protective Order (April 12, 2022).

<sup>4</sup> Order No. 2, Denying Motion for Protective Order and Setting Hearing and Prehearing Schedule (April 20, 2022). While this case was pending, SOAH adopted a new case-management system and no longer uses a numerical naming convention for most orders.



issued, Respondent's criminal case was not scheduled for trial. No further motion seeking delay or protection was made prior to the hearing, nor did either party apprise the ALJs of any further developments in the criminal proceeding.

Staff issued its Notice of Hearing on May 3, 2022, which attached and incorporated the Complaint. The Complaint was not amended at any time prior to the hearing.

The hearing in this case was held via Zoom videoconference on February 7-9, 2023, before SOAH ALJs Sarah Starnes and Shelly M. Doggett. Assistant Attorneys General Jerry Bergman and Glen Imes represented Staff, and attorney Donald Ferrill represented Respondent. At the outset of the hearing, Respondent re-urged her argument that the hearing should be postponed until the related criminal proceeding had concluded; she again asserted that the hearing would unfairly prejudice her due process rights by forcing her to choose between invoking her Fifth Amendment privilege against self-incrimination in this proceeding or, if she elected to testify, compromising her defense in the upcoming criminal trial.<sup>5</sup> The ALJs overruled her objections.<sup>6</sup>

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<sup>5</sup> Transcript (Tr.) Vol. I at 39-40.

<sup>6</sup> *Gebhardt v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App.—San Antonio 1995, no writ) (pendency of criminal investigation does not affect a contemporaneous civil proceeding based on the same facts or parties); *Closs v. Goose Creek Consol. Indep. Sch. Dist.*, 874 S.W.2d 859, 874 (Tex. App.—Texarkana 1994, no writ) (administrative hearing held while employee was under criminal indictment did not violate employee's due process rights); *McInnis v. State*, 618 S.W.2d 389, 392-93 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.) (upholding trial court's refusal to continue civil disbarment case until final disposition of related criminal case).

The hearing concluded on February 9, 2023, and the record closed on June 26, 2023, after the parties' written closing arguments were filed. The ALJs have determined that Respondent did not receive notice of certain claims that were made for the first time in Staff's written closing, and not alleged in the Complaint. Jurisdiction was not disputed.

## II. APPLICABLE LAW

Pursuant to the Veterinary Licensing Act,<sup>7</sup> the Board is authorized to take disciplinary action against a Texas veterinarian who has engaged in dishonest or illegal practices in, or connected with, the practice of veterinary medicine; engaged in conduct that violates the Board's rules of professional conduct; or performed or prescribed unnecessary or unauthorized treatment.<sup>8</sup> Among the Board's disciplinary powers is the authority to revoke or suspend a license; impose a probated suspension, including probationary terms that impose practice limits and other requirements; reprimand a license holder; impose administrative penalties; and require license holders to participate in continuing education programs.<sup>9</sup>

Here, in addition to its claims that Respondent engaged in dishonest or illegal practices and performed unnecessary treatment, Staff alleges violations of three of

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<sup>7</sup> Tex. Occ. Code ch. 801.

<sup>8</sup> Tex. Occ. Code §§ 801.401, .402(4), (6), (12).

<sup>9</sup> Tex. Occ. Code § 801.401.

the Board’s rules of professional conduct.<sup>10</sup> First, Staff alleges that Respondent violated Rule 573.4, which addresses a veterinarian’s adherence to the law. Rule 573.4 provides that “[n]o licensee shall commit any act that is in violation of the laws of the State of Texas, other states, or of the United States, if the act is connected with the licensee’s professional practice, including, but not limited to, the acts enumerated in § 575.50(f) of this title (relating to Criminal Convictions).”<sup>11</sup> The rule further states that a “complaint, indictment, or conviction of a law violation is not necessary for the enforcement of this rule” and that “[p]roof of the commission of the act while in the practice of, or under the guise of the practice of ... veterinary medicine ... is sufficient for action by the Board under this rule.”<sup>12</sup>

Staff also alleges that Respondent violated Rule 573.22, which addresses the standard of care. Rule 573.22 requires licensees to:

exercise the same degree of humane care, skill, and diligence in treating patients as are ordinarily used in the same or similar circumstances, including the type of practice, by average members of the veterinary medical profession in good standing in the locality or geographic community in which they practice, or similar communities.<sup>13</sup>

Finally, Staff alleges that Respondent failed to meet the record-keeping requirements in Rule 573.52, which requires a veterinarian performing a physical

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<sup>10</sup> The Board’s rules of professional conduct are found in Texas Administrative Code title 22, chapter 573. Those sections are referred to herein as “Rule \_\_\_.”

<sup>11</sup> 22 Tex. Admin. Code § 573.4.

<sup>12</sup> 22 Tex. Admin. Code § 573.4.

<sup>13</sup> 22 Tex. Admin. Code § 573.22.

examination, diagnosis, treatment, or surgery on an animal to prepare a legible written or computer record that includes the “procedures performed/treatment given and results.”<sup>14</sup>

The Board has promulgated a Schedule of Sanctions for use in assessing the appropriate sanction to be imposed upon a licensee who is subject to disciplinary action.<sup>15</sup> Violations are classified as Class A, Class B, or Class C, depending on the severity, and a minimum and maximum sanction is specified for each category and type of violation. Aggravating and mitigating factors are considered to determine the appropriate sanction within the range provided.<sup>16</sup> The specific categorization and sanctions factors for the violations at issue are discussed in more detail below, in the sections addressing the ALJs’ sanctions recommendations.

Staff has the burden of proving the case by a preponderance of the evidence.<sup>17</sup>

### III. EVIDENCE

Staff presented testimony from ten witnesses—two of whom were adverse witnesses who also testified as part of Respondent’s case in chief—and had eight

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<sup>14</sup> 22 Tex. Admin. Code § 573.52(a)(9).

<sup>15</sup> 22 Tex. Admin. Code § 575.25.

<sup>16</sup> 22 Tex. Admin. Code § 575.25 (Figure).

<sup>17</sup> 1 Tex. Admin. Code § 155.427; *Granek v. Texas St. Bd. of Med. Examin’rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).

exhibits admitted into evidence.<sup>18</sup> Respondent presented additional testimony from one witness and had three exhibits admitted into evidence.<sup>19</sup>

### **A. UNDISPUTED BACKGROUND**

Allie was a 16-year-old Gypsy Drum mare, a large horse breed similar to a Clydesdale, who weighed over 1500 pounds.<sup>20</sup> In late 2019, Allie began exhibiting pain and lameness in her right rear leg, caused by an abscessed infection in her foot. When the pain did not resolve after treatment from Allie's regular equine veterinarian, her owners brought her to Texas A&M University's Veterinary Medical Teaching Hospital (Texas A&M) for further care.<sup>21</sup>

Allie arrived after hours on December 17, 2019, and was scheduled for surgery with Respondent the following day.<sup>22</sup> When she arrived, Allie was "bright and alert" but showed increased respiratory effort and resisted bearing weight on her right rear leg.<sup>23</sup> The next day, Allie was anesthetized and Respondent treated and debrided her infected wounds.<sup>24</sup> Afterwards, despite efforts to help her rise with head and tail

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<sup>18</sup> Staff Ex. 2 (Respondent's Answers and Objections to First Set of Interrogatories); Ex. 3 (Dr. Eleanor Green Expert Report and Biographical Summary); Ex. 4 (Video); Ex. 5 (Allie Medical Records); Ex. 6 (Dr. David Dutton Expert Designation, Report, and Curriculum Vitae (CV)); Ex. 7 (Dr. Alyssa Doering Statement); Ex. 9 (Dr. Ben Buchanan Expert Report); and Ex. 12 (Dr. Erma Susan Eades email to Dr. Green).

<sup>19</sup> Resp. Ex. 5 (Dr. Eades CV); Ex. 13 (Respondent CV); and 19 (Dr. Michael Tacker CV).

<sup>20</sup> Tr. Vol. I at 282; Tr. Vol. III at 738; Staff Ex. 5 at 0079.

<sup>21</sup> Staff Ex. 5 at 0074, 0078.

<sup>22</sup> Staff Ex. 5 at 0071-72.

<sup>23</sup> Staff Ex. 5 at 0075.

<sup>24</sup> Staff Ex. 5 at 0076, 0086.

ropes, Allie could not stand. At some point Respondent used the hotshot to try to coax Allie to stand, but she did not respond.<sup>25</sup> Allie was then re-anesthetized and moved to a deeply bedded stall to rest overnight and continue recovering from anesthesia, with a plan to try raising her the next day using a large-animal sling.<sup>26</sup>

In the evening of December 18, 2019, Allie was “bright and eating,” and was able to shift from lateral to sternal recumbency (that is, move from lying on her side to lying on her chest). She made at least one attempt at standing but “at the last moment laid back down.”<sup>27</sup> Her owners visited that night and, to them, Allie appeared alert. They were able to coax her into drinking and eating hay and treats they offered.<sup>28</sup> However, Allie was never able to stand overnight and by morning was unwilling to even sit sternal.<sup>29</sup>

A horse that cannot stand will die. Allie’s owners were not ready to euthanize their horse and wanted to give her another chance at recovering,<sup>30</sup> so in the morning on December 19, 2019, Allie was moved to a stall with a mechanical lift. A video camera in the stall recorded what happened next.<sup>31</sup> Allie was placed in a sling and

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<sup>25</sup> Staff Ex. 5 at 0109.

<sup>26</sup> Staff Ex. 5 at 0076, 0086, 0109.

<sup>27</sup> Staff Ex. 5 at 0076.

<sup>28</sup> Tr. Vol. III at 747.

<sup>29</sup> Staff Ex. 5 at 0108.

<sup>30</sup> The evidence is disputed regarding whether, or when, Respondent recommended euthanasia and whether she told Allie’s owners she had used, or intended to use, the hotshot.

<sup>31</sup> Staff Ex. 4.

hoisted to a stand, her weight supported by the sling. When Allie would not bear weight on her legs, Respondent began using the hotshot to shock her. Respondent's notes state that during these attempts, Allie was "fighting us, kicking, trying to bite, vocalizing and bucking but refused to stand on the front or hind legs."<sup>32</sup> After using the hotshot for over half an hour (including an approximately seven-minute break in the middle), Allie was lowered and left alone to rest. She died in the stall approximately an hour and half later.

A necropsy revealed that, in addition to the foot infection Respondent was treating, Allie had also been battling severe pneumonia with numerous abscesses in her organs.<sup>33</sup> With these underlying conditions, Allie was unlikely to have survived even if she had been able to stand following surgery. There is no allegation that Respondent misdiagnosed Allie or should have recognized these conditions, which the evidence indicates are very difficult to diagnose. There is also no claim regarding the surgery that Respondent performed. Staff's Complaint alleges only claims related to Respondent's use of the hotshot in her efforts to get Allie to stand following surgery.

Following Allie's death, a Texas A&M veterinary technician filed a complaint with the Board and provided the video of Respondent using the hotshot. This proceeding ensued. Respondent has also been criminally charged with animal cruelty

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<sup>32</sup> Staff Ex. 5 at 0109.

<sup>33</sup> Staff Ex. 5 at 0079-80.

in connection with Allie's treatment and, at the time of the hearing in this case, was still awaiting trial on that charge.

## **B. SUMMARY OF THE VIDEO**

Staff Exhibit 4 is a video, just under two and a half hours long, taken in the stall where Respondent used the hotshot on Allie on December 19, 2019.<sup>34</sup> The video is in color but does not have sound. It was recorded from a camera positioned high in a corner of the stall, giving a view of the stall with all four walls and both entrances visible. At the hearing, the video was presented primarily through the testimony of Dr. Michael Vallon, a then-veterinary student who was present during the events shown. Several other witnesses also viewed and commented on portions of the video. Their testimony is summarized more fully below but is cited in this section where the ALJs have relied on witness explanations to understand the video. Otherwise, this summary represents the ALJs' own observations, with citations to the approximate time where the described events are found in the video.

At the start of the video, Allie was lying recumbent on her left side with her legs extended in front of her and an IV line administering fluids. She was mostly still and only occasionally shifted her front legs or head. Allie was wearing a yellow protective hood on her face, with her ears, eyes, and nose exposed.

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<sup>34</sup> There is no video of Respondent's use of the hotshot on the previous day, in her first effort to get Allie to stand following surgery. *See* Staff Ex. 2 at Interrogatory 8.



Two minutes into the video, people began coming into the stall to remove the IV and place a lift harness on Allie. She did not move or resist their efforts when the sling was pulled under midsection<sup>35</sup> or when they pulled or lifted her head.<sup>36</sup> A total of six people were involved in getting Allie placed in the sling and then slowly hoisting her to a stand.<sup>37</sup> At first, as the hoist began lifting her, Allie lifted her head and scraped at the floor with her front legs, seemingly an effort to get them beneath her or help push herself up.<sup>38</sup> However, once lifted, she did not stand and remained off balance, with her weight supported by the sling. Also once lifted, it is apparent in the video that the rump strap of the sling was off-center; instead of sitting evenly on either side of Allie's hips, the strap was shifted to the right so that on her left side the strap was pressing just beside her tail instead of against and under her left hip.

Everyone but Respondent then backed out of the stall and out of camera view. Approximately nine minutes into the video, as the hoist was still lifting Allie, Respondent reached out from the doorway towards Allie with the hotshot—a long white stick with a prod on the end—and shocked her approximately five times, in rapid succession, on her left hip. Allie immediately began thrashing and bucking as though she were trying to run away, but she but remained off-balance and did not keep her feet down. Because her rear feet were not bearing weight, Allie spun around in the hoist slowly and erratically during this struggle. Five seconds later,

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<sup>35</sup> Staff Ex. 4 at 4:20.

<sup>36</sup> Staff Ex. 4, beginning at 4:40.

<sup>37</sup> Dr. Vallon identified himself, fellow student Tyler Mackey, a veterinary technician named Sabrina Cribari, Dr. Doering, and Respondent in this part of the video. Tr. Vol. I at 93-94. The other person was not identified.

<sup>38</sup> Staff Ex. 4 at 8:40.

Respondent administered several more shocks on Allie's left flank and side, to similar effect.<sup>39</sup> Allie pulled to the opposite side of the stall from Respondent, trying to avoid the hotshot.

A few seconds later, while Allie was hanging limp with her head turned away and her body leaning to the left, Respondent poked Allie's left side several more times with the hotshot.<sup>40</sup> This time, Allie did not move or react, indicating that the hotshot was not administering a shock with those prods. However, after ignoring the pokes for about ten seconds, Allie suddenly jolted in response to a poke, apparently because Respondent had used the electrical charge again.<sup>41</sup> Respondent then prodded Allie along her right side a number of times, for about ten seconds,<sup>42</sup> and Allie watched but did not otherwise react until she jerked her head suddenly and bucked away from a poke to her right shoulder.<sup>43</sup> A few more pokes followed on Allie's right side.

For approximately the next 90 seconds, Allie was prodded nearly constantly with the hotshot on both sides of her neck, sides, belly, and flanks, and several times on her muzzle and mouth. Allie did not respond to many of these prods, but others provoked a violent, jerking response, particularly when Respondent poked Allie's

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<sup>39</sup> Staff Ex. 4 at 9:06.

<sup>40</sup> Staff Ex. 4 at 9:17.

<sup>41</sup> Staff Ex. 4 at 9:27.

<sup>42</sup> Staff Ex. 4 at 9:30.

<sup>43</sup> Staff Ex. 4 at 9:42.

muzzle and mouth with the hotshot. Throughout this time, Allie sagged in the sling, sometimes leaning to one side, and never tried to stand or support her weight.<sup>44</sup>

Then, while Respondent had briefly paused from using the hotshot, Dr. Doering came in and grabbed Allie's protective hood and began shaking and pulling her head and slapping her neck.<sup>45</sup> While Dr. Doering was doing this, Respondent resumed using the hotshot on Allie's side and continued for another 90 seconds to prod her continuously on her neck, chest, and face, and under her tail.<sup>46</sup> The horse tried to pull her head away but did not move her legs; she continued to hang limp in the sling with her legs bent under her. Particularly when Respondent was using the hotshot under Allie's tail, all four legs were extended straight down and dangling above the ground, indicating that Allie could not have stood at that point even if she was trying.<sup>47</sup> Respondent continued using the hotshot and spent nearly a minute poking Allie with it directly on her injured leg and even directly on the foot bandaged from surgery.<sup>48</sup> Allie did not react to many of these pokes, but at least one of them prompted a violent, thrashing response.<sup>49</sup>

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<sup>44</sup> Staff Ex. 4 at 9:45-11:10.

<sup>45</sup> Staff Ex. 4 at 11:15-11:30.

<sup>46</sup> Staff Ex. 4 at 11:30-13:00.

<sup>47</sup> Staff Ex. 4 at 13:00-13:08.

<sup>48</sup> Staff Ex. 4 at 13:11-14:08.

<sup>49</sup> Staff Ex. 4 at 13:49.

After Respondent had been using the hotshot for over five minutes, Allie was hanging in the sling with her head low and was barely reacting to the prods and shocks, even though the hotshot was being poked all over her body.<sup>50</sup> Then, a prod to her belly prompted Allie to turn her head towards the hotshot, as though she were trying to bite it.<sup>51</sup> Respondent then withdrew for about 45 seconds—with Allie still sagging in the sling, leaning to her left, head hanging—before approaching again and using the hotshot repeatedly on Allie’s left side.<sup>52</sup> Then Respondent stopped using the hotshot for about another minute—again, with Allie hanging unmoving in the sling, her hind legs appearing to dangle just above the ground—before Respondent resumed prodding her with the hotshot.<sup>53</sup> Allie jolted before she sagged again, then turned her head and again tried to bite the hotshot as Respondent continued to prod her left side.<sup>54</sup> Otherwise, Allie moved little in the sling other than to turn and pull away from Respondent and the hotshot.

Dr. Doering came in and slapped Allie’s left flank with a rope several times in a row<sup>55</sup> while Respondent continuously prodded Allie’s left shoulder, front leg, chest, and neck with the hotshot.<sup>56</sup> Allie once again turned toward the hotshot and

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<sup>50</sup> Staff Ex. 4 at 14:00.

<sup>51</sup> Staff Ex. 4 at 14:17. As described below, witnesses explained that horses are prey animals that engage in survival behavior like biting when they realize they cannot outrun or escape a threat or when they are experiencing pain.

<sup>52</sup> Staff Ex. 4 at 15:00-15:15.

<sup>53</sup> Staff Ex. 4 at 16:15.

<sup>54</sup> Staff Ex. 4 at 16:39.

<sup>55</sup> Staff Ex. 4 at 16:42-16:48.

<sup>56</sup> Staff Ex. 4 at 16:42-17:00.

tried to bite it.<sup>57</sup> Respondent's prodding continued along Allie's left side and legs, with more slaps from the rope by Dr. Doering, for another three minutes. Allie would jolt in response to some of the prods, and she tried a time or two to bite the hotshot, but often she just hung her head low and tried to pull her head away. Allie reacted most strongly to shocks on her muzzle and face, and Respondent used the hotshot continuously and almost exclusively in those areas for over two minutes.<sup>58</sup> Allie pulled her head sharply away from the hotshot and tried to turn her whole body away. At one point Allie lowered her head and Respondent yanked it up with the lead rope and resumed shocking her muzzle.<sup>59</sup> Allie was still dangling in the sling and did not appear to make any effort to straighten her legs and stand. During much of this time, her legs were visibly dangling just above the stable floor. Throughout, the rump strap of the sling was off-center and pulling to the right.

After Respondent had been using the hotshot for over eleven minutes, veterinary technician Vidal Villareal reached in to point at the sling position, indicating to Respondent that the sling needed to be adjusted.<sup>60</sup> As Mr. Villareal spoke, Respondent did not stop prodding the horse with the hotshot, focusing most of her attention on the neck, ears, and nose. Allie pulled her head away and scraped at the floor with her front legs, trying to spin herself away from the hotshot, for over

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<sup>57</sup> Staff Ex. 4 at 17:00.

<sup>58</sup> Staff Ex. 4 at 18:12-20:16.

<sup>59</sup> Staff Ex. 4 at 19:47.

<sup>60</sup> Staff Ex. 4 at 20:18; *see also* Tr. Vol. II at 470. Though only his arm is visible in this part of the video, Mr. Villareal identified himself.

two minutes as Respondent continuously prodded.<sup>61</sup> After a short, fifteen-second break,<sup>62</sup> Respondent resumed shocking Allie's face and neck, though she barely moved in the sling other than to yank her head away.<sup>63</sup>

About fourteen minutes after the hotshot session began, Respondent took a break. Dr. Doering came into the stall and gently patted Allie's neck.<sup>64</sup> Then Allie was lowered from the sling—a task that required six people—and left to rest recumbent on her right side.<sup>65</sup> She was breathing heavily, her stomach heaving, as she lay on the ground. Several employees stayed in the stall with her, including Dr. Doering and Respondent, and Respondent stood off to the side looking at her phone. While Allie was resting, Dr. Vallon and Mr. Villareal adjusted the rump strap of the sling. They offered her some hay, which she nibbled at intermittently for the next several minutes.<sup>66</sup>

After Allie had been resting for about seven minutes, Dr. Vallon and Dr. Doering came in and started waving their arms, clapping, and trying to coax her into standing.<sup>67</sup> Her head was lifted but she did not move her legs to stand. Then

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<sup>61</sup> Staff Ex. 4 at 20:18-21:35.

<sup>62</sup> Staff Ex. 4 at 21:35-21:50.

<sup>63</sup> Staff Ex. 4 at 21:50-22:30.

<sup>64</sup> Staff Ex. 4 at 22:42.

<sup>65</sup> Staff Ex. 4 at 24:30.

<sup>66</sup> Staff Ex. 4 at 28:30-31:00.

<sup>67</sup> Staff Ex. 4 at 31:30.

Allie was lifted by the hoist again; this time, the rump strap was placed evenly on each side of her hips, further forward than before.<sup>68</sup> Almost immediately, Respondent started using the hotshot again, prodding Allie nearly constantly for over three minutes, focusing the hotshot on her muzzle, face, and neck. Allie just hung in the sling and tried to pull her head away; she sometimes scraped her front legs against the floor to try to pull away from the hotshot, but she did not bear weight and was not trying to stand or run.<sup>69</sup>

Next, Respondent moved to Allie's rear and started prodding her under the tail for over a minute. Allie reacted strongly to many of these prods, scraping her hind legs against the floor and waving her tail in agitation, but anytime Respondent relented Allie would sag back into the sling with her head held low, almost touching the ground.<sup>70</sup> Then Respondent moved up towards Allie's head and resumed prodding her with the hotshot on her ears, nose, and face for the next four minutes. In response, Allie scarcely moved her legs but vigorously shook her head to try to avoid the hotshot. Anytime Respondent paused, Allie would hang limp in the sling with her head low, nose against the ground, legs almost in a crouch.<sup>71</sup> Then, Respondent moved away from Allie's head and began prodding the hotshot on her belly, then her left hind leg and hoof. Allie jolted and tried to pull her leg away but

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<sup>68</sup> Staff Ex. 4 at 32:30. In his expert report, Dr. Dutton suggested that the straps were now placed too far forward for Allie to have been able to get her hind feet on the ground; he did not elaborate on this opinion in his testimony at the hearing. Staff Ex. 6 at 0137.

<sup>69</sup> Staff Ex. 4 at 32:42-36:00.

<sup>70</sup> Staff Ex. 4 at 36:05-37:06.

<sup>71</sup> Staff Ex. 4 at 37:10-41:10.

did not shift her weight or stop sagging in the sling.<sup>72</sup> Respondent then used the hotshot under Allie's tail for about twenty seconds, which prompted Allie to swing her legs wildly before she sank back in the sling and tried to get low to the ground.<sup>73</sup> Finally, almost ten minutes into this second round of hotshotting, Respondent stopped using the hotshot for good and stepped out of the stall.<sup>74</sup>

Allie was then lowered from the lift and left resting on her right side. The sling was removed,<sup>75</sup> an IV was started,<sup>76</sup> and someone held a bucket by her face to offer her a drink, which she did not lift her head to take.<sup>77</sup> Then Allie was left alone in the stall with hay and water next to her face.<sup>78</sup>

Once out of the sling, Allie moved very little, only occasionally shifting her head and neck, or restlessly moving her front legs. Her movements knocked over her water bucket.<sup>79</sup> After she'd been alone for about 15 minutes, several people (not including Respondent) came into Allie's stall and spent several minutes checking on her, giving her medication, hanging a new IV bag, and replacing her water bucket.<sup>80</sup>

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<sup>72</sup> Staff Ex. 4 at 41:15-41:47.

<sup>73</sup> Staff Ex. 4 at 41:45-42:05.

<sup>74</sup> Staff Ex. 4 at 42:15.

<sup>75</sup> Staff Ex. 4 at 44:00.

<sup>76</sup> Staff Ex. 4 at 46:30.

<sup>77</sup> Staff Ex. 4 at 49:11.

<sup>78</sup> Staff Ex. 4 at 50:00.

<sup>79</sup> Staff Ex. 4 at 1:01:08.

<sup>80</sup> Staff Ex. 4 at 1:11:08-1:19:13.



Then she was left alone again and remained on her side, breathing heavily and occasionally kicking her front left leg. After a little over 25 minutes, someone opened the door by Allie's head and crouched down to watch her and stroke her ears for a few seconds.<sup>81</sup> About twenty minutes after that, another employee entered the room and leaned over Allie's head while she spoke to someone standing in the doorway.<sup>82</sup> While they were with her, Allie defecated and continued making small twitching movements with her legs until her movements soon stopped altogether.<sup>83</sup> They left and two men entered shortly afterward. One of them checked her with a stethoscope, apparently confirming that Allie had died.<sup>84</sup>

### **C. TESTIMONY OF WITNESSES INVOLVED WITH ALLIE'S CARE<sup>85</sup>**

#### **1. Michael Vallon, D.V.M.**

Dr. Michael Vallon graduated from Texas A&M's veterinary school in 2020. He was a veterinary student working under Respondent's supervision on December 19, 2019, when she used the hotshot on Allie.

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<sup>81</sup> Staff Ex. 4 at 1:46:00-1:46:30.

<sup>82</sup> Staff Ex. 4 at 2:08:20.

<sup>83</sup> Staff Ex. 4 at 2:08:58-2:12:18.

<sup>84</sup> Staff Ex. 4 at 2:15:00-2:15:15.

<sup>85</sup> To facilitate an orderly explanation of the evidence, the witness summaries are not presented in the same order the witnesses appeared at the hearing.

Dr. Vallon grew up on a farm and has been around horses and livestock his whole life.<sup>86</sup> He aspired to become a vet from a young age and began working in animal clinics while he was still in high school, first for a small-animal clinic and then for a Waco hospital where he worked with small animals and horses.<sup>87</sup> Dr. Vallon attended Texas A&M for both his undergraduate and veterinary degrees, and throughout his schooling he worked for Dr. Ronnie Edwards at a Waco equine hospital.<sup>88</sup> Since becoming a licensed veterinarian in 2020, Dr. Vallon has worked as a shelter veterinarian for the City of Waco.<sup>89</sup> He also provides emergency, after hours care for Dr. Edwards’s equine hospital, where he is on call every other week.<sup>90</sup>

Dr. Vallon explained that a hotshot is a “noxious stimulus” used to motivate an animal to do something it does not want to do.<sup>91</sup> Other examples of common noxious stimuli include hitting a horse on the rump with a rope, using a twitch or whip, or waving arms or clapping loudly next to the horse.<sup>92</sup> In veterinary school, Dr. Vallon was never trained on using a hotshot on a horse or, as far as he can recall, on any other animal.<sup>93</sup> He recalled that hotshots were stored in Texas A&M’s food

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<sup>86</sup> Tr. Vol. I at 85.

<sup>87</sup> Tr. Vol. I at 85-86.

<sup>88</sup> Tr. Vol. I at 85-86.

<sup>89</sup> Tr. Vol. I at 87.

<sup>90</sup> Tr. Vol. I at 86-87, 160.

<sup>91</sup> Tr. Vol. I at 172-73.

<sup>92</sup> Tr. Vol. I at 176-77.

<sup>93</sup> Tr. Vol. I at 149.

animal ward with other tools, but until the incident with Allie, he had never seen one used on any animal at the school.<sup>94</sup> Some of Dr. Vallon's professors objected to using hotshots even on food animals and considered them unnecessary in light of other methods available for moving or positioning cattle.<sup>95</sup> To the extent he was trained as a student on using a hotshot at all, Dr. Vallon said he was just cautioned that they should be used "extremely sparingly."<sup>96</sup> He has never used a hotshot on an animal and would use one only as a last resort.<sup>97</sup>

Prior to the incident with Allie, Dr. Vallon had only ever witnessed one other occasion where a hotshot had been used on a horse.<sup>98</sup> When he was a student working at Dr. Edwards's equine clinic, they had a horse who collapsed suddenly. Dr. Edwards suspected the horse's intestine had ruptured and understood she was not going to survive.<sup>99</sup> The horse had collapsed in its stall in a position that made it impossible to safely get to her jugular to sedate or euthanize her, so Dr. Edwards used the hotshot one time on her flank to get her up and move her immediately to a nearby pasture where she could be safely euthanized.<sup>100</sup> Afterwards, Dr. Edwards

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<sup>94</sup> Tr. Vol. I at 95.

<sup>95</sup> Tr. Vol. I at 150, 189.

<sup>96</sup> Tr. Vol. I at 150.

<sup>97</sup> Tr. Vol. I at 182.

<sup>98</sup> Dr. Vallon said he had seen hotshots used around broncos at rodeos, but they were not applied directly to the horse. Instead, a handler might apply a hotshot to a pole or the side of a chute. This would make a sound that would startle the horse or perhaps give a "light conduct" of current through the metal fence. Tr. Vol. I at 151.

<sup>99</sup> Tr. Vol. I at 126, 151-53.

<sup>100</sup> Tr. Vol. I at 126, 154-55.

explained to Dr. Vallon that the hotshot was a last resort, must be used extremely sparingly, and if it does not work initially then it is not going to work and there would be no sense in continuing.<sup>101</sup>

The fact that he has only seen two instances where a hotshot was used on a horse—the time with Dr. Edwards and the time where Respondent used one on Allie—led Dr. Vallon to believe “it’s not something that’s standard practice” and is something a prudent veterinarian would use only in “extreme circumstances for a very short duration.”<sup>102</sup> When used to get a horse to stand, Dr. Vallon believes a hotshot should only be used in dire situations and as “an absolute last resort.”<sup>103</sup>

Allie had likely been exposed to other forms of noxious stimuli but had probably never been hotshotted before, according to Dr. Vallon. That meant the hotshot would be “a much more stimulating and painful and scary experience” for her, as compared to other noxious stimuli.<sup>104</sup> The hotshot only has one setting, so “it’s going to be just as noxious the first time [it is used] as the hundredth.”<sup>105</sup>

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<sup>101</sup> Tr. Vol. I at 166.

<sup>102</sup> Tr. Vol. I at 165.

<sup>103</sup> Tr. Vol. I at 125.

<sup>104</sup> Tr. Vol. I at 196.

<sup>105</sup> Tr. Vol. I at 173.

### a) The First Fourteen Minutes of Hotshot Use

Respondent was employed at Texas A&M during all four years Dr. Vallon attended the veterinary school, and she was the attending clinician during his one-week intermester in orthopedic surgery.<sup>106</sup> Dr. Vallon said they had very little personal interaction.<sup>107</sup> He knew her to have a reputation for being “a little bit strict, sometimes harsh” and said she did not seem to encourage questions from students; she expected them to “do what [they]’re told and kind of move on.”<sup>108</sup>

When Respondent began using the hotshot, Dr. Vallon was in the hallway outside Allie’s stall with Dr. Doering and other veterinary students and employees.<sup>109</sup> He conceded that, at least initially, Respondent was using the hotshot similar to the way Dr. Edwards had—as an effort to get the ailing horse to stand and move.<sup>110</sup> Sometimes veterinarians have to inflict pain to save an animal, and he agreed with Respondent’s assessment that Allie was going to die if she did not get up and walk.<sup>111</sup>

Dr. Vallon explained that a hotshot can be used as an ordinary prod, but when a button in the handle is depressed, the end becomes charged and a shock is

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<sup>106</sup> Tr. Vol. I at 88, 89. Dr. Vallon explained that an “intermester” is an academic segment between full rotations.

<sup>107</sup> Tr. Vol. I at 90.

<sup>108</sup> Tr. Vol. I at 90-91.

<sup>109</sup> Tr. Vol. I at 98-99.

<sup>110</sup> Tr. Vol. I at 172.

<sup>111</sup> Tr. Vol. I at 181-82.

administered when it comes into contact with the animal.<sup>112</sup> The hotshot makes a distinct ringing or buzzing sound when it is charged and a loud pop when discharged.<sup>113</sup> Sometimes Respondent just prodded Allie without administering a shock,<sup>114</sup> but Dr. Vallon said he heard those sounds “pretty much the whole time” Respondent was in the stall with Allie, and specifically could “hear the pops when it hit her.”<sup>115</sup> Each time Allie reacted strongly or recoiled, that indicated the hotshot was charged and causing Allie pain.<sup>116</sup>

Once Allie was hoisted in the lift, Dr. Vallon recalled that she began “violently thrashing” as soon as Respondent touched her with the hotshot, pedaling around, spinning, and trying to kick.<sup>117</sup> This left Allie “kind of cockeyed off to the side [with] her back legs splayed” at an angle that was not conducive to standing.<sup>118</sup> Respondent was “talking to the horse, kind of yelling at her,” telling her to “Get up. Get mad. The lions are coming.”<sup>119</sup> Dr. Vallon said Allie was snorting, grunting, and conveying

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<sup>112</sup> Tr. Vol. I at 98, 169. Dr. Vallon acknowledged that a viewer cannot tell from the video alone whether Allie was “overreacting” to the touch of a prod without electrical stimulus versus reacting to the electrical stimulus; however, he testified that in person, there was no question when Allie was being shocked. Tr. Vol. I at 175.

<sup>113</sup> Tr. Vol. I at 98, 194.

<sup>114</sup> Tr. Vol. I at 106.

<sup>115</sup> Tr. Vol. I at 103.

<sup>116</sup> Tr. Vol. I at 101-02, 106.

<sup>117</sup> Tr. Vol. I at 96.

<sup>118</sup> Tr. Vol. I at 96.

<sup>119</sup> Tr. Vol. I at 167.

her agitation as Respondent prodded and shocked her shoulder, ribs, and then her nose and muzzle.<sup>120</sup>

Dr. Vallon testified that he could tell “pretty early, [after] a couple of minutes at the most” that the hotshot was not going to be effective at getting Allie to stand.<sup>121</sup> She did not try to stand and was focused only on “pedaling in circles to try to get her face away from [Respondent].”<sup>122</sup> As an emergency vet for an equine clinic in a rural area, Dr. Vallon said he is often called to help animals that he ends up having to euthanize. It is always a difficult decision, and it is typically informed by the owner’s preferences and financial resources.<sup>123</sup> However, Dr. Vallon testified, the veterinarian also has an obligation to help an owner understand when euthanasia is “the best thing they can do to end the suffering of that animal that they care about,” when no amount of money would save them.<sup>124</sup> He firmly believes Allie should have been euthanized and that Respondent’s use of the hotshot was “unnecessary and unwarranted.”<sup>125</sup> Within “a couple of minutes” of using the hotshot it was clear to Dr. Vallon that Allie was frightened, was not able to stand, and that the hotshot was not going to help.<sup>126</sup> Instead of continuing to use the hotshot, he believes that

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<sup>120</sup> Tr. Vol. I at 97.

<sup>121</sup> Tr. Vol. I at 192.

<sup>122</sup> Tr. Vol. I at 192.

<sup>123</sup> Tr. Vol. I at 156-57.

<sup>124</sup> Tr. Vol. I at 157.

<sup>125</sup> Tr. Vol. I at 199.

<sup>126</sup> Tr. Vol. I at 158.

Respondent should have stopped and tried to “make her last moments at least somewhat peaceful.”<sup>127</sup> Instead, she continued.

As Respondent continued to use the hotshot, Allie’s snorts and grunts escalated to loud vocalizations. Dr. Vallon said the sounds were “very difficult to describe” and nothing he had ever heard a horse do before or since.<sup>128</sup> Dr. Vallon disagreed with an interrogatory response where Respondent described Allie’s sounds as “similar to the vocalizations that mares make when teasing out,” or trying to tease a stallion.<sup>129</sup> Dr. Vallon said a teasing mare makes sounds like a squeal or high-pitched whinny. Allie did make some similar sounds but “there were also sounds that she made that were not similar to that at all.”<sup>130</sup> Her vocalizations were more like a “guttural wail.”<sup>131</sup>

Dr. Vallon especially disapproved of Respondent’s use of the hotshot on areas known to be particularly sensitive for horses, like the face, ears, and perineum.<sup>132</sup> He explained that horses cannot see well under their noses or behind their tails, so they do a lot of touch sensing, which makes those areas extremely sensitive.<sup>133</sup> Further,

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<sup>127</sup> Tr. Vol. I at 158.

<sup>128</sup> Tr. Vol. I at 105.

<sup>129</sup> Tr. Vol. I at 105; Staff Ex. 2 at 0059 (Interrogatory 10).

<sup>130</sup> Tr. Vol. I at 105.

<sup>131</sup> Tr. Vol. I at 106.

<sup>132</sup> Tr. Vol. I at 192-93.

<sup>133</sup> Tr. Vol. I at 100.



because Allie was wearing a protective mask that further limited her vision, Dr. Vallon thought poking her neck or face would be especially scary because Allie would not be able to see where the prod was coming from.<sup>134</sup> Likewise, a hotshot to the eye would be far more painful than areas where the skin was thicker, like the flanks or rump.<sup>135</sup> Dr. Vallon was also upset by Respondent’s use of the hotshot under Allie’s tail, where the anus and vulva are found.<sup>136</sup> He considered it “extremely unnecessary” and “not acceptable” for Respondent to use the hotshot in those delicate, sensitive areas.<sup>137</sup>

Dr. Vallon pointed out several places in the video where Allie’s hind feet were not touching the ground and her front feet were, at most, skimming the shavings on the floor of the stall. Those shavings are usually around six inches deep, according to Dr. Vallon, meaning she was not in a position where it was even possible for her to bear weight and stand.<sup>138</sup> With the video paused at about the 14 minute mark—when the hotshot had been in use for about five minutes—Dr. Vallon pointed out that Allie’s legs were not straightened and she was not making any effort to stand. Even if she had tried, she was not in “the proper proprioceptive position to bear weight.”<sup>139</sup> In Dr. Vallon’s view, Allie had already “passed the point of no return”

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<sup>134</sup> Tr. Vol. I at 120.

<sup>135</sup> Tr. Vol. I at 102. Dr. Vallon testified that he saw Respondent shock Allie around her eye socket and on her eyelid. Tr. Vol. I at 209.

<sup>136</sup> Tr. Vol. I at 104.

<sup>137</sup> Tr. Vol. I at 100, 102, 104.

<sup>138</sup> Tr. Vol. I at 107.

<sup>139</sup> Tr. Vol. I at 108.

by then and there was no longer any reasonable hope that the hotshot would be helpful.<sup>140</sup> He testified:

I think we've proven that she's not going to be able to stand, and I don't think hitting her with that thing any more is going to make her stand at this point. She's just going to be exhausted and it's just going to aggravate her and stress her more and, really, I don't think it's going to lead anywhere.<sup>141</sup>

Still, Respondent continued. When Allie was hit—which Dr. Vallon could tell by the pop of the hotshot—she would wail, snort, grunt, and try to get away.<sup>142</sup> Dr. Vallon said he saw no positive reaction from Allie in response to the hotshots.<sup>143</sup> She did not try to stand or bear weight, but only slumped in the sling and tried to get her head away from the hotshot.<sup>144</sup> At most Allie would be “kind of paddling with her front feet, but her back legs always remain[ed] bent” and the video shows that she never straightened her legs or tried to bear weight.<sup>145</sup> A reasonable veterinarian would not have continued to use the hotshot.<sup>146</sup>

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<sup>140</sup> Tr. Vol. I at 108-09.

<sup>141</sup> Tr. Vol. I at 109.

<sup>142</sup> Tr. Vol. I at 119-20, 121.

<sup>143</sup> Tr. Vol. I at 115.

<sup>144</sup> Tr. Vol. I at 115, 119.

<sup>145</sup> Tr. Vol. I at 118-19, 121-22.

<sup>146</sup> Tr. Vol. I at 119.

In his opinion, Allie was in pain “every time the hotshot was used, and I think she was also extremely distressed just from this ordeal.”<sup>147</sup> Dr. Vallon recalled that after the hotshot had been in use for around seven or eight minutes, when Allie started trying to bite at the hotshot, her wailing “progressed and got bad.”<sup>148</sup> He reiterated that the sound was nothing like the high-pitched whinny or squeal a mare makes when she’s being teased out; instead, these were “loud, deep, guttural” sounds that he had never heard before.<sup>149</sup> Allie’s attempt to bite the hotshot also indicated to Dr. Vallon that Allie was in pain and trying to stop the pain.<sup>150</sup> It was unreasonable for Respondent to continue using the hotshot, Dr. Vallon opined.<sup>151</sup> The chances of Allie standing were “extremely limited” and the hotshot was “just prolonging the inevitable in a very unpleasant way.”<sup>152</sup>

Dr. Vallon said he had difficulty understanding Respondent’s goal or intent because she did not offer any explanations to the veterinary students and technicians who were present.<sup>153</sup> They were leaned against the wall of the stall, “going back and forth between staring at our boots and looking at what was going on.”<sup>154</sup> No one told

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<sup>147</sup> Tr. Vol. I at 118.

<sup>148</sup> Tr. Vol. I at 116.

<sup>149</sup> Tr. Vol. I at 117.

<sup>150</sup> Tr. Vol. I at 116.

<sup>151</sup> Tr. Vol. I at 118.

<sup>152</sup> Tr. Vol. I at 118.

<sup>153</sup> Tr. Vol. I at 186.

<sup>154</sup> Tr. Vol. I at 110.

Respondent to stop, and Dr. Vallon felt he lacked authority to do so.<sup>155</sup> He said, “[Respondent] seemed very adamant that this is what was going to happen; and I don’t—short of me going in there and physically removing that hot-shot from her, I don’t think it would have stopped.”<sup>156</sup>

Finally, after about fourteen minutes of hotshotting, Allie was lowered to the ground to rest, with positioning assistance from Dr. Vallon and several others. Because Respondent did not explain to them what she was doing, Dr. Vallon at first thought she was trying to move Allie’s legs to find another way to help her stand.<sup>157</sup> As they lowered her, Allie’s legs buckled and “she just crumple[d] to the ground.”<sup>158</sup> They tried to move her into a sternal position but were only able to get her positioned in lateral recumbency.<sup>159</sup> Dr. Vallon reiterated his belief that Respondent’s use of the hotshot had long-since become excessive. It was apparent that the hotshot was not helping Allie stand, it was “absolutely” unnecessary to continue shocking her, and a reasonable vet would not have continued.<sup>160</sup>

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<sup>155</sup> Tr. Vol. I at 117, 191.

<sup>156</sup> Tr. Vol. I at 113.

<sup>157</sup> Tr. Vol. I at 169.

<sup>158</sup> Tr. Vol. I at 125.

<sup>159</sup> Tr. Vol. I at 126-27.

<sup>160</sup> Tr. Vol. I at 123.

## **b) Second Ten Minutes of Hotshot Use**

After resting for a few minutes, Allie was lifted again. With the encouragement of someone (Dr. Vallon could not recall who), he and Dr. Doering started waving and clapping at Allie, “making noise, trying to encourage her to get up, get sternal, maybe try to get her forelimbs in front of her so she could try to stand.”<sup>161</sup> He was hoping that if she pushed up with her front legs she might be able to lift her rear legs next, but it did not work. Dr. Vallon said Allie gave “maybe a half-hearted effort there, but it got her absolutely nowhere.”<sup>162</sup> If Respondent thought the rest might have renewed Allie’s energy, this made it clear that continuing to use the hotshot would accomplish nothing but “prolonging the inevitable in the worst way possible.”<sup>163</sup>

This time when Respondent entered with the hotshot, Dr. Vallon saw Allie jolt and try to get away even before Respondent used it.<sup>164</sup> This showed that Allie had gained an understanding of what the hotshot did and learned to fear it.<sup>165</sup> Respondent proceeded to use the hotshot “a little more aggressively” than she had before, using it “kind of like a bayonet on a rifle” and jabbing Allie repeatedly in the face.<sup>166</sup>

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<sup>161</sup> Tr. Vol. I at 128-29, 176.

<sup>162</sup> Tr. Vol. I at 128.

<sup>163</sup> Tr. Vol. I at 129.

<sup>164</sup> Tr. Vol. I at 129.

<sup>165</sup> Tr. Vol. I at 130.

<sup>166</sup> Tr. Vol. I at 130.

Dr. Vallon said this was “absolutely unnecessary” and “cruel” to Allie.<sup>167</sup> He believed Allie had already given up, pointing out on the video how she was not trying to stand, was barely trying to run away, and was mostly just trying to get her face away from the hotshot.<sup>168</sup> In Dr. Vallon’s opinion there was no longer any chance that Allie was going to stand and “continuing to hit her with that hot-shot is just causing pain and I don’t think there was any chance this was going to benefit her in any way.”<sup>169</sup> No reasonable vet would continue, according to Dr. Vallon; he believed “this is an effort in futility that is just making Allie’s last moments hell.”<sup>170</sup>

Respondent continued shocking Allie, moving to her hindquarters and under the tail head. Given the sensitivity of these areas, Dr. Vallon emphasized how “very painful” this must have been, whether Allie was just being poked or was being hotshotted.<sup>171</sup> He pointed out that when Respondent used the hotshot under Allie’s tail, she tried to lower and bury herself in the shavings on the stall floor.<sup>172</sup> It was particularly illogical for Respondent to use the hotshot on Allie’s bandaged foot, according to Dr. Vallon. The horse was already unable to stand on it due to pain from

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<sup>167</sup> Tr. Vol. I at 131.

<sup>168</sup> Tr. Vol. I at 130, 133.

<sup>169</sup> Tr. Vol. I at 132, 134.

<sup>170</sup> Tr. Vol. I at 133.

<sup>171</sup> Tr. Vol. I at 135.

<sup>172</sup> Tr. Vol. I at 140.

her injury and surgery and Dr. Vallon did not think “a jolt from electrocution is going to make that leg feel any better.”<sup>173</sup>

Dr. Vallon pointed out how “very negatively” Allie reacted when Respondent again started focusing the hotshot on Allie’s face, mouth, muzzle, ears and eyes; she tried to shake her head to make it hard to hit, and tried get away by burying her muzzle in the shavings on the stall floor.<sup>174</sup> Dr. Vallon considered it entirely unnecessary and unacceptable for Respondent to use the hotshot on Allie’s head.<sup>175</sup> He said Allie grew increasingly exhausted and would be quiet for intervals but then would wail loudly when she was hit with the hotshot.<sup>176</sup> “ She still made no attempts to stand—her legs were bent, her feet were knuckled over, and she was not even paying attention to her feet to try to get in a proper position to stand.<sup>177</sup> Dr. Vallon testified that, from what he was witnessing, there was no possibility that the hotshot was going to help Allie stand.<sup>178</sup>

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<sup>173</sup> Tr. Vol. I at 140. On cross-examination, Dr. Vallon conceded that the hotshot had not touched Allie’s wound because it was protected by a bandage, but he noted that Respondent had shocked her just above the wound and bandage, which was still painful. Tr. Vol. I at 180.

<sup>174</sup> Tr. Vol. I at 137.

<sup>175</sup> Tr. Vol. I at 137.

<sup>176</sup> Tr. Vol. I at 137-38.

<sup>177</sup> Tr. Vol. I at 138-39.

<sup>178</sup> Tr. Vol. I at 182-83.

When they finally lowered Allie from the hoist, she just lay on the ground breathing quick, shallow breaths, and trembling.<sup>179</sup> Dr. Vallon said she was visibly exhausted and “almost obtunded,” (unable to respond) at that point.<sup>180</sup>

Dr. Vallon testified that he regrets not intervening “pretty much every day that this crosses my mind,” even if confronting Respondent would have cost him his career.<sup>181</sup> He said “someone should have stopped [Respondent]. I should have done it as well; and I think we were all just stunned, a little bit taken aback, you know. It’s not something you ever expected to see by any means. I think we all just kind of froze.”<sup>182</sup>

### **c) Medical Records**

Dr. Vallon did not know that Respondent had used the hotshot on Allie on December 18, 2019, following her surgery.<sup>183</sup> It was not mentioned in the progress notes in her medical records or in the surgical report from that day.<sup>184</sup> The only reference to this use was in the communication log, which Respondent had prepared after Allie’s death.<sup>185</sup>

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<sup>179</sup> Tr. Vol. I at 140-41.

<sup>180</sup> Tr. Vol. I at 141.

<sup>181</sup> Tr. Vol. I at 111, 114.

<sup>182</sup> Tr. Vol. I at 111.

<sup>183</sup> Tr. Vol. I at 145.

<sup>184</sup> Tr. Vol. I at 145-46; Staff Ex. 5 at 0089, 0097.

<sup>185</sup> Staff Ex. 5 at 0109 (titled “late entry” and dated December 20, 2019).



In Dr. Vallon's experience, veterinary students at Texas A&M typically handled writing up medical records, which would later be reviewed and edited by the supervising resident and clinician.<sup>186</sup> In this case, however, either Respondent or Dr. Doering told him after Allie died that they would handle all further recordkeeping and communications with Allie's owner.<sup>187</sup> Dr. Vallon could not recall any other time when he was told not to complete a patient's documentation as a veterinary student.<sup>188</sup>

Having now reviewed the medical records for Allie, Dr. Vallon testified that they do not accurately reflect what happened.<sup>189</sup> The case summary did not mention the hotshot at all, let alone record the duration and intensity of Respondent's use on December 19. The case summary also did not mention that the sling had to be readjusted or that Allie had to be lain down to rest midway through the hotshot session.<sup>190</sup> Though his name was listed at the bottom of the case summary alongside Drs. Watts and Doering's names, Dr. Vallon said he was never shown the document until he became involved with Staff's case.<sup>191</sup>

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<sup>186</sup> Tr. Vol. I at 147-48.

<sup>187</sup> Tr. Vol. I at 147.

<sup>188</sup> Tr. Vol. I at 148.

<sup>189</sup> Tr. Vol. I at 148-49.

<sup>190</sup> Tr. Vol. I at 149.

<sup>191</sup> Tr. Vol. I at 149; Staff Ex. 5 at 0074-79.

The only documentation of the hotshot is in the client communications report that Respondent prepared after the fact.<sup>192</sup> According to Dr. Vallon, Texas A&M does not typically disclose or provide client communication notes to an animal's owner, so Allie's owners would not have seen that part of the record.<sup>193</sup> The owner is typically provided only the report and summary which, in this case, would not have given Allie's owners any information about Respondent's extensive hotshot use with Allie.<sup>194</sup>

## **2. Vidal Villareal**

Vidal Villareal is a manager and supervisor of the Large Animal Intensive Care Unit (ICU) at Texas A&M. He witnessed Respondent use the hotshot on Allie on December 19, and testified to his impressions of the incident.

Mr. Villareal has a bachelor's degree in animal science and began working at Texas A&M in 1991 as a veterinarian technician, then worked his way up to the supervisor role he has now held for over twenty years.<sup>195</sup> He is charged with working patient emergencies and care, training employees, and coordinating services with clinicians and administration.<sup>196</sup> In addition, Mr. Villareal is tasked with keeping and maintaining the slings and lifts at the hospital and making sure they are in proper

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<sup>192</sup> Tr. Vol. I at 203.

<sup>193</sup> Tr. Vol. I at 203. Dr. Vallon said that employees are required to maintain the communications log but they are used only for Texas A&M's internal records.

<sup>194</sup> Tr. Vol. I at 204.

<sup>195</sup> Tr. Vol. II at 456-57.

<sup>196</sup> Tr. Vol. II at 456-57.

working order.<sup>197</sup> Mr. Villareal has worked with Respondent over the last few years on some cases where Respondent's patients were treated in the ICU, providing the designated treatments.<sup>198</sup>

Mr. Villareal first observed Allie in her stall on December 18, the day after she was admitted for care at the hospital.<sup>199</sup> When he arrived the following day, on December 19, Allie was already up in a lift using an electrical hoist.<sup>200</sup> Mr. Villareal understood that Respondent wanted Allie to move to see if the horse could stand.<sup>201</sup> He observed Respondent in the stall using the hotshot on the shoulder and neck area of the horse.<sup>202</sup> He estimated that he watched in or near the stall for 20 seconds, at most, and that he observed Respondent use the hotshot two to four times during that time.<sup>203</sup>

When he entered the stall, Mr. Villareal also immediately observed that the straps on the lift were loose and/or misplaced and pointed out to Respondent that they needed to be adjusted.<sup>204</sup> Mr. Villareal testified that this is a common issue and

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<sup>197</sup> Tr. Vol. II at 458.

<sup>198</sup> Tr. Vol. II at 459-60.

<sup>199</sup> Tr. Vol. II at 460-61.

<sup>200</sup> Tr. Vol. II at 461.

<sup>201</sup> Tr. Vol. II at 463.

<sup>202</sup> Tr. Vol. II at 461.

<sup>203</sup> Tr. Vol. II at 461-62.

<sup>204</sup> Tr. Vol. II at 463, 470, 474-75; Ex. 4, beginning at 20:15.

that lift straps often require correction or adjustment in these situations.<sup>205</sup> Respondent responded to Mr. Villareal's observation about the straps by saying, "Do you think that would make a difference?"<sup>206</sup> Mr. Villareal interpreted Respondent's response to suggest that she, as the senior clinician, was going to proceed without listening to his suggestions, so he did not respond.<sup>207</sup>

After leaving the stall, Mr. Villareal informed his supervisor of what he observed.<sup>208</sup> He returned to a workstation where he was able to watch Allie's stall on a live video monitor, along with other employees, and saw Respondent continue to hotshot Allie.<sup>209</sup> Mr. Villareal testified that he was emotionally impacted by the incident and does not agree with using a hotshot on animals, including horses.<sup>210</sup> He believed the hotshot use that he observed by Respondent was excessive.<sup>211</sup>

### **3. Julie Baker**

After graduating from the school's technician program, Ms. Baker worked as a veterinarian technician in Texas A&M's Large Animal ICU from 2017 to 2021.<sup>212</sup>

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<sup>205</sup> Tr. Vol. II at 463, 470.

<sup>206</sup> Tr. Vol. II at 470.

<sup>207</sup> Tr. Vol. II at 473-74.

<sup>208</sup> Tr. Vol. II at 465.

<sup>209</sup> Tr. Vol. II at 465, 468.

<sup>210</sup> Tr. Vol. II at 463, 464, 478.

<sup>211</sup> Tr. Vol. II at 464, 478.

<sup>212</sup> Tr. Vol. II at 480-81, 482.

Ms. Baker was involved with Allie’s care prior to the hotshot incident and later filed the complaint with the Board that gave rise to this proceeding.

Ms. Baker equated her role as a veterinarian technician to that of a nurse in human hospitals, explaining that she monitored fluids, administered medications as directed by doctors, drew blood, ran labs, and performed other tasks to assist with patient care.<sup>213</sup> While employed at the ICU, Ms. Baker had limited interaction with senior clinicians like Respondent and generally interacted more with the interns and residents.<sup>214</sup> She testified, however, that Respondent had a reputation among the staff for being somewhat difficult to work with, as “you did not want to get on her bad side.”<sup>215</sup>

From December 17-19, 2019, when Allie was at Texas A&M, Ms. Baker worked each day from approximately 3 p.m. to 1 a.m.<sup>216</sup> She was present when Allie arrived the evening of December 17 and assisted with getting the horse off a trailer and settled into a deep-bedded stall.<sup>217</sup> Ms. Baker or someone working with her alerted Dr. Doering that Allie, who was in pain and scheduled for surgery, had arrived.<sup>218</sup>

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<sup>213</sup> Tr. Vol. II at 481.

<sup>214</sup> Tr. Vol. II at 482.

<sup>215</sup> Tr. Vol. II at 483.

<sup>216</sup> Tr. Vol. II at 482.

<sup>217</sup> Tr. Vol. II at 483.

<sup>218</sup> Tr. Vol. II at 483.

The next day, on December 18, Ms. Baker began her rounds in the surgery ward.<sup>219</sup> After noticing people gathered around Allie's stall, she went over with another technician to see what was going on and if they could assist.<sup>220</sup> Ms. Baker and her colleague helped set up fluids for Allie, who had just returned from surgery, and continued to return to monitor and hang fluids through the night.<sup>221</sup> They asked Respondent and Dr. Doering to have Allie brought to the ICU, where Ms. Baker believed they could do a better job of observing and monitoring Allie than was possible in a different part of the hospital (presumably, the surgery ward), but Ms. Baker testified their request was "shut down."<sup>222</sup> Specifically, Ms. Baker testified that they asked about moving Allie to a deep-bedded stall in the ICU because there were more people there and the stall was already set up for a sling, which they could use to change Allie's recumbency and prevent her from laying on one side for an extended period of time.<sup>223</sup>

Around 6 p.m. that evening, Allie attempted to move from left lateral recumbency and was closer to a sternal position, but she still could not change recumbency to the other side.<sup>224</sup> Allie would occasionally attempt to get up during

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<sup>219</sup> Tr. Vol. II at 484.

<sup>220</sup> Tr. Vol. II at 483.

<sup>221</sup> Tr. Vol. II at 484.

<sup>222</sup> Tr. Vol. II at 485.

<sup>223</sup> Tr. Vol. II at 485-86.

<sup>224</sup> Tr. Vol. II at 486, 489; Staff Ex. 5 at 105.

the evening and into the morning but, according to Ms. Baker, she stopped trying a little after 3 a.m. on December 19 and refused to even sit sternal by 5 a.m. that day.<sup>225</sup> Ms. Baker explained that it typically takes at least four people and a cooperative horse, or three people and a sling, to lift a large and heavy draft mare like Allie enough to change the horse's recumbency by moving the horse's feet over and laying it back down on the other side.<sup>226</sup> Changing a horse's recumbency is considered a treatment, which cannot be performed without a doctor's order.<sup>227</sup> Moving Allie from the surgery ward to ICU, similarly, required a doctor's permission, as it would constitute a change in level of care.<sup>228</sup>

By the time Ms. Baker arrived for her 3 p.m. shift on December 19, Allie had died.<sup>229</sup> After watching video of Respondent hotshotting Allie, Ms. Baker downloaded the video and submitted it and bloodwork evidence to the Board.<sup>230</sup> She also subsequently submitted a complaint to the Board.<sup>231</sup> Ms. Baker testified that she downloaded the video because she was concerned the video would be deleted,<sup>232</sup> and she also testified to being concerned that there would be retaliation for her filing a complaint based on "previous episodes" at Texas A&M where evidence would be

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<sup>225</sup> Tr. Vol. II at 494; Staff Ex. 5 at 108.

<sup>226</sup> Tr. Vol. II at 486-87.

<sup>227</sup> Tr. Vol. II at 487, 493.

<sup>228</sup> Tr. Vol. II at 487-88, 493.

<sup>229</sup> Tr. Vol. II at 494.

<sup>230</sup> Tr. Vol. II at 496, 499, 500.

<sup>231</sup> Tr. Vol. II at 500.

<sup>232</sup> Tr. Vol. II at 500.

“buried” and the school would “cover things up and smooth it over.”<sup>233</sup> On cross-examination, however, Ms. Baker could not specify any instance she was aware of where evidence had been destroyed at Texas A&M.<sup>234</sup>

Testifying from Allie’s medical record, Ms. Baker said that the word “hotshot” was not included in any of the notes from 11 a.m. on December 18 to 7 a.m. on December 19.<sup>235</sup> Ms. Baker explained that those medical charts are generally made by students according to the clinician’s requirements, though she noted that technicians had made some entries in these records either at the request of Dr. Doering or to record a 10 p.m. call on December 18 from the technicians to Dr. Doering.<sup>236</sup> Ms. Baker admitted that her in-person conversations with Respondent and Dr. Doering regarding moving Allie were not recorded in the medical records, which she said was not unusual at that time.<sup>237</sup> However, Ms. Baker testified that after the incident with Allie, she and other ICU technicians began documenting in-person conversations relating to patient care in the records.<sup>238</sup>

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<sup>233</sup> Tr. Vol. II at 501-02.

<sup>234</sup> Tr. Vol. II at 502-03.

<sup>235</sup> Tr. Vol. II at 490, 492; Staff Ex. 5 at 105-07.

<sup>236</sup> Tr. Vol. II at 489-90, 492-93.

<sup>237</sup> Tr. Vol. II at 490-91.

<sup>238</sup> Tr. Vol. II at 491.



#### 4. Alyssa Doering, D.V.M.

Respondent originally designated Alyssa Doering, D.V.M., as a fact witness, and then subsequently designated Dr. Doering as an expert. This prompted a motion to exclude from Staff, who objected that the expert designation, made five days after the close of discovery, was untimely.<sup>239</sup> The ALJs denied Staff's motion because Staff did not allege any surprise or prejudice from the untimely designation.<sup>240</sup> During the hearing, however, Staff re-urged a motion to strike Dr. Doering's expert testimony after she testified that, among other things, she was not aware she had been designated an expert in this case.<sup>241</sup> The ALJs granted the motion, and Dr. Doering's testimony was, consequently, considered only in her capacity as a fact witness, subject to her testimony being colored by her role as one of Allie's treating veterinarians.<sup>242</sup>

Dr. Doering performed her surgical residency at Texas A&M between 2017 and 2021, and was present when the events relevant to this case occurred.<sup>243</sup> Approximately a quarter of her residency was spent working on Respondent's

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<sup>239</sup> Staff's Motion to Exclude Testimony of Alyssa Doering D.V.M. (Dec. 16, 2022); *see also* Respondent's Response to Staff's Motion to Exclude (Jan. 6, 2023).

<sup>240</sup> *See* Order Denying Motion to Exclude an Expert (Jan. 10, 2023).

<sup>241</sup> Tr. Vol. II at 536, 604, 605-10. Dr. Doering also said that to prepare for her testimony she had reviewed only the written statement she gave following the incident at issue and portions of her deposition. She had not reviewed, and was not familiar with, the statutes and rules cited in Staff's Complaint. Tr. Vol. II at 521, 534.

<sup>242</sup> Tr. Vol. II at 535-36, 540; Tr. Vol. III at 619-21.

<sup>243</sup> Tr. Vol. II at 516-17; Tr. Vol. III at 622.

service.<sup>244</sup> Dr. Doering said she had seen other surgeons at Texas A&M and elsewhere use hotshots on horses a handful of times and noted it was a treatment of last resort and was not routine.<sup>245</sup> She never saw or heard of Respondent using a hotshot at Texas A&M or elsewhere other than on Allie, though that was the longest and most extensive use of a hotshot on a horse that Dr. Doering had ever seen.<sup>246</sup> Dr. Doering testified that she believes a hotshot should rarely be used on a horse, if ever.<sup>247</sup>

The hotshot was first used on Allie on December 18, following her surgery and after administering steroid and IV fluid therapies.<sup>248</sup> According to Dr. Doering, Respondent used the hotshot as a training device to attempt to train Allie to stand.<sup>249</sup> That day, the veterinarians combined the hotshot with hoisting Allie using head and tail ropes, but Dr. Doering said Allie made minimal additional effort in response.<sup>250</sup> They also attempted, at some point in time, to push up Allie using mats.<sup>251</sup> Dr. Doering recalled Respondent saying that the rationale for using the hotshot was that Allie would die if she did not stand, though Dr. Doering could not recollect their

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<sup>244</sup> Tr. Vol. III at 629.

<sup>245</sup> Tr. Vol. II at 541, 586; Tr. Vol. III at 630-31.

<sup>246</sup> Tr. Vol. II at 546-47; Tr. Vol. III at 629.

<sup>247</sup> Tr. Vol. II at 541, 578 (“It’s not like I want to use a hot-shot, ever.”).

<sup>248</sup> Tr. Vol. II at 555-56, 592, 594.

<sup>249</sup> Tr. Vol. III at 631.

<sup>250</sup> Tr. Vol. II at 564-65.

<sup>251</sup> Tr. Vol. II at 555-56.

specific conversation.<sup>252</sup> During her testimony, Dr. Doering hesitated to classify the hotshot as a “treatment,” something she says is provided for the overall wellbeing and benefit of the patient.<sup>253</sup>

The following day, on December 19, the veterinarians combined using the hotshot with the large animal lift.<sup>254</sup> The benefits of the large animal lift can be enhanced, according to Dr. Doering, by raising and lowering the lift, or by using a prod along with the lift to prevent the horse from relying on the apparatus.<sup>255</sup> Stimulating the horse and raising the lift can force the horse to search for its footing, lock its legs, and support its own bodyweight.<sup>256</sup> Dr. Doering admitted there was a sense of urgency in trying to get Allie to stand, and that the hotshotting began at or close to the time Allie was placed into the lift.<sup>257</sup>

Dr. Doering believed that using the lift and hotshot was the right thing to do in this case, despite admitting that one “could say that it’s alarming how long the cattle prod was used.”<sup>258</sup> She described it as justified because it was the only option they had left to try to save Allie’s life, a horse they “truly cared for,” and the

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<sup>252</sup> Tr. Vol. III at 629-30.

<sup>253</sup> Tr. Vol. II at 556-58, 559.

<sup>254</sup> Tr. Vol. II at 592.

<sup>255</sup> Tr. Vol. III at 634-35.

<sup>256</sup> Tr. Vol. III at 634-35.

<sup>257</sup> Tr. Vol. II at 554.

<sup>258</sup> Tr. Vol. III at 636.

alternative was death.<sup>259</sup> Dr. Doering indicated that Respondent would respond by saying “good girl” and stopping the shock or poking whenever Allie responded to the hotshot stimulus.<sup>260</sup> They did not stop the hotshotting earlier, according to Dr. Doering, because “[Allie] continued to try,” and their ultimate goal was to get her to stand.<sup>261</sup> She stated that they used the hotshot and lift again after the first 14 minute period of hotshotting and a 10-minute break because they wanted to make one last effort to get Allie to stand after letting her rest.<sup>262</sup>

Dr. Doering believed Allie demonstrated positive signs to the hotshot at certain points—which included attempting to stand—and then began showing progressively less response over time.<sup>263</sup> Watching the video at 11:50 and 14:09 minutes up to 17:25 minutes (when the hotshot had been used for approximately three to eight minutes), Dr. Doering said she did not see any negative signs in Allie (besides Allie not standing) and believed the horse was still “responsive,” “bright,” “interactive,” and “trying.”<sup>264</sup> “Bright and alert,” in Dr. Doering’s mind, refers to actions that may reflect on Allie’s cognitive state, including using her head to look around and movement of her forelimbs.<sup>265</sup>

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<sup>259</sup> Tr. Vol. II at 545; Tr. Vol. III at 636-37.

<sup>260</sup> Tr. Vol. III at 631. Dr. Doering testified that every touch of the prod to Allie was not a shocking or electrified touch. Tr. Vol. III at 631.

<sup>261</sup> Tr. Vol. III at 633.

<sup>262</sup> Tr. Vol. II at 592-93; Tr. Vol. III at 636.

<sup>263</sup> Tr. Vol. II at 573, 574.

<sup>264</sup> Tr. Vol. II at 577, 578, 579-80; Tr. Vol. III at 633.

<sup>265</sup> Tr. Vol. II at 566-67.

At 17:25 minutes in the video (a little over eight minutes after hotshotting began), Dr. Doering testified that she observed Allie kicking out her hind legs, a positive sign that would encourage Dr. Doering to not stop.<sup>266</sup> She continued to characterize signs as more positive than negative at the 34-minute mark, though she noted that Allie was now starting to buckle her forelimbs more as the hotshotting continued.<sup>267</sup> At one point when Respondent hotshotted Allie in the anus or vulva while the horse was not touching the ground, Dr. Doering stated that Respondent was trying to use the combination of the lift and prod to get Allie to buck so that she would right herself in the apparatus and bear weight, a natural response to a bucking maneuver.<sup>268</sup>

Dr. Doering testified that she did not believe Respondent's hotshot use on Allie was excessive, though hotshot use could be excessive if the horse was no longer responding over a given period of time, paralyzed or mechanically unable to stand, or had an abdominal incision that could be eviscerated.<sup>269</sup> Dr. Doering said she and Respondent did not consider that the hotshot might have made it less likely that Allie would stand, the opposite effect of what they intended.<sup>270</sup> They did, however, consider that increased hotshot use could decrease the likelihood of Allie standing,

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<sup>266</sup> Tr. Vol. II at 579-80.

<sup>267</sup> Tr. Vol. II at 581, 582.

<sup>268</sup> Tr. Vol. II at 580-81; Ex. 4 at 12:51.

<sup>269</sup> Tr. Vol. II at 547.

<sup>270</sup> Tr. Vol. II at 574.

which is why, according to Dr. Doering, they stopped after using the hotshot for about 24 minutes.<sup>271</sup> She testified that she believes she and Respondent acted reasonably and out of only the best intentions to save Allie.<sup>272</sup>

Dr. Doering indicated that the longer a horse is down, the less likely it is that the horse will get up, and any draft horse being down is problematic.<sup>273</sup> While the horse is down, its muscles are crushed under its own weight, causing the release of enzymes and lactic acid and the horse to decompensate, which Allie was experiencing.<sup>274</sup>

Dr. Doering testified that Allie was allowed to stay recumbent in a stall for approximately 17 hours from the afternoon of December 18 to the morning of December 19 because Allie's owner had said the horse had "done this before," meaning she had gone down for extended periods of time before "pop[ping] up and be[ing] normal again."<sup>275</sup> Thus, even though they believed it was not normal for any other draft horse to stay down that long, Respondent and Dr. Doering still believed there was a chance Allie could spontaneously stand up herself.<sup>276</sup> At the time, Dr. Doering also believed that even though Allie was decompensating and her hind

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<sup>271</sup> Tr. Vol. II at 574.

<sup>272</sup> Tr. Vol. II at 584.

<sup>273</sup> Tr. Vol. II at 563, 570.

<sup>274</sup> Tr. Vol. II at 563, 564, 566.

<sup>275</sup> Tr. Vol. II at 562.

<sup>276</sup> Tr. Vol. II at 562, 565.

legs were getting weaker, if they were able get her to stand and lock her hind legs using the lift, she could have been physically strong enough to hold up and carry her body weight after gaining strength from the steroids and other therapies they had administered.<sup>277</sup>

Contrary to Ms. Baker's testimony, Dr. Doering denied that anyone had asked her to move Allie from the deep-bedded stall to the ICU overnight on December 18.<sup>278</sup> Regardless, she believed that anesthetizing Allie for a third time to move her would have further compromised the horse and suggested it would have been physically challenging to move Allie out of the deep stall to the ICU while she was recumbent.<sup>279</sup>

Dr. Doering originally described Allie's case as a "budget case" because there was no indication that Allie's owners had an unlimited budget or intended to spend a large amount on Allie's treatment.<sup>280</sup> After the CT exam showed there was no bone infection, however, Allie's prognosis somewhat improved.<sup>281</sup> Dr. Doering testified that she would normally use a hotshot before putting a horse down, if the horse's owner wanted her to keep trying.<sup>282</sup> Regarding Allie, Dr. Doering stated that the

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<sup>277</sup> Tr. Vol. II at 567, 569-70, 571.

<sup>278</sup> Tr. Vol. III at 637-38.

<sup>279</sup> Tr. Vol. III at 638. Dr. Doering stated this may have required using a forklift. Tr. Vol. III at 638.

<sup>280</sup> Tr. Vol. III at 632.

<sup>281</sup> Tr. Vol. III at 632-33.

<sup>282</sup> Tr. Vol. II at 588.

“owners didn’t want to stop yet” and did not want to put the horse down, so euthanasia was not an option before using the hotshot.<sup>283</sup> Had the owners requested it, Dr. Doering testified that they would have euthanized Allie at several points earlier in the process.<sup>284</sup>

According to Dr. Doering, the left rear strap was properly placed at approximately 8 minutes into the video, despite a technician (Mr. Villareal) later moving and shifting the strap.<sup>285</sup> She attributed Allie slumping over to one side to her having been recumbent on that side.<sup>286</sup> Dr. Doering stated that she believed Allie was weightbearing on her forelimbs, which was a positive sign, but said Respondent had continued to hotshot Allie because she was not weightbearing on her left hindlimbs.<sup>287</sup>

## 5. Respondent

Respondent has been a veterinarian since 2003, and previously held licenses in California, Colorado, and New York. She is board-certified in large animal surgery.<sup>288</sup> In 2012, Respondent obtained a Texas veterinary license and became an assistant professor in Texas A&M’s Department of Large Animal Clinical Sciences.

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<sup>283</sup> Tr. Vol. II at 586; Tr. Vol. III at 630.

<sup>284</sup> Tr. Vol. III at 634.

<sup>285</sup> Tr. Vol. II at 575-76; Staff Ex. 4 at 8:00.

<sup>286</sup> Tr. Vol. II at 576.

<sup>287</sup> Tr. Vol. II at 576-77.

<sup>288</sup> Resp. Ex. 13.



She became an associate professor in 2018.<sup>289</sup> At the hearing, Respondent asserted her Fifth Amendment privilege and refused to answer most of the questions asked when Staff called her to testify.<sup>290</sup> However, during discovery she provided responses to Staff's interrogatories. Those responses were admitted into evidence and are summarized here.<sup>291</sup>

Asked to explain the standard of care that applies to a post-surgical equine that is unable to stand, Respondent answered that the care depends on why the horse is unable or unwilling to stand. If the horse will not stand because of "lack of horse effort (i.e., lack of will to live)" then Respondent believes "aggressive and strong encouragement should be used and if a sling is available, it can be used." She did not elaborate on what might constitute "aggressive and strong encouragement." She explained the sling would be unlikely to work if the horse was not responding to the "aggressive and strong encouragement" because "the pressure of the sling makes horses less responsive/more somnolent." She also said the chances of a horse rising on its own after 24 hours are "dismal."<sup>292</sup> A separate interrogatory asked what alternative methods, other than hotshots, can be used to get an equine to stand. Respondent answered, "[i]f a horse is unable to stand, there are no methods that can

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<sup>289</sup> Resp. Ex. 13.

<sup>290</sup> Tr. Vol. I at 45-82.

<sup>291</sup> Staff Ex. 2. Respondent's interrogatories do not appear to be signed under oath, as required by Texas Rule of Civil Procedure 197.2(d). However, "the failure to sign or verify answers is only a formal defect that does not otherwise impair the answers," or otherwise prevent them from being used against the responding party. Tex. R. Civ. P. 197.2, cmt. 2.

<sup>292</sup> Staff Ex. 2 at 0057 (Interrogatory 4).

be used to get the horse to stand other than identifying and successfully treating any condition which is making the horse unable to stand.”<sup>293</sup>

Respondent was also asked to explain the standard of care for use of hotshots in treating an equine who will not stand. She responded that there are no published guidelines or standards, and veterinarians must rely on their own training, judgment, and experience.<sup>294</sup> She was trained during her surgical residency at Cornell University from 2004 – 2007, where another surgeon showed her that “repeated use of the hotshot and tapping the horse with the hotshot without pressing the button, and then tapping the button to activate the shock is the most effective.”<sup>295</sup> In Respondent’s experience, “repeated shocks are required to induce a horse to stand when it will not otherwise.” If a horse stands after only one or a few shocks, it likely would have risen without the hotshot and “therefore its use was not justified.” Respondent stated, “I strongly dislike using a hotshot and only use it when I think there is no other option to save the horse’s life.”<sup>296</sup> Prior to the incident with Allie, Respondent had used a hotshot on only one other horse in her ten years at Texas A&M. That horse recovered.<sup>297</sup>

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<sup>293</sup> Staff Ex. 2 at 0060 (Interrogatory 13).

<sup>294</sup> Staff Ex. 2 at 0058 (Interrogatory 5).

<sup>295</sup> Staff Ex. 2 at 0058 (Interrogatory 6).

<sup>296</sup> Staff Ex. 2 at 0058 (Interrogatory 5).

<sup>297</sup> Staff Ex. 2 at 0058 (Interrogatory 7).

Several interrogatories specifically addressed Respondent’s use of the hotshot on Allie on December 19. Asked why she had used the hotshot on Allie’s neck, muzzle, ears, and eyes, Respondent said there were several times she thought “we were just about to get Allie to stand, but then she would become somnolent again, only to follow moments later with a strong (good) reaction.”<sup>298</sup> Respondent acknowledged that the treatment was painful, but explained that the reason the hotshot works is because the pain “induces a physical response and a desire in the horse to move away.”<sup>299</sup> She also believed that Allie’s vocalizations—which she described as a “loud and distressed squeal”—indicated that she was reacting to the strong stimulation of the hotshot. This was a positive sign, Respondent thought, because Allie had not been responding that morning or the previous day. Respondent said it gave her “hope that we could possibly stimulate her to stand by repeatedly using the hotshot and showing her that she could rise to get away from it.”<sup>300</sup>

Respondent admitted that, while Allie was in the sling, Mr. Villareal had told her that “the rump straps were misplaced,” but she did not think this changed the effectiveness of the sling. Respondent said that the sling was able to effectively lift Allie into a standing position and stopping the “strong stimulation” from the hotshot to readjust the sling while Allie was not responding “would be more detrimental to her chances of rising. In other words, by stopping the strong stimulation without an

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<sup>298</sup> Staff Ex. 2 at 0059 (Interrogatory 9).

<sup>299</sup> Staff Ex. 2 at 0059 (Interrogatory 11).

<sup>300</sup> Staff Ex. 2 at 0059 (Interrogatory 10).

effort on Allie’s part, I would be contributing to her learned helplessness/lack of a will to live.”<sup>301</sup>

In the interrogatory responses, Respondent admitted that “[a]fter the first session of hot shotting I did not think it would work” and she prepared to call Allie’s owner to recommend euthanasia at that point. However, after speaking with Dr. Doering and discussing “how close we were to getting her up,” they decided to try again with “different timing/height of her limbs relative to the ground.”<sup>302</sup> Respondent continued:

I knew the owner would not want to give up if I told them there was a shred of a chance that she would stand and the conversation with Dr. Doering gave me renewed hope that we could in fact save her life, so I went back to try again. After that second session, I believe there was no chance she would stand. I did not know why she would not stand and had given up the will to live, but I believed that she had.<sup>303</sup>

Asked whether there was a therapeutic benefit to using the hotshots on Allie, Respondent answered that the benefit “would be rising from recumbency and surviving to go home to her family,” but “[u]nfortunately, at times our treatments do not have the desired effect.” However, “[t]hat is not a reason to abandon a known successful treatment,” she wrote.<sup>304</sup>

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<sup>301</sup> Staff Ex. 2 at 0061 (Interrogatory 17).

<sup>302</sup> Staff Ex. 2 at 0061 (Interrogatory 19).

<sup>303</sup> Staff Ex. 2 at 0061 (Interrogatory 19).

<sup>304</sup> Staff Ex. 2 at 0060 (Interrogatory 12).

When asked to identify where the term “hot shot” was used in Allie’s medical records, Respondent pointed only to “[t]he client communication log.”<sup>305</sup> However, her interrogatory responses assert that she discussed hotshot use with Allie’s owner, Scott Berry, several times on December 18 and 19. First, during their initial conversation on December 18, Respondent said she advised Mr. Berry that she did not think the sling would be helpful because Allie had been “completely non-responsive to the hotshot,” and that she is certain Mr. Berry understood she had used the hotshot that day because he responded that “it was very strange Allie was non-responsive to the hotshot.”<sup>306</sup> Respondent said she called him again that evening and suggested using the hotshot and sling that night, but Mr. Berry told her that he wanted to give Allie more time. In response, Respondent said “I told him that was fine but if she did not stand on her own overnight [there would be] no option (other than euthanasia) but to use the sling and hotshot in the morning, as she would have no chance of standing after 24 hours of recumbency.”<sup>307</sup>

Describing their discussion the following day, Respondent wrote:

During the conversation on 12/19 I did not use the words “hotshot” in my conversation with Mr. Berry but I told him that I had pushed Allie as hard as I could and she was not willing to stand. I strongly recommended euthanasia. He said he would not euthanize her, and he asked me to try again with her. I refused to try again and told him that I’m sorry, but I simply can’t keep doing this to her when I no longer

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<sup>305</sup> Staff Ex. 2 at 0060 (Interrogatory 14).

<sup>306</sup> Staff Ex. 2 at 0058 (Interrogatory 8).

<sup>307</sup> Staff Ex. 2 at 0058 (Interrogatory 8).

believe it is going to work – it is too emotionally hard on me and those working with me to push her this hard when I no longer believe it will work based on her response thus far....

Often owners miss important parts of conversations, especially when they are stressed about their horse. I am certain that Mr. Berry understood what I meant when I said “hotshot” because he replied, “That is so strange that she wouldn’t react to that.”<sup>308</sup>

Respondent also claimed to have discussed hotshot use with Mr. Berry again several months later, in March 2020, and that during that conversation he told her that “he remembered that we had discussed the hotshot use and how she was initially non-responsive to it.”<sup>309</sup>

Respondent also wrote that Mr. Berry had instructed “several times that he wanted to ‘do whatever it takes’ to save Allie’s life,” stating this in their conversation before Allie was anesthetized and reiterating it in each subsequent conversation.<sup>310</sup> Even when she told Mr. Berry that “I had pushed Allie as hard as I can push a horse and she still refused to stand” and “strongly recommended euthanasia,” Respondent contended that Mr. Berry “refused to authorize giving up on Allie” and asked her to try again. She believed from those conversations that “Mr. Berry understood what I was doing and still wanted me to try again, even after I emphatically refused to try again with the hotshot.”<sup>311</sup>

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<sup>308</sup> Staff Ex. 2 at 0058-59 (Interrogatory 8).

<sup>309</sup> Staff Ex. 2 at 0059 (Interrogatory 8).

<sup>310</sup> Staff Ex. 2 at 0060 (Interrogatory 16).

<sup>311</sup> Staff Ex. 2 at 0060-61 (Interrogatory 16).

Asked about her responsibility when an owner wanted to continue a treatment she no longer believed was therapeutic, Respondent said she would not continue treatment if there was “no chance of survival and a good outcome (quality of life).” However, if there was a chance of survival and a good outcome, then “short term suffering is justified if that is what the owner wants.”<sup>312</sup>

## 6. Scott Berry

Mr. Berry was Allie’s owner. He and his family live in the Houston area, where he works for the Houston Police Department as the Homeland Security Liaison with the Mayor’s Office of Public Safety and Homeland Security.<sup>313</sup> Mr. Berry is also a lifelong horseman; he grew up around horses, has owned horses, and worked as a mounted patrol officer for 18 years in Houston.<sup>314</sup> When his wife wanted a Gypsy breed, they found Allie on a horse farm in Colorado Springs. Allie easily approached Mr. Berry to greet him and ask for head scratches, and then greeted his children. Mr. Berry said, “I knew I was in trouble at that point” and the family had to have her.<sup>315</sup>

In or about the fall of 2019, Allie started exhibiting some “mild lameness” in her back, right leg and Mr. Berry contacted his regular veterinarian (Dr. Will Jordan)

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<sup>312</sup> Staff Ex. 2 at 0062 (Interrogatory 20).

<sup>313</sup> Tr. Vol. III at 737-38.

<sup>314</sup> Tr. Vol. III at 765-66.

<sup>315</sup> Tr. Vol. III at 766.

when the problem did not resolve on its own.<sup>316</sup> The veterinarian found and treated an abscess in Allie’s hoof. After he packed the wound with medication and bandaged her hoof, Allie began to improve, but soon worsened again.<sup>317</sup> At that point, the veterinarian advised Mr. Berry that Allie’s prognosis was poor, though there was still a chance she could recover.<sup>318</sup> He advised that their options were to either euthanize Allie or take her to Texas A&M to have her evaluated for possible surgery.<sup>319</sup> According to Mr. Berry, the veterinarian told him that “most of the time he would just put the horse down” and cautioned him that surgery and treatment at Texas A&M would be expensive.<sup>320</sup> However Mr. Berry said he was determined to give Allie every opportunity to get better if she could and that the cost did not matter.<sup>321</sup>

Hopeful his horse could recover, Mr. Berry elected to take Allie to Texas A&M for further treatment.<sup>322</sup> He transported Allie to Texas A&M in his own horse trailer, arriving in the evening on December 17.<sup>323</sup> At that time Allie was still able to walk, albeit with lameness in the afflicted foot.<sup>324</sup> Mr. Berry unloaded her and

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<sup>316</sup> Tr. Vol. III at 739.

<sup>317</sup> Tr. Vol. III at 740.

<sup>318</sup> Tr. Vol. III at 743.

<sup>319</sup> Tr. Vol. III at 740, 743.

<sup>320</sup> Tr. Vol. III at 741.

<sup>321</sup> Tr. Vol. III at 741.

<sup>322</sup> Tr. Vol. III at 741, 743.

<sup>323</sup> Tr. Vol. III at 744.

<sup>324</sup> Tr. Vol. III at 740, 744.



“just basically handed her off to the staff there,” who took Allie into the clinic. Mr. Berry did not speak to Respondent or any other veterinarian that evening.<sup>325</sup>

The following day, December 18, Mr. Berry said he spoke with Respondent several times. First, she called that morning to explain her assessment after examining Allie, and they made the decision to proceed with surgery. Following the surgery, Respondent called again and Mr. Berry recalled that she was “very optimistic” and reported that the infection in Allie’s foot did not appear to have penetrated too deeply into her hoof. “Things were looking pretty good at that time,” according to Mr. Berry.”<sup>326</sup> He recalled Respondent telling him that it was critical for Allie to be able to stand and walk within the next 24 hours. Later that day, Respondent called Mr. Berry again and he recalled her telling him that they had used a sling and tried to get Allie to stand, but that Allie was still unable or unwilling to stand.<sup>327</sup> Mr. Berry told Respondent that he was going to come visit Allie that evening with his family.<sup>328</sup> He said at the time, he was pleased with Respondent’s status updates and responsiveness.<sup>329</sup> Mr. Berry also recalled that Respondent raised the issue of cost that day, cautioning him that continuing to use the sling and other treatments would be expensive, and he remembered responding “that the cost

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<sup>325</sup> Tr. Vol. III at 744.

<sup>326</sup> Tr. Vol. III at 745.

<sup>327</sup> Tr. Vol. III at 746. Other witnesses denied that the sling was used on December 18 and it appears that, with the passage of several years, Mr. Berry may have misremembered the timing or detail of the some of the discussions at issue.

<sup>328</sup> Tr. Vol. III at 746.

<sup>329</sup> Tr. Vol. III at 747.

didn't really matter, that, you know, [Respondent should] try to continue to help her stand and do what she could to get [Allie] standing."<sup>330</sup>

Respondent's communication notes confirm that she spoke with Mr. Berry three times on December 18.<sup>331</sup> She wrote that, during the first post-surgical conversation she had said "I was very concerned that [Allie] was giving up, as I had tried the hotshot on her several times and she made no effort to stand," and that in a follow-up conversation that day they discussed trying to "sling her and use the hotshot in the morning."<sup>332</sup> At the hearing, Mr. Berry denied having any discussions with Respondent about using a hotshot, testifying firmly and repeatedly that Respondent never told him that she had used, or planned to use, the hotshot.<sup>333</sup> He said he would have remembered the conversation if it had occurred as Respondent described; moreover, had Respondent told him she planned to use the hotshot the next day, Mr. Berry said he would not have authorized it.<sup>334</sup> It was his understanding that Respondent planned to encourage Allie to stand by moving her to a special stall and using the sling. Mr. Berry said that he is certain Respondent did not mention using a hotshot, testifying "that's not something I really agree with and would not forget."<sup>335</sup>

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<sup>330</sup> Tr. Vol. III at 748.

<sup>331</sup> Staff Ex. 5 at 109.

<sup>332</sup> Staff Ex. 5 at 109.

<sup>333</sup> Tr. Vol. III at 749-50.

<sup>334</sup> Tr. Vol. III at 750.

<sup>335</sup> Tr. Vol. III at 750-51.

In the evening on December 18, Mr. Berry traveled to Texas A&M with his wife and children to visit Allie in her stall. She was lying down but appeared alert and ate the carrots and other treats they had brought her.<sup>336</sup> She drank water when they offered her a bucket and ate hay they hand-fed her.<sup>337</sup> To Mr. Berry, Allie appeared to be feeling better than when he had dropped her off the day before. She made one attempt to stand while they were visiting but was not able to rise.<sup>338</sup>

Mr. Berry testified that the following morning, December 19, he received a call from a clinic employee (not Respondent) telling him that Allie had passed away overnight.<sup>339</sup> Respondent's client communication notes describe having two conversations with Mr. Berry on December 19—one in the morning, where they purportedly “discussed their visit with Allie the previous night” and talked about Respondent's efforts to get Allie to stand, and one “in the afternoon after Allie had died.”<sup>340</sup> Mr. Berry did not recall having either of these conversations with Respondent.<sup>341</sup>

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<sup>336</sup> Tr. Vol. III at 747.

<sup>337</sup> Tr. Vol. III at 747.

<sup>338</sup> Tr. Vol. III at 747.

<sup>339</sup> Tr. Vol. III at 752. Again, Mr. Berry may be remembering the timing of this call, as the other witnesses and medical records reflect that Allie died in the afternoon on December 19, not overnight the night before.

<sup>340</sup> Staff Ex. 5 at 109-110.

<sup>341</sup> Tr. Vol. III at 755.

According to Mr. Berry, the first conversation Respondent described having with him on December 19 actually included details of conversations they had had the previous day, as well as many details they never discussed at all.<sup>342</sup> Specifically, he denied that Respondent ever disclosed Allie had been “fighting us, kicking, trying to bite, vocalizing and bucking” while in the sling, as Respondent claimed in her communication notes.<sup>343</sup> He disputed that Respondent told him she had “really pushed [Allie] with the hotshot to make her stand up on her own,” testifying that Respondent never disclosed she had used a hotshot.<sup>344</sup> He denied that Respondent ever told him that her “strong recommendation at this point was euthanasia.”<sup>345</sup> He also denied discussing concerns about expense with Respondent, testifying that he had told Respondent that “cost wasn’t an issue” and she should continue using the sling as much as possible, regardless of expense.<sup>346</sup> These are all topics Respondent’s notes indicate she discussed with Mr. Berry by phone in the morning on December 19, all of which Mr. Berry denies.

Respondent’s communication notes also report that she spoke with Mr. Berry a second time on December 19, after Allie had died, and after another employee (“Sabrina”) had called him.<sup>347</sup> Again, Mr. Berry testified that he did not remember

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<sup>342</sup> Tr. Vol. III at 753.

<sup>343</sup> Tr. Vol. III at 753; Staff Ex. 5 at 109.

<sup>344</sup> Tr. Vol. III at 754; Staff Ex. 5 at 109.

<sup>345</sup> Tr. Vol. III at 754; Staff Ex. 5 at 109.

<sup>346</sup> Tr. Vol. III at 754.

<sup>347</sup> Staff Ex. 5 at 110.

having any conversation at all with Respondent on December 19.<sup>348</sup> He also reiterated that Respondent never informed him that she was planning to use, or had used, a hotshot on Allie and said “I would not have allowed that if I had been asked.”<sup>349</sup>

After Allie died, Mr. Berry said he received a four-page “Equine Orthopedic Surgery Case Summary” from Texas A&M that described Allie’s care and “all the things that they had done to the horse all the way to her passing.”<sup>350</sup> He recalled that the document had a lot of detail and information until the very end where “it was like one sentence that Allie had quite possibly developed seizures and died, and that was it.”<sup>351</sup> Specifically, the only detail the report included about the events on December 19 was the following:

The following morning Allie was administered a second dose of dexamethasone and the large animal lift was used to assist the mare to stand. Despite our best efforts, the mare was unable or unwilling to stand. Through all of our efforts she seemed strong and coordinated, but would not support her own weight. She remained in the stall on intravenous fluids. She was frequently sitting up to sternal recumbence to eat and laying back on her side. She developed what was possibly seizures and died.<sup>352</sup>

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<sup>348</sup> Tr. Vol. III at 755.

<sup>349</sup> Tr. Vol. III at 756. Mr. Berry also refuted Respondent’s assertion, made in her interrogatory responses, that she had discussed hotshot use with him and was “certain Mr. Berry understood what I meant” when she had described Allie’s response to the hotshot. Tr. Vol. III at 763-64.

<sup>350</sup> Tr. Vol. III at 757-58.

<sup>351</sup> Tr. Vol. III at 758.

<sup>352</sup> Staff Ex. 5 at 3-4.

This paragraph struck him as “kind of abrupt and short, terse” compared to the level of detail given about other aspects of Allie’s time at Texas A&M.<sup>353</sup> The report did not give any indication that a hotshot had been used on Allie on December 18 or 19.<sup>354</sup>

Mr. Berry testified that it was nearly a year after Allie’s death when he learned for the first time, from a Board investigator, that a hotshot had been used on Allie. The investigator told him there was video of the incident and that the Board was investigating a complaint against Respondent over what had happened.<sup>355</sup> Mr. Berry contacted Texas A&M and asked to see the video but was initially told it could not be released. Shortly afterward, Respondent contacted Mr. Berry and said she would view the video with him if he wanted.<sup>356</sup> Mr. Berry said that, at the time, he had to decline because “COVID happened and everything shut down at that point.”<sup>357</sup> Since then, he has learned more about what happened to Allie and how the hotshot was used and determined that he does not want to view the video.<sup>358</sup>

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<sup>353</sup> Tr. Vol. III at 758.

<sup>354</sup> Tr. Vol. III at 761; Staff Ex. 5 at 74-77.

<sup>355</sup> Tr. Vol. III at 757, 788-89.

<sup>356</sup> Tr. Vol. III at 776, 786.

<sup>357</sup> Tr. Vol. III at 776.

<sup>358</sup> Tr. Vol. III at 777.

Mr. Berry testified that he does not believe a hotshot is a tool that should ever be used on a horse and he would not have taken Allie to Respondent for treatment had he known she would use a hotshot.<sup>359</sup>

## **D. OPINIONS OF OTHER VETERINARIANS**

In addition to the professionals who cared for Allie, the parties presented testimony from a variety of veterinarians who offered opinions on Respondent's use of the hotshot and/or her professional character. Staff presented testimony from David Dutton, D.V.M. and Ben Buchanan, D.V.M, both veterinarians retained to provide expert testimony; and from Erma Susan Eades, D.V.M., a fact witness who was one of Respondent's supervisors at Texas A&M. Respondent presented testimony from her expert witness Eleanor Green, D.V.M., then-Dean at Texas A&M School of Veterinary Medicine; and from Jerry Foland, D.V.M., a veterinarian who had previously consulted with, but was not retained by, Staff.

### **1. David Dutton, D.V.M.**

Staff designated David Dutton, D.V.M as an expert witness.<sup>360</sup> He graduated veterinary school in 1995 and became licensed in Texas the same year.<sup>361</sup> He performed his surgical residency at Texas A&M and stayed on staff as a lecturer before going into private practice where he dealt with equine surgery, lameness, and

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<sup>359</sup> Tr. Vol. III at 765.

<sup>360</sup> Dr. Dutton's CV and expert report were admitted as Staff Ex. 6C and 6D, respectively.

<sup>361</sup> Tr. Vol. II at 333, 334.

sports medicine for the next twenty years.<sup>362</sup> In 2020, he became a professor of surgery at Texas Tech University and helped establish its new veterinary school before taking a part-time appointment as a clinical coordinator, which allows him to continue his private practice and treat patients in both settings.<sup>363</sup> Dr. Dutton is board certified in large animal surgery and has previously served as an expert witness for plaintiffs and defendants in half a dozen cases.<sup>364</sup>

In preparing his expert report for this case, Dr. Dutton reviewed the video; Allie's medical records; investigative reports; statements from witnesses and veterinarians, some of whom were present during Allie's care; the Board's complaint; and indictment documents.<sup>365</sup> He testified that the standard of care is what is acceptable, or what can be expected, from individuals with similar educational backgrounds and positions, depending on their location.<sup>366</sup> In forming an opinion regarding Respondent's use of the hotshot on Allie, he considered the number of applications, the location of applications, Allie's behavior, Allie's physiological and psychological signs, and general knowledge of hotshots.<sup>367</sup>

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<sup>362</sup> Tr. Vol. II at 333-36.

<sup>363</sup> Tr. Vol. II at 334-35.

<sup>364</sup> Tr. Vol. II at 333, 337, 338; Staff Ex. 6D at 0133.

<sup>365</sup> Tr. Vol. II at 339-40; Staff Ex. 6D at 0134.

<sup>366</sup> Tr. Vol. II at 340.

<sup>367</sup> Tr. Vol. II at 447.



Dr. Dutton testified the “Hot Shot,” a branded cattle prod, was developed for the movement of livestock;<sup>368</sup> nevertheless, he believes it may be appropriate to adapt for use on a horse in certain situations to make a horse move or respond by delivering a noxious stimulus.<sup>369</sup> It is Dr. Dutton’s opinion that “[j]udicious use of noxious stimulus to the hind end of the horse a couple times to stimulate a response is more than adequate on an equine.”<sup>370</sup> He testified that hotshot use is only taught in relation to production animals like beef or dairy cattle, so its use on equines must be extrapolated from knowledge of its intended use.<sup>371</sup> He compared it to off-label drug use, testifying that even if there are no specific guidelines regarding the use of hotshots in horses, one can use knowledge of the hotshot as well as the horse’s demeanor, behavior, and physiological differences from cattle in determining appropriate application.<sup>372</sup>

According to Dr. Dutton, hotshot use on horses involves risk because they are more sensitive and reactive to the stimulus, partially due to their skin being thinner than cattle, and they may become more agitated and react violently.<sup>373</sup> Dr. Dutton testified that he has personally used a hotshot on a horse and has also observed others

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<sup>368</sup> Although some definitions relevant to this case include horses under the umbrella of “livestock,” Dr. Dutton testified that the hotshot was developed for and used on livestock animals that were production or food animals, such as cattle or pigs. *See* Tr. Vol. II at 344-45, 390; Staff Ex. 6B at 0138.

<sup>369</sup> Tr. Vol. II at 344-45.

<sup>370</sup> Staff Ex. 6D at 0138.

<sup>371</sup> Tr. Vol. II at 391.

<sup>372</sup> Tr. Vol. II at 393-94.

<sup>373</sup> Tr. Vol. II at 391, 394.

do so.<sup>374</sup> He noted that a horse would generally experience more pain from a hotshot than from a rope, twitch, or slap, and that a hotshot could have effects on cellular tissue as well as nerves, which conduct electricity.<sup>375</sup> Dr. Dutton believed it should be used on horses only in advanced situations and should not be a common occurrence.<sup>376</sup>

When asked to review the first minute of hotshot use in the video, Dr. Dutton testified that Allie was being lifted in the sling, her head and ears were up, and she appeared to be putting weight on her limbs.<sup>377</sup> He opined that the initial use of the hotshot to try to stimulate Allie was within the standard of care and neither uncalled for nor excessive.<sup>378</sup> He also stated that further use of the hotshot within that first minute may be a judgment call, though he personally believed that Allie needed a break to try to right herself and to stand in the hoist after having been recumbent for 17 hours.<sup>379</sup> After the first minute to minute and a half, however, Dr. Dutton believes Allie was demonstrating negative and detrimental behavior from the use of the hotshot.<sup>380</sup>

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<sup>374</sup> Tr. Vol. II at 448, 449.

<sup>375</sup> Tr. Vol. II at 345-46.

<sup>376</sup> Tr. Vol. II at 406, 407.

<sup>377</sup> Tr. Vol. II at 341-43; Staff Ex. 4 at 9:00-10:00.

<sup>378</sup> Tr. Vol. II at 343-44; Staff Ex. 4 at 9:00-10:00.

<sup>379</sup> Tr. Vol. II at 343.

<sup>380</sup> Tr. Vol. II at 391, 440.

At minute 13:30 of the video—after the hotshot had been used for about four and a half minutes—Dr. Dutton noted that Allie’s demeanor had changed from earlier because her head was down, her ears were back, and she was leaning back in the sling.<sup>381</sup> He explained that Allie’s movements and reactions, which were sometimes violent, indicated that the hotshot was used both as an unelectrified and an electrified probe.<sup>382</sup> Dr. Dutton testified that, by that point, Allie was “starting to become fairly agitated where Allie’s reaching back and trying to basically, in general terms, attack the hot-shot because she’s recognizing that as a threat.”<sup>383</sup> He described the attacks as survival behavior that would occur only after a horse, a “flight animal,” realizes it cannot outrun or escape a threat.<sup>384</sup>

By minute 14 in the video, approximately five minutes after hotshotting began, Dr. Dutton believes that Respondent was acting below the standard of care and that the continued hotshot treatment was unnecessary.<sup>385</sup> He testified that, from this point on, Respondent had violated the standard of care and engaged in unnecessary treatment and animal cruelty.<sup>386</sup> Dr. Dutton believed the hotshot had no remaining therapeutic benefit or effect by that point, as it was not eliciting the desired response,

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<sup>381</sup> Tr. Vol. II at 346-47.

<sup>382</sup> Tr. Vol. II at 347. Dr. Dutton admitted on cross-examination, however, that he cannot tell from looking at the video each time the device was used whether it was electrified versus merely used as a prod. Tr. Vol. II at 416-17.

<sup>383</sup> Tr. Vol. II at 347. Dr. Dutton’s report notes that Allie was biting at the hotshot at 14:20 and 16:40 in the video. Staff Ex. 6D at 0136, 0137.

<sup>384</sup> Tr. Vol. II at 349-50.

<sup>385</sup> Tr. Vol. II at 349, 351, 354.

<sup>386</sup> Tr. Vol. II at 367. Elsewhere, Dr. Dutton testified that unnecessary treatment may have begun as early as one and a half to two minutes into hotshotting. *See* Tr. Vol. II at 440.

and that continued application of the hotshot was itself detrimental and causing physiological stress, cellular damage, and adverse levels of cortisol and catecholamine release.<sup>387</sup> He further believed Respondent was engaging in animal cruelty, which he defined as causing unnecessary pain and suffering of an animal,<sup>388</sup> given the unrelenting use of a treatment that no longer served any beneficial effect and that caused fear, agitation, and physiological stress while Allie was cognizant.<sup>389</sup> Allie's response, according to Dr. Dutton, went "from a horse's flight response to one of helplessness and despair."<sup>390</sup>

He also opined that there was no indication whatsoever for Respondent to hotshot Allie in highly sensitive areas like the ears, lips, face, muzzle, vulva, or perineum, and questioned whether the teachings cited by Respondent in support of applying the hotshot to those areas was referencing other types of stimulation rather than a hotshot.<sup>391</sup> Dr. Dutton testified he has never seen a hotshot used on a horse's eyes, nose, mouth, or perineum and that guidelines regarding the use of hotshots on production animals prohibit their use in those sensitive locations.<sup>392</sup>

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<sup>387</sup> Tr. Vol. II at 349-52, 356-57, 397, 442; Staff Ex. 6D at 0138.

<sup>388</sup> Dr. Dutton explained further that unnecessary pain and suffering is pain and suffering without medical justification or reasoning, despite the outcome. Tr. Vol. II at 415.

<sup>389</sup> Tr. Vol. II at 352-53, 354.; Staff Ex. 6D at 0138. Dr. Dutton's report noted that wailing and excessive vocalization are correlated with pain and suffering and the former is not a normal behavior in a horse. Staff Ex. 6D at 0138.

<sup>390</sup> Staff Ex. 6D at 0138.

<sup>391</sup> Tr. Vol. II at 355, 356, 394-95; Staff Ex. 2 at 0059 (Interrogatory 9), 6D at 0138.

<sup>392</sup> Tr. Vol. II at 394-95.

Dr. Dutton further observed that the standard of care was not met because Allie's sling appeared to be inappropriately positioned at several points in the video, such that it shifted to the right or pulled Allie's feet forward.<sup>393</sup> According to Dr. Dutton, this caused Allie to be lifted so that she was not making contact with the ground and impeded her progress and ability to try to stand.<sup>394</sup> Video and witness statements reviewed by Dr. Dutton indicated that Mr. Villareal had attempted to point out to Respondent that the lift was improperly applied and positioned, but she ignored his suggestions and continued hotshotting the horse rather than repositioning the lift or straps.<sup>395</sup>

Dr. Dutton disagreed with Respondent's assessment that stopping to readjust the straps would be more detrimental to Allie's chances of rising, and he questioned why Respondent waited close 17 to hours—from 4 p.m. to 9 a.m. the following day—to attempt to lift Allie, instead of doing so after surgery the previous evening, if there was some sense or urgency in getting Allie to stand.<sup>396</sup> At minimum, Dr. Dutton believed Respondent should have ordered that Allie be rotated from side to side post-surgery to maintain blood flow in the limbs and avoid muscle necrosis, though

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<sup>393</sup> Tr. Vol. II at 348; *see* Staff Ex. 6D at 0136-37.

<sup>394</sup> Tr. Vol. II at 348, 358; Staff Ex. 6D at 0136, 0137, 0138.

<sup>395</sup> Staff Ex. 6D at 0137, 0138; Tr. Vol. II at 364, 441-42.

<sup>396</sup> Tr. Vol. II at 357-59, 380-81; Staff Ex. 2 at 0061 (Interrogatory 17).

this was not done,<sup>397</sup> and he testified that Allie was left down for an excessive amount of time.<sup>398</sup> Dr. Dutton also questioned why Allie was not let down and given more time to rest and recuperate after being placed in the sling and before proceeding with treatment, noting that the work could be carried out in more than one session and that he would have stopped by minute 14 to lower the horse and re-evaluate.<sup>399</sup> In addition, Dr. Dutton stated that using the hotshot on Allie's front and face was, in his opinion, counterintuitive to getting Allie to move forward and bear weight on her hindlimbs and only made things worse.<sup>400</sup>

At minute 17 of the video, or eight minutes into Respondent using the hotshot on Allie, Dr. Dutton believed that Respondent's treatment remained below the standard of care and constituted animal cruelty.<sup>401</sup> He noted that Allie appeared extremely agitated with her face, head, and ears turned down or away from the hotshot, except when she was biting at and attacking the hotshot, which he described as the horse's "last line of defense."<sup>402</sup> Dr. Dutton states that he did not believe there was a good chance of a good outcome at this point, as the video shows Allie

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<sup>397</sup> Tr. Vol. II at 381. Dr. Dutton disputed Respondent's assertion that there were no further treatments to institute post-surgery, pointing to the sling and alternating recumbencies as appropriate treatments. Tr. Vol. II at 381-82; Staff Ex. 2 at 0062 (Interrogatory 21). Dr. Dutton did not address Dr. Doering's testimony that alternating recumbencies overnight posed additional risks because it would have required re-anesthetizing Allie in order to move her to the ICU into a stall equipped with a sling.

<sup>398</sup> Tr. Vol. II at 385.

<sup>399</sup> Tr. Vol. II at 357.

<sup>400</sup> Tr. Vol. II at 355, 356; Staff Ex. 6D at 0138.

<sup>401</sup> Tr. Vol. II at 362.

<sup>402</sup> Tr. Vol. II at 361-62, 363-64; Staff Ex. 4 at 17:00.

was leaning into and laying listlessly in the sling, had given up trying to stand, and looked as if she was merely trying to “survive.”<sup>403</sup> He observed that Respondent nevertheless continued to use of the hotshot on Allie’s face and neck.<sup>404</sup>

Dr. Dutton testified that he would not have continued using the hotshot—a nonessential treatment—even if the owner had instructed him to do so, due to the lack of therapeutic benefit.<sup>405</sup> Had an owner insisted that Dr. Dutton conduct additional hotshotting, Dr. Dutton testified he would have instructed the owner to either pick up the horse and see another veterinarian or to follow Dr. Dutton’s remaining recommended treatments (including, potentially, consulting with other clinicians or euthanasia).<sup>406</sup> Dr. Dutton testified that the medical records do not indicate that Respondent involved other clinicians, which should have been noted if that occurred, nor did they indicate that Respondent was discussing the situation with the horse’s owner during the events.<sup>407</sup>

During minute 37 of the video, or minute 19 of hotshotting, Dr. Dutton testified that Allie had given up, was trying to hide from the hotshot, and was leaning into the sling.<sup>408</sup> Respondent continued to use the hotshot on Allie’s face, but, in

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<sup>403</sup> Tr. Vol. II at 361, 363-64.

<sup>404</sup> Tr. Vol. II at 361.

<sup>405</sup> Tr. Vol. II at 364.

<sup>406</sup> Tr. Vol. II at 365.

<sup>407</sup> Tr. Vol. II at 366, 442.

<sup>408</sup> Tr. Vol. II at 366.

Dr. Dutton's opinion, Allie was not even thinking about standing and was merely trying to survive and get away from the hotshot, despite being tied into a sling.<sup>409</sup>

Dr. Dutton also testified regarding portions of Allie's medical records from her time at Texas A&M. He initially noted that Dr. Doering's description of Allie as a "very compromised draft mare" in a statement made after Allie had been admitted on December 17 appeared to contradict a progress note that described Allie as "bright and alert" upon intake presentation.<sup>410</sup> He later specified, however, that he interpreted "compromised" at admission to mean that the patient has systemic abnormalities that are affecting the patient and admitted on cross-examination that other practitioners may use the term differently so it was difficult to say whether the descriptions were actually contradictory.<sup>411</sup> He also testified that based on the intake information showing Allie had a temperature and increased respiratory intake, and based on the preoperative anesthetic workup before surgery, he would have performed further investigation including a CBC/chemistry test that costs around \$150.<sup>412</sup>

Dr. Doering had suggested the case was initially presented as a "budget case," which is why, she said, no CBC/chemistry test was performed. In response, Dr. Dutton testified that this test was the least costly of all the procedures that would

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<sup>409</sup> Tr. Vol. II at 366-67.

<sup>410</sup> Tr. Vol. II at 369, 370-71; Staff Ex. 5 at 0075; Staff Ex. 7 at 0141.

<sup>411</sup> Tr. Vol. II at 443, 452-53.

<sup>412</sup> Tr. Vol. II at 369-70, 372-73.



have been done by that point.<sup>413</sup> He also testified that Respondent gave Allie's owner an initial estimate of \$3,500-10,000 for treatment, which he did not consider to be a "budget case," and that the owner was ultimately billed \$2,691.<sup>414</sup>

As for records regarding the hotshot treatment, Dr. Dutton was aware from witness statements that a hotshot was used on December 18, and an entry in the client communications section of Allie's records for that day stated that Respondent had told Allie's owner that she tried to hotshot Allie several times.<sup>415</sup> The use of the hotshot was not, however, documented in any other records for December 18.<sup>416</sup> Dr. Dutton testified that the hotshot should have been documented in several places, including the recovery documentation along with other documented recovery efforts, unless someone was afraid of saying they had used it.<sup>417</sup>

Similarly, he testified that he believed Allie's progress note records for December 19, which did not say anything about the use of a hotshot or sling, and the case summary, which mentioned the use of a sling but no hotshot, did not adequately

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<sup>413</sup> Tr. Vol. II at 374-75; Staff Ex. 7 at 0141.

<sup>414</sup> Tr. Vol. II at 373-74, 376; Staff Ex. 5 at 0109. On cross-examination, Dr. Dutton admitted that another reason the CBC may not have been performed is that Allie could have been suffering from a longstanding coffin joint infection that would make the horse "valueless." Tr. Vol. II at 421-22.

<sup>415</sup> Tr. Vol. II 378-79; Staff Ex. 5 at 0109.

<sup>416</sup> Tr. Vol. II at 376-77, 377-78, 379-80, 385; Staff Ex. 5 at 0074, 0081, 0082, 0097.

<sup>417</sup> Tr. Vol. II at 380, 385.

reflect the events or treatment methods depicted in the video.<sup>418</sup> Nevertheless, on cross-examination, Dr. Dutton stated that he believed client communications and videos are part of the medical record, if they are incorporated or included.<sup>419</sup> Dr. Dutton suggested that if a video is taken, he would still document and interpret the video in the medical records themselves.<sup>420</sup> Dr. Dutton further noted that the medical records do not indicate an attempt to use certain medical therapies and medications that could improve a horse's chances of standing.<sup>421</sup>

Dr. Dutton testified that humane euthanasia is a therapeutic medical option to end the suffering of an animal that can be done with the owner's consent.<sup>422</sup> He testified that he believes a veterinarian can cross a line treating a horse even if the treatment results in the animal surviving or is done with best intentions, as veterinarians should attempt to eliminate pain and suffering and not cause undue pain to the animal, which Allie experienced in the last hour and a half of her life.<sup>423</sup> He also disputed Respondent's suggestion that no case would have been brought

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<sup>418</sup> Tr. Vol. II at 385-87; Staff Ex. 5 at 0076-77, 0097. Dr. Dutton disagreed with Dr. Green's assessment that the information did not need to be in the medical record given that the hotshot was deemed to be an important component of Allie's treatment that lasted more than 30 minutes, regardless of whether the outcome was positive or negative. Tr. Vol. II at 387, 388-89.

<sup>419</sup> Tr. Vol. II at 423-24, 443-44.

<sup>420</sup> Tr. Vol. II at 444-45.

<sup>421</sup> Tr. Vol. II at 384.

<sup>422</sup> Tr. Vol. II at 395-96, 432.

<sup>423</sup> Tr. Vol. II at 398, 399, 400-01.

against her had Allie survived, stating that the complaint against Respondent concerned abuse and excessive use of the hotshot, not the patient's death.<sup>424</sup>

Dr. Dutton also reviewed a statement from Respondent, which indicated that she had success in another case in using the same hotshot technique that was used on Allie, and agreed that her experiences may guide her actions and practices in other cases.<sup>425</sup>

## **2. Ben Buchanan, D.V.M.**

Benjamin Buchanan, D.V.M. also testified as an expert for Board Staff.<sup>426</sup> He is an equine veterinarian who has been working in equine hospitals for almost twenty years.<sup>427</sup> He has served as an expert witness on behalf of the defense in two prior legal matters regarding the standard of care, neither of which went to trial.<sup>428</sup> Dr. Buchanan testified that the only discussion he recalled relating to hotshots during his veterinary training concerned the use of hotshots on cattle—never horses—and that the charge they produce is quite painful.<sup>429</sup> According to Dr. Buchanan, the University of Tennessee, where he interned, had no hotshot on

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<sup>424</sup> Tr. Vol. II at 399.

<sup>425</sup> Tr. Vol. II at 434.

<sup>426</sup> Dr. Buchanan's CV and expert report were admitted as Staff Ex. 9A and 9B, respectively.

<sup>427</sup> Tr. Vol. III at 684-85; Staff Ex. 9A at 0430.

<sup>428</sup> Tr. Vol. III at 683.

<sup>429</sup> Tr. Vol. III at 685, 685-86.

campus.<sup>430</sup> He stated that he has never used a hotshot on a horse and had never seen someone else use one on a horse before watching the video of Respondent and Allie.<sup>431</sup>

Dr. Buchanan testified that he did not believe it was appropriate for a veterinarian to use a hotshot on a horse, and stated his personal opinion that it should never be used on a horse.<sup>432</sup> He described a hotshot as a blunt and painful stimulant that results in an imprecise flight response and stated that veterinarians can instead use crops, pinching, sound, or slapping to stimulate a horse to stand.<sup>433</sup>

Nevertheless, Dr. Buchanan opined that using two or three short hotshot stimuli on a horse to encourage it to stand would be within the standard of care, though he stated the hotshot should be used only after exhausting other stimuli.<sup>434</sup> He quantified his opinion at two or three shocks because he believes that if you have not seen the desired result by that point, the horse will not get up after additional shocks.<sup>435</sup> Dr. Buchanan admitted that there are no specific veterinary or treatment guidelines on the use of hotshots informing his opinions, though he noted that there

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<sup>430</sup> Tr. Vol. III at 685.

<sup>431</sup> Tr. Vol. III at 686.

<sup>432</sup> Tr. Vol. III at 686-87.

<sup>433</sup> Tr. Vol. III at 686-87, 687.

<sup>434</sup> Tr. Vol. III at 687, 688.

<sup>435</sup> Tr. Vol. III at 688.

is a federal regulation regarding the transportation of horses that prohibits using hotshots and electrical prods on horses for any purpose other than human safety.<sup>436</sup>

Dr. Buchanan knows Respondent professionally and has had cases referred from the institutions that he worked for to Texas A&M for second opinions or advanced imaging.<sup>437</sup> He testified that he received feedback from colleagues and students related to these referrals, and his impression is that, in the veterinary community, Respondent has a reputation for being hard to work with and not communicating well with referring veterinarians regarding the treatment provided at Texas A&M.<sup>438</sup> Dr. Buchanan testified that he is receiving no compensation for his expert testimony or for time spent reviewing the case. He volunteered his time because he believes this case is “egregious” and is testifying out of concern for his alma mater and the education of future veterinarians.<sup>439</sup>

Dr. Buchanan prepared expert opinions regarding whether this case met the standard of care and whether the treatment of Allie could be considered cruelty.<sup>440</sup> He ultimately concluded that the standard of care was not met, and that the use of

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<sup>436</sup> Tr. Vol. III at 688-89.

<sup>437</sup> Tr. Vol. III at 689, 712-13.

<sup>438</sup> Tr. Vol. III at 689.

<sup>439</sup> Tr. Vol. III at 690.

<sup>440</sup> Tr. Vol. III at 691; Staff Ex. 9B.

the hotshot was cruel, and, potentially, torture.<sup>441</sup> Dr. Buchanan's methodology for preparing his opinions included reading through provided statements and documents,<sup>442</sup> watching the video, reviewing medical records, and reviewing literature to determine if any guidelines existed regarding the use of hotshots on horses.<sup>443</sup>

Regarding the standard of care, Dr. Buchanan described it as the minimum level at which a reasonable doctor would be practicing in those circumstances; in other words, a reasonable doctor will objectively meet the lowest level of care on which practitioners would agree a doctor should be performing.<sup>444</sup> He opined that the standard of care was not met in this case, as the continued use of the hotshot following an initial response was inappropriate, unnecessary, and excessive, and resulted in causing unjustifiable pain and suffering.<sup>445</sup> Dr. Buchanan further noted that there were no efforts to try anything but the hotshot, and that Respondent did not attempt to engage any other specialists in pain management, anesthesia, sling recovery, or internal medicine to assist, despite having ready access to them at

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<sup>441</sup> Tr. Vol. III at 692. Dr. Buchanan also briefly testified that the medical records contained inadequacies, but these opinions were excluded after Respondent objected that Dr. Buchanan had not been designated as an expert on the topic of medical records and his opinions were not disclosed during discovery. Tr. Vol. III at 711.

<sup>442</sup> This included the complaint, statements from other veterinarians, letters to Respondent, and an indictment. Tr. Vol. III at 691.

<sup>443</sup> Tr. Vol. III at 691.

<sup>444</sup> Tr. Vol. III at 692. Dr. Buchanan further opined that the standard of care may differ depending on the region and what equipment and facilities are available. Tr. Vol. III at 692.

<sup>445</sup> Tr. Vol. III at 692-93; Staff Ex. 9B at 0441.

Texas A&M.<sup>446</sup> He did not elaborate how consultation with other specialists could have changed Allie's treatment, or what other efforts should have been tried.

Dr. Buchanan noted that at approximately 8:24 in the video, Allie was in the sling and attempted to get up, but then the hotshot created a flight response that caused Allie to try to flee.<sup>447</sup> Instead of focusing on standing, Dr. Buchanan opined that Allie was focused on running, thus limiting the opportunity to get her to balance and stand.<sup>448</sup> According to Dr. Buchanan, any hotshotting should have stopped once Allie showed some effort to stand, which he attributed to the lift, rather than the hotshot,<sup>449</sup> and the focus should have then shifted to providing Allie support, repositioning her leg, or pushing her over to get her to bear weight.<sup>450</sup> Dr. Buchanan indicated that the hotshot was creating a negative response in Allie, did not allow Allie to stay centered under the lift hanging point,<sup>451</sup> and distracted Allie from trying to stand.<sup>452</sup>

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<sup>446</sup> Tr. Vol. III at 693; Staff Ex. 9B at 0441.

<sup>447</sup> Tr. Vol. III at 698. Dr. Buchanan's report states that "[n]o obvious encouragement to stand is seen on the video prior to the first application of the cattle prod/hot shot being applied." Staff Ex. 9B at 0441.

<sup>448</sup> Tr. Vol. III at 698, 699.

<sup>449</sup> Tr. Vol. III at 703-04.

<sup>450</sup> Tr. Vol. III at 699.

<sup>451</sup> Dr. Buchanan testified that the placement of the straps seemed off to the side but also indicated that he does not have much experience with the large animal lift that was used on Allie. Tr. Vol. III at 699-700.

<sup>452</sup> Tr. Vol. III at 699.

In Dr. Buchanan's opinion, the goal of trying to get Allie to stand was accomplished by the nine-minute mark in the video when Allie attempted to get up, but during the 11-minute mark (two minutes into hotshot use) Allie was sitting in the sling, breathing hard, and showing signs of stress or anxiety, indicating a different tool should be used.<sup>453</sup> He further testified that he does not believe a reasonable doctor would use the hotshot on Allie's face, lips, or ears, because a sufficient stimulus can be achieved by shocking the body, and there is no therapeutic benefit to shocking the other areas as it only stresses the horse.<sup>454</sup>

Dr. Buchanan stated that the use of the hotshot in the 12- to 13-minute mark of the video, when Allie was hoisted in the air and unable to put her legs on the ground to bear weight, was neither necessary nor justified, and that this demonstrates inappropriate technique that only kept Allie off center and made it harder for her to stand.<sup>455</sup> He did not believe any reasonable doctor in the same circumstances would continue to use the hotshot while Allie was hoisted in that manner, or subsequently.<sup>456</sup> He further disagreed with Dr. Doering's assessment that Respondent was using the hotshot to try to get the horse to square up her legs, as Allie's legs appeared to already be square when she was lifted.<sup>457</sup>

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<sup>453</sup> Tr. Vol. III at 700-01. Dr. Buchanan's report states that, "[b]y 12 min [sic] the mare appears to 'give up' and has reduced efforts to stand, reduced response to the shocks and primarily displayed avoidance. Dozens more shocks are applied." Staff Ex. 9B at 0441.

<sup>454</sup> Tr. Vol. III at 701.

<sup>455</sup> Tr. Vol. III at 702-03.

<sup>456</sup> Tr. Vol. III at 703, 705, 707.

<sup>457</sup> Tr. Vol. III at 703.



Starting around 14:38 in the video, more than five minutes after Respondent began using the hotshot, Dr. Buchanan stated that Allie was breathing faster with her head and ears down and mouth open.<sup>458</sup> She was not showing a response nor bearing weight on her front legs, and Dr. Buchanan believed the veterinarians needed to stop, let her down for a break, and figure out a new plan.<sup>459</sup> He testified there was no therapeutic benefit to the continued use of the hotshot past minute 15:25, and that no reasonable doctor in those circumstances would proceed with the hotshot, despite Respondent continuing its use for another six minutes before breaking and then resuming to use it for ten minutes more.<sup>460</sup> Dr. Buchanan opined that Respondent's use of the hotshot on Allie past the 14- or 15-minute mark of the video was below the standard of care and approaching cruelty and torture.<sup>461</sup>

On cross-examination, Dr. Buchanan admitted that there are no guidelines regarding the appropriate use of techniques that Dr. Buchanan suggested as an alternative to hotshotting, such as crops, pinching, or slapping.<sup>462</sup> In those cases, the standard of care is dependent on how a reasonable doctor in similar circumstances would act and use the techniques.<sup>463</sup> Asked to address the opinions of Dr. Foland, a

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<sup>458</sup> Tr. Vol. III at 706.

<sup>459</sup> Tr. Vol. III at 706.

<sup>460</sup> Tr. Vol. III at 706-07.

<sup>461</sup> Tr. Vol. III at 712.

<sup>462</sup> Tr. Vol. III at 717-18.

<sup>463</sup> Tr. Vol. III at 718.

veterinarian Staff consulted but did not retain, Dr. Buchanan admitted that the doctors at Dr. Foland’s Weatherford Equine practice were probably “reasonable veterinarians,” and that, after reading Dr. Foland’s report, he and Dr. Foland appeared to disagree on whether the treatment in this case fell below the standard of care.<sup>464</sup> In addition, Dr. Dutton described the case as challenging, admitting that Respondent may have attributed Allie’s fever to her foot abscess rather than the lung and liver infections that were identified during the necropsy, and did not dispute he had characterized Respondent missing that diagnosis as “fine” to the Board.<sup>465</sup>

### **3. Erma Susan Eades, D.V.M.**

Erma Susan Eades, D.V.M., testified as a fact witness for Staff. She was the department head for large animal clinical sciences at Texas A&M from 2017 to 2021.<sup>466</sup> In that role, she supervised department faculty and was responsible for mentoring and evaluating the performance of approximately 40 veterinarians, including Respondent.<sup>467</sup> She also served as the interim director of the large animal hospital.<sup>468</sup> Dr. Eades testified that she generally had authority to discipline veterinarians, subject to the approval of her own supervisor, the school’s dean.<sup>469</sup>

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<sup>464</sup> Tr. Vol. III at 719-20, 722-23.

<sup>465</sup> Tr. Vol. III at 724, 724-725, 728.

<sup>466</sup> Tr. Vol. III at 646.

<sup>467</sup> Tr. Vol. III at 646, 648.

<sup>468</sup> Tr. Vol. III at 646.

<sup>469</sup> Tr. Vol. III at 646-47.

Dr. Eleanor Green was the dean during the majority of Dr. Eades's time as department head.<sup>470</sup>

Dr. Eades testified that Dr. Green asked her to prepare a report on the incident with Respondent and Allie.<sup>471</sup> Consequently, Dr. Eades, along with Dr. Chaffin, the Chief Medical Officer for the large animal hospital, and Dr. Watkins, the surgery section chief, reviewed the video and considered witness statements before emailing Dr. Green a report with their conclusions.<sup>472</sup>

Based on her rough approximation from reviewing the video, Dr. Eades wrote that Respondent used the hotshot on Allie for approximately 13 minutes before stopping and then resuming its use for approximately eight more minutes.<sup>473</sup> According to their report, the doctors "all agree[d] that the amount of time that the 'hot shot' was used on this horse was excessive."<sup>474</sup> Dr. Eades explained in her testimony that hotshots are typically used to provide momentary stimulus to an animal to get it to stand.<sup>475</sup> Here, Allie did not respond to the hotshot by trying to stand, yet Respondent continued its use despite it being ineffective.<sup>476</sup> Relatedly, the

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<sup>470</sup> Tr. Vol. III at 647.

<sup>471</sup> Tr. Vol. III at 646.

<sup>472</sup> Tr. Vol. III at 648-49; Staff Ex. 12.

<sup>473</sup> Tr. Vol. III at 649-50; Staff Ex. 12 at 0447.

<sup>474</sup> Staff Ex. 12 at 0448.

<sup>475</sup> Tr. Vol. III at 650.

<sup>476</sup> Tr. Vol. III at 650-51.

report states that “[Respondent] should have reached the conclusion sooner that the hot-shot was an ineffective management strategy.”<sup>477</sup>

In addition, Dr. Eades testified that the reviewing doctors agreed the hotshot should not have been used on highly sensitive areas of Allie’s body, including the face, muzzle, and perineum, as it would cause “a lot more pain” than other areas of the body.<sup>478</sup> The doctors believed Respondent exhibited “bad judgment” in her management of the case,<sup>479</sup> and Dr. Eades testified that, as the senior faculty on the case, Respondent was responsible for the treatment in the recovery stall, not the students.<sup>480</sup>

Ultimately, Dr. Eades’s report recommended that Respondent receive a rating of “unsatisfactory in patient care and needs improvement” and “needs improvement in teaching” on her annual faculty evaluation, which would give Respondent an opportunity to work with other faculty in the peer review committee and, hopefully, improve.<sup>481</sup> Despite believing that the hotshot use and infliction of pain was excessive, Dr. Eades determined that termination was not warranted primarily because she thought Respondent had been motivated by a desire to ensure

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<sup>477</sup> Tr. Vol. III at 652-53; Staff Ex. 12 at 0448.

<sup>478</sup> Tr. Vol. III at 651.

<sup>479</sup> Tr. Vol. III at 653; Staff Ex. 12 at 0448.

<sup>480</sup> Tr. Vol. III at 654-55; Staff Ex. 12 at 0448.

<sup>481</sup> Tr. Vol. III at 656, 658, 659; Staff Ex. 12 at 0449.

Allie's survival and do what was best for the patient.<sup>482</sup> Dr. Eades, similarly, told the Board that she believed Respondent was not "at fault" and that Respondent was trying to ensure the horse's survival, considering that the only other option was euthanasia, and intended to do the best for the horse and owner.<sup>483</sup> Dr. Eades subsequently testified, however, that she believed Respondent committed an unspecified violation.<sup>484</sup>

On October 27, 2021, Dr. Eades sent the report to Dr. Green, who responded by writing, "[T]his is fair."<sup>485</sup> Dr. Eades nevertheless did not take any disciplinary action against Respondent because, according to Dr. Eades, Dr. Green told her she was taking authority regarding the consequences stemming from this incident.<sup>486</sup> Dr. Eades further testified that Dr. Green specifically told her to not give Respondent the unsatisfactory and needs improvement ratings proposed in the report.<sup>487</sup> When asked whether it would surprise her to hear that Dr. Green had testified that Dr. Eades was the person with authority to discipline Respondent, Dr. Eades indicated that it would because "that's not what occurred."<sup>488</sup>

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<sup>482</sup> Tr. Vol. III at 657-58, 663; Staff Ex. 12 at 0448.

<sup>483</sup> Tr. Vol. III at 663.

<sup>484</sup> Tr. Vol. III at 666.

<sup>485</sup> Tr. Vol. III at 658; Staff Ex. 12 at 0447.

<sup>486</sup> Tr. Vol. III at 658, 660.

<sup>487</sup> Tr. Vol. III at 666-67.

<sup>488</sup> Tr. Vol. III at 658-59.

Dr. Eades has never personally used a hotshot on a horse, as they are much more commonly used on cattle, though she has seen others use hotshots on a horse three or four times.<sup>489</sup> She did not personally observe anyone use a hotshot on a horse during her time as a department head at Texas A&M but has heard of surgeons at Texas A&M and other institutions using them on horses.<sup>490</sup> She is also not aware of any journal articles, treatises, or textbooks that address how and when a hotshot should be used on an equine.<sup>491</sup>

#### **4. Eleanor Green, D.V.M.**

Dr. Green was designated as Respondent's expert witness. She has been a veterinarian since 1973, and has decades of experience owning, riding, and showing horses.<sup>492</sup> She described horses and equine welfare as lifelong passions.<sup>493</sup>

After a few years in private practice, Dr. Green began working at the newly established veterinary college at Mississippi State University, then practiced equine internal medicine at the University of Missouri from 1986-1991. She then moved into administrative positions, first serving as the hospital director and department head at University of Tennessee from 1991-1996, then as chief of staff and department

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<sup>489</sup> Tr. Vol. III at 651, 652, 661. She testified that she has never seen it used on a horse's eyes, muzzle, or perineum. Tr. Vol. III at 659.

<sup>490</sup> Tr. Vol. III at 651-52.

<sup>491</sup> Tr. Vol. III at 661-62.

<sup>492</sup> Tr. Vol. I at 223, 291.

<sup>493</sup> Tr. Vol. I at 292.

head at University of Florida from 1996-2009.<sup>494</sup> In 2009, Dr. Green became Dean of the Texas A&M veterinary school, where she supervised Dr. Eades, who was Respondent’s department head and supervisor.<sup>495</sup> Dr. Green still holds a veterinary license in Tennessee and has been board-certified in internal medicine, but she has not had a hands-on, clinical veterinary practice since at least 2009, when she moved to Texas, other than caring for her own horses.<sup>496</sup>

Dr. Green testified that in her fifty years of experience as a veterinarian, she has never used a hotshot on a horse. She has encountered many horses who could not stand after anesthesia, but none she could not get up by other means; thus, she has never had reason to try using a hotshot.<sup>497</sup> However, she said hotshots have been used successfully—albeit “sparingly”—in other cases where a horse was having difficulty rising, and she would consider using a hotshot “if it meant saving a horse’s life.”<sup>498</sup>

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<sup>494</sup> Tr. Vol. I at 219-21, 293.

<sup>495</sup> Tr. Vol. I at 221.

<sup>496</sup> Tr. Vol. I at 218-19, 222.

<sup>497</sup> Tr. Vol. I at 223.

<sup>498</sup> Tr. Vol. I at 224, 302.

Dr. Green’s “expert report” for this case was more in the nature of a character reference for Respondent.<sup>499</sup> In her report, Dr. Green wrote admiringly of Respondent’s academic history and accomplishments as an equestrian.<sup>500</sup> Respondent has won prestigious dressage competitions, accomplishments that Dr. Green said would not be possible “without a deep understanding of and empathetic interaction with the horse.”<sup>501</sup> Dr. Green also praised Respondent’s surgical talent and dedication to her patients, citing two instances where Respondent successfully treated horses that other colleagues had given up on and wanted to euthanize.<sup>502</sup> One of those horses had required a hotshot to be able to stand after surgery.<sup>503</sup> Dr. Green reiterated these opinions at the hearing, testifying that Respondent had strong academics, “amazing” surgical skills, and would sometimes draw criticism for “putting [a] horse through too much” to treat it when other colleagues would have euthanized.<sup>504</sup> Dr. Green suggested that, in those cases, the ends justified the means because if Respondent had succumbed to her colleagues’ pressure the horses would not have survived.<sup>505</sup>

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<sup>499</sup> As indicated prior to the hearing, the ALJs allowed Dr. Green to speak from her personal knowledge about Respondent’s accomplishments and professional reputation, but that testimony is not considered an “expert” opinion nor is it probative of whether Respondent did or did not commit the violations alleged. *See* Order Denying Motion to Exclude an Expert (Dec. 7, 2022); *see also* Tex. R. Evid. 404 (evidence of a person’s character or trait is generally not admissible to prove whether the person acted in accordance with that character or trait).

<sup>500</sup> Staff Ex. 3.

<sup>501</sup> Staff Ex. 3.

<sup>502</sup> Staff Ex. 3.

<sup>503</sup> Tr. Vol. I at 297.

<sup>504</sup> Tr. Vol. I at 296.

<sup>505</sup> Tr. Vol. I at 296-97.



Dr. Green opined that Respondent had done her best in a life-and-death situation with Allie. In her expert report she wrote that the only choices “were to put the horse down or try to save [her],” and that she believes Respondent’s actions were “appropriate” because she was trying to save the horse’s life.<sup>506</sup> At the hearing she also addressed certain breed characteristics that made Allie’s case particularly difficult. Dr. Green testified that draft horses are known for having “a high [pain] tolerance and a low reactivity” compared to smaller horses, which makes them slower to respond to painful stimuli and makes their pain difficult for veterinarians to assess.<sup>507</sup> They also do not recover from anesthesia as easily as lighter breeds, according to Dr. Green.<sup>508</sup>

Dr. Green indicated that she did not know Respondent very well, testifying that she had “absolutely no personal relationship with” Respondent and made it a point not to develop personal relationships with clinicians or administrators she works with.<sup>509</sup> Dr. Green acknowledged that Respondent had been sent to anger management classes and executive coaching sessions in the wake of a charge (subsequently dismissed) that she had assaulted a student and complaints that she had created a difficult working environment.<sup>510</sup> Dr. Green was also aware that Respondent’s veterinary license was suspended by the Board in 2021, and that she

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<sup>506</sup> Staff Ex. 3.

<sup>507</sup> Tr. Vol. I at 305-06.

<sup>508</sup> Tr. Vol. I at 313.

<sup>509</sup> Tr. Vol. I at 302-03.

<sup>510</sup> Tr. Vol. I at 251-52, 319-20.

was subsequently criminally indicted on claims arising from her use of the hotshot on Allie.<sup>511</sup> These conflicts and allegations did not diminish her favorable opinion of Respondent's skill as a veterinarian.<sup>512</sup> Dr. Green brushed off allegations that Respondent was difficult to work with by comparing her to Dr. Green's own surgeon father, whom she described as kind in his personal life but "strict and harsh" in the operating room because he was appropriately focused on what was best for his patient.<sup>513</sup>

Though designated as Respondent's expert on the subject, Dr. Green pointedly refused to opine specifically on whether or not Respondent had met the standard of care in using the hotshot on Allie.<sup>514</sup> When shown excerpts of the video and asked directly whether Respondent's use of the hotshot was within the standard of care, Dr. Green said her answer was "not 'no,'" but she could not give a definitive answer; instead, she testified that using the hotshot "could be" but also "could not be" within the standard of care.<sup>515</sup> She added that there was too much "context involved" to answer with a simple yes or no.<sup>516</sup>

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<sup>511</sup> Tr. Vol. I at 255.

<sup>512</sup> Tr. Vol. I at 258-59.

<sup>513</sup> Tr. Vol. I at 295.

<sup>514</sup> On direct examination, Dr. Green opined that Respondent's "treatment, as far as the entire patient goes, was very appropriate" because she had promptly assessed and performed surgery on Allie, and attended to her recovery. Tr. Vol. I at 313. However, Dr. Green would not provide an opinion specifically on the use of the hotshot.

<sup>515</sup> Tr. Vol. I at 273.

<sup>516</sup> Tr. Vol. I at 273.

Dr. Green expressed reservations about judging Respondent based only on the video because the video is “poor quality” and does not have sound. She conceded that what she viewed on the video “certainly looked excessive” but that she could not draw any conclusions from it.<sup>517</sup> Dr. Green said that a viewer cannot tell when Respondent was touching Allie with the hotshot versus just holding it near her or touching her without an electric charge.<sup>518</sup> She thought Respondent might have been using the hotshot as a tool to “teach Allie that if she would try to get up, she would not be shocked.”<sup>519</sup> According to Dr. Green, this type of training method, often used for dogs or horses, follows a “teach, show, tell, and correct” pattern.<sup>520</sup> If following this method, Respondent would “teach” Allie by touching her without a prod; if Allie did not respond to the touch, then Respondent would “show” her by shocking her. The horse should learn that if she moved, she would not be shocked, which should “correct” the behavior.<sup>521</sup> Dr. Green also suggested that some of Allie’s movements could have been misinterpreted as reactions to a shock, explaining that a horse will always yank its head away when touched on the muzzle, so Allie’s movements are not proof that her muzzle was being shocked.<sup>522</sup> In sum, Dr. Green

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<sup>517</sup> Tr. Vol. I at 305.

<sup>518</sup> Tr. Vol. I at 239-40, 288, 303-04.

<sup>519</sup> Tr. Vol. I at 304.

<sup>520</sup> Tr. Vol. I at 304.

<sup>521</sup> Tr. Vol. I at 304.

<sup>522</sup> Tr. Vol. I at 304.

believed the video was “confusing and just wasn’t solid information [from which] to draw the conclusions that have been drawn.”<sup>523</sup>

Dr. Green also emphasized that a draft horse will die if it stays down and “Allie needed to get up ... so that her will to live could be restored.”<sup>524</sup> She said the video showed a horse who had “given up the will to live, it appeared to me; but she still was responsive.”<sup>525</sup> When Respondent first started using her hotshot on Allie, Dr. Green pointed out that Allie lifted her head and perked up her ears, which she thought was a positive response.<sup>526</sup> Dr. Green defended the continued use of the hotshot because “if she goes down, she’s dead.”<sup>527</sup> When Respondent continued to use the hotshot on Allie’s neck, ear, and face, Dr. Green believed that Allie was still responding, but not standing, in response to the stimulation.<sup>528</sup> She said that “with context and explanation,” practitioners would have varied responses to the video.<sup>529</sup> Dr. Green said there is “no standard and no number” of times a hotshot could be used in treating a horse.<sup>530</sup> She also testified that it was her understanding that the owner did not want to euthanize Allie and Respondent had to take that into

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<sup>523</sup> Tr. Vol. I at 304.

<sup>524</sup> Tr. Vol. I at 282.

<sup>525</sup> Tr. Vol. I at 314.

<sup>526</sup> Tr. Vol. I at 282; Staff Ex. 4 at 9:00-10:00. Dr. Green also thought the medical records accurately described Allie as “bright and alert,” meaning only that she was “not demented” but was “refusing to stand.” Tr. Vol. I at 314.

<sup>527</sup> Tr. Vol. I at 283.

<sup>528</sup> Tr. Vol. 1 at 284, 286.

<sup>529</sup> Tr. Vol. I at 274.

<sup>530</sup> Tr. Vol. I at 275.

consideration, even though it was Dr. Green’s understanding that Respondent had already recommended euthanasia.<sup>531</sup>

While there are no written standards specifically on the use of hotshots in equine veterinary medicine,<sup>532</sup> Dr. Green acknowledged on cross examination that the Professional Rodeo Cowboys Association has guidelines that allow electric prods to be used only when necessary and only when they touch a horse on the hip or shoulder.<sup>533</sup> She also agreed that the Beef Quality Assurance Cattle Care and Handling Guidelines said that cattle should not be hit with any objects that could cause injury, pain, or harm, and that she was “very much in agreement with” that policy.<sup>534</sup> Dr. Green distinguished those policies from Respondent’s painful use of the hotshot in this case because Allie’s condition was an emergency, asserting “there are no established standards for the use of hot-shots in horses in emergency situations when you’re trying to save their lives.”<sup>535</sup>

Dr. Green testified regarding Texas A&M’s investigation of the incident. Concerned by what she saw on the video—which “did not look so good to me”—Dr. Green asked Dr. Eades and two other colleagues (Drs. Watkins and Chaffin), to

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<sup>531</sup> Tr. Vol. I at 280-81, 283.

<sup>532</sup> Tr. Vol. I at 318.

<sup>533</sup> Tr. Vol. I at 284.

<sup>534</sup> Tr. Vol. I at 285. She also testified that horses have a thinner hide than cattle and are consequently more sensitive to painful stimuli. *Id.*

<sup>535</sup> Tr. Vol. I at 287.

investigate and write a report on Respondent's treatment of Allie.<sup>536</sup> Those investigators concluded that Respondent had used the hotshot for an excessive amount of time, the hotshot was an "ineffective management strategy," and specifically its use on Allie's perineum, face, and muzzle was "not indicated."<sup>537</sup> Dr. Green testified that she respects all three veterinarians and their opinions but could not say whether she agreed with their conclusions because "this was a difficult case" and reasonable minds could differ, depending on the context.<sup>538</sup> She acknowledged that she responded to the investigators by telling them their conclusions were "fair," but indicated she was referring principally to their statement that it had been "difficult to reach the conclusion that the case management of another clinician was inappropriate given that the only treatment option was euthanasia."<sup>539</sup> She thought the investigation report did not convey that Respondent "had one intent and one intent only, and that was to give a horse a shot for life."<sup>540</sup>

Asked why she had not followed the investigators' recommendation to give Respondent an "unsatisfactory" rating in patient care and a "needs improvement" in teaching on her performance evaluation, Dr. Green claimed this was Dr. Eades's

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<sup>536</sup> Tr. Vol. I at 311; Staff Ex. 12.

<sup>537</sup> Tr. Vol. I at 260; Staff Ex. 12 at 448.

<sup>538</sup> Tr. Vol. I at 261, 266.

<sup>539</sup> Tr. Vol. I at 265; Staff Ex. 12 at 448.

<sup>540</sup> Tr. Vol. I at 312.

decision to make, not hers.<sup>541</sup> She asserted that Dr. Eades, not her, performed Respondent's evaluations and Dr. Green signed off on Dr. Eades's recommendations because she supported the conclusions of the department head.<sup>542</sup>

Ultimately, Dr. Green does not believe that Respondent fell below the standard of care because there is no clear standard for veterinarians to follow in cases like Allie's. She testified that "[e]very single person, every veterinarian around, could have a different judgment on when" Respondent should have stopped treating Allie and urged euthanasia," but "[i]t doesn't make any one of them right or wrong."<sup>543</sup> If the hotshot had been successful in getting Allie to stand and the horse had survived, Dr. Green did not think anyone would be questioning Respondent's use of the hotshot or whether she had met the standard of care.<sup>544</sup> Overall, she believed Respondent had acted "very appropriately" in her treatment of Allie.<sup>545</sup>

## 5. Jerry Foland, D.V.M.

Jerry Foland, D.V.M. is an equine veterinarian and board-certified equine surgeon who has had a clinic in Weatherford, Texas for over two decades.<sup>546</sup> Respondent initially tried to call Dr. Foland as an expert witness, but Staff objected

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<sup>541</sup> Tr. Vol. I at 269; Staff Ex. 12 at 449.

<sup>542</sup> Tr. Vol. I at 269-70.

<sup>543</sup> Tr. Vol. I at 309.

<sup>544</sup> Tr. Vol. I at 308-09.

<sup>545</sup> Tr. Vol. I at 315.

<sup>546</sup> Tr. Vol. III at 677.

because the expert designation was untimely (made for the first time in Respondent's pre-hearing witness list) and unclear (the witness list identified Dr. Foland as *Staff's* expert, not Respondent's).<sup>547</sup> The ALJs sustained Staff's objection and Dr. Foland was not permitted to testify in an expert capacity for Respondent.<sup>548</sup> With Staff's agreement, he gave only limited testimony regarding his earlier consultation with Staff.

Dr. Foland was the first veterinarian Staff consulted with regarding Respondent's treatment of Allie. In the summer of 2020, he reviewed medical records, audio recordings, the video recording of Allie, and related documents, and then provided Staff with a written opinion letter on the case.<sup>549</sup>

In his letter, Dr. Foland explained that he believed Respondent had been "acting in what she believed to be the best interest of her patient and the patient's owner."<sup>550</sup> He also wrote that her use of the hotshot was "excessive, both in the number of shocks administered ... and the frequency with which they were administered."<sup>551</sup> Based on his review of the video, he thought that Allie had made an effort to gain and maintain a standing position when the first shocks were administered, but was unable to stabilize and remain on her feet because she lacked

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<sup>547</sup> Tr. Vol. III at 618, 669-71.

<sup>548</sup> Tr. Vol. III at 673.

<sup>549</sup> Tr. Vol. III at 679-80.

<sup>550</sup> Resp. Ex. 42 at 1.

<sup>551</sup> Resp. Ex. 42 at 1.



the strength and neurological capacity to stand.<sup>552</sup> Allie was “more systemically ill” than any of her veterinarians realized at the time.<sup>553</sup>

Dr. Foland wrote that whether hotshot use constitutes animal cruelty is a “muddy area,” but he suggested it may be appropriate in some circumstances.<sup>554</sup> He felt that Respondent had been mistaken in her assessment of Allie’s ability to stand and this mistake caused her to administer excessive shocks, but he did not believe there was “any intentional cruelty” involved, though he acknowledged that others might “interpret the actions in this case as cruel.”<sup>555</sup> He concluded by stating:

I think the degree to which the hot shot was used in this case is something that many veterinarians would not be comfortable with, but I would hesitate to condemn [Respondent] as cruel or negligent, as she was ultimately trying to do the last thing she felt might have saved the life of this horse.<sup>556</sup>

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<sup>552</sup> Resp. Ex. 42 at 1.

<sup>553</sup> Resp. Ex. 42 at 2.

<sup>554</sup> Resp. Ex. 42 at 2.

<sup>555</sup> Resp. Ex. 42 at 2. When asked about Dr. Foland’s opinions during his own testimony, Staff’s expert Dr. Buchanan said he agreed with many of the statements in Dr. Foland’s letter, including Dr. Foland’s opinion that Respondent mistakenly believed she could induce Allie to stand with excessive shocks from the cattle prod. Dr. Buchanan also agreed with Dr. Foland’s opinion that Respondent’s judgment may have been adversely influenced by her prior experience with a horse who defied expectations by eventually standing after Respondent’s aggressive use of a hotshot. Tr. Vol. III at 731-32, 733.

<sup>556</sup> Resp. Ex. 42 at 3.

## IV. ANALYSIS OF ALLEGED VIOLATIONS

### A. STANDARD OF CARE

Staff alleges that Respondent is subject to disciplinary action because her post-operative treatment of Allie failed to meet the standard of care in several regards, in violation of Board Rule 573.22. To establish that Respondent violated Rule 573.22, it was Staff's burden to show, by a preponderance of the evidence, that Respondent failed to "exercise the same degree of humane care, skill, and diligence in treating patients as are ordinarily used in the same or similar circumstances by average members of the veterinary medical profession."<sup>557</sup> The preponderance of the evidence standard is satisfied when a fact is established by "the greater weight of the credible evidence," or when the evidence establishes that a fact is "more likely true than not true."<sup>558</sup>

Specifically, Staff argues that Respondent violated the standard of care by (1) not effectively exploring or implementing all other reasonably available avenues of treatment before resorting to using a hotshot on Allie; (2) excessively hotshotting Allie on December 19 for approximately 24 minutes; (3) ineffectively using the large animal lift and the hotshot while Allie was hoisted and unable to stand; and (4) hotshotting Allie in sensitive areas like the face, muzzle, eyes, ears, and tailhead.

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<sup>557</sup> 1 Tex. Admin. Code § 155.427; *Scally v. Tex. State Bd. of Med. Exam'rs*, 351 S.W.3d 434, 437 n.15 (Tex. App.—Austin 2011, pet. denied); 22 Tex. Admin. Code § 573.22).

<sup>558</sup> *Murff v. Pass*, 249 S.W.3d 407, 409 n.1 (Tex. 2008); Tex. R. Civ. P. 226a.

## 1. The Standard of Care is an Objective Standard

At the outset, the ALJs must consider the relevant standard of care. According to Respondent, the use of hotshots on Allie was left to Respondent’s “sound judgment” as the treating veterinarian because “there is no established standard of care in the field of veterinary medicine for using hotshots on equids.”<sup>559</sup> Respondent’s designated expert, Dr. Green, similarly testified that she believes there is no clear standard for veterinarians to follow in cases like Allie’s because different veterinarians could make different judgments on when Respondent should have stopped treating Allie, which “doesn’t make any one of them right or wrong.”<sup>560</sup>

To be sure, every testifying expert in this case—and every veterinarian, for that matter—agreed no treatises, journal articles, or textbooks define the acceptable limits of hotshot use as a noxious stimulus on horses generally, let alone when used to assist with standing.<sup>561</sup> Such authoritative texts can certainly be informative regarding the care, skill, and diligence to be expected in certain circumstances. But in their absence, the standard of care must still be measured, as required in Rule 573.22, against an objective standard maintained by average members of the profession in good standing within the same or similar localities and communities—not the

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<sup>559</sup> Respondent’s Closing Brief at 12; *see also* Staff Ex. 2 at 0058 (Interrogatory 5).

<sup>560</sup> Tr. Vol. I at 309.

<sup>561</sup> *See, e.g.*, Tr. Vol. I at 213-14, 287, 318; Tr. Vol. II at 393, 445; Tr. Vol. III at 635-36, 661-62, 688; Staff Ex. 2 at 0058 (Interrogatory 5).

subjective judgments of the treating veterinarian.<sup>562</sup> To find otherwise would be to find there is no minimum “standard” within the standard of care at all.<sup>563</sup> Consequently, in determining whether Respondent met the standard of care in this case, the ALJs consider whether she objectively met the minimum level of care that reasonable veterinarians with similar training and in a similar communities and circumstances would be expected to provide.<sup>564</sup>

Multiple veterinarians who have practiced alongside Respondent, or within the community or similar communities, testified in this proceeding. Some testified as experts, while others participated as fact witnesses; and some were directly involved in Allie’s care, while others offered after-the-fact opinions. They had varying degrees of experience with using hotshots on horses or observing others do so. While all agreed that circumstances may warrant using hotshots on equine, they cautioned that hotshots must be used sparingly, rarely, and only as a last resort.

## **2. Hotshot Use Before Exhausting Other Treatments**

In its briefing, Staff first alleges that Respondent’s post-operative treatment of Allie fell below the professional standard of care because she “did not effectively explore or implement all other reasonably available avenues of treatment before

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<sup>562</sup> See 22 Tex. Admin. Code § 573.22.

<sup>563</sup> Respondent seemingly recognizes this contradiction by acknowledging that her judgment on the hotshot’s use must still have been “sound.” Respondent’s Closing Brief at 12.

<sup>564</sup> See, e.g., Tr. Vol. II at 340; Tr. Vol. III at 692.

resorting to use of the hotshot.”<sup>565</sup> Staff cites Respondent’s hotshot use on both December 18 and December 19 when claiming that she violated the standard of care by not employing alternative medical treatments, including certain medications and the use of a sling or the large animal lift in the recovery stall, repositioning Allie throughout the evening, or consulting with other specialists before applying the first hotshot.<sup>566</sup>

This particular claim is not articulated in Staff’s Complaint, which mentions that the large animal lift was used on December 19<sup>567</sup> but says nothing about potential alternative treatments that should have been tried, nor that the standard of care required the large animal lift to be used earlier. Staff has raised this claim for the first time in its closing brief, thus failing to provide the requisite prehearing notice of the statutes and rules involved and a short statement of the factual matters asserted for this claim.<sup>568</sup> Consequently, Staff has failed to plead this allegation and the ALJs do not address the merits.

### **3. Hotshot Use for 24 Minutes with Large Animal Lift/Sling**

Practically every veterinarian—whether designated as an expert or fact witness—testified that they believed hotshots should be used as a “last resort” when there is no other option to save a horse’s life. Although the evidence here did not

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<sup>565</sup> Staff’s Closing Brief at 12.

<sup>566</sup> Staff’s Closing Brief at 13-16.

<sup>567</sup> Staff’s Complaint does not discuss or address any hotshot use that occurred on December 18.

<sup>568</sup> Tex. Gov’t Code § 2001.051(3), (4)(A).

suggest such a literal interpretation is demanded to remain within the standard of care,<sup>569</sup> the preponderance of the evidence does indicate that limited hotshot use on a horse may be appropriate, albeit rarely, as a noxious stimulus to motivate a horse to stand.

Collectively, Staff's experts testified that a range of one to six hotshots on a horse would generally be permissible under the standard of care.<sup>570</sup> They further testified that one should consider the properties of the hotshot (including that it is being applied to a horse, rather than the production animal for which it was developed), the number of applications, the location of the applications, and the horse's demeanor and physiological and psychological responses in evaluating the appropriateness of the application.<sup>571</sup> Ultimately, these experts credibly testified, and the preponderance of the evidence showed, that Respondent's indiscriminate use of the hotshot was excessive in the duration, extent, and manner of application and fell below the standard of care.

The first one or two minutes of Respondent's hotshot application on Allie, according to Drs. Dutton and Buchanan, fell within the standard of care. The experts noted that Allie's head and ears were up, she was trying to put weight on her limbs,

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<sup>569</sup> See, e.g., *infra*, discussing conclusions of Staff's experts that the first few minutes of hotshotting on December 19 were within the standard of care, despite Respondent not having first used the large animal lift without the hotshot.

<sup>570</sup> Tr. Vol. I at 125-26; Tr. Vol. II at 397; Tr. Vol. III at 687-88. Of the testifying experts presented at hearing, only Dr. Dutton had personally used a hotshot on a horse. Nevertheless, nearly all testified to previously observing veterinarians use a hotshot on a horse, and all indicated that hotshot use on horses may be appropriate and within the standard of care.

<sup>571</sup> Tr. Vol. II at 393-94, 447.

and she demonstrated a positive reaction by making an effort to stand and bear weight after the hotshot was first used.<sup>572</sup> By approximately the third minute of hotshots, however, Allie's demeanor had changed to show signs of stress and anxiety, and she was bearing no weight, with her knees buckled forward and back limbs canted underneath.<sup>573</sup> To Dr. Vallon, who was present and could hear Allie making guttural, wailing sounds that he had never previously heard from a horse, it was apparent Allie was not able to stand.<sup>574</sup>

By minute five or six, Respondent's hotshot application had gone beyond any therapeutic benefit or medical justification and fell below the standard of care.<sup>575</sup> Allie was agitated, her head and ears were down, she was leaning back in the sling, and she was attempting to attack and bite the hotshot, a survival behavior exhibited when horses realize they cannot outrun or escape a threat.<sup>576</sup> By this point, Allie should have been let down and given a break while Respondent considered a new plan.<sup>577</sup> Respondent nevertheless continued, which only caused Allie to try to flee from the painful stimulus rather than attempt to bear weight or stand.<sup>578</sup> The hotshotting went on for several more minutes before Respondent finally took a break

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<sup>572</sup> Tr. Vol. II at 343-44; Tr. Vol. III at 698-700. Dr. Dutton testified that Respondent should have stopped after one minute, and Dr. Buchanan testified that Respondent should have stopped within two minutes.

<sup>573</sup> Tr. Vol. I at 100-01, 105-06; Tr. Vol. III at 700-01.

<sup>574</sup> Tr. Vol. I at 100-01, 105-06.

<sup>575</sup> Tr. Vol. I at 108-09; Tr. Vol. II at 349, 354, 367, 442; Tr. Vol. III at 705-07, 712.

<sup>576</sup> Tr. Vol. II at 347, 349-50.

<sup>577</sup> Tr. Vol. II at 343; Tr. Vol. III at 700-01, 706.

<sup>578</sup> Tr. Vol. I at 108; Tr. Vol. III at 698-99.

and allowed Allie, who was trembling and breathing quick, shallow breaths, to rest by lowering her from the sling.

Then the hotshotting resumed for another ten agonizing minutes.<sup>579</sup> Respondent relentlessly and haphazardly applied the hotshot and prods despite observing that Allie was not standing or bearing weight, was moving to avoid and hide from the hotshot, was reacting only in fear, and was wailing and vocalizing to express her agony. Respondent also aggressively employed the hotshot in sensitive areas that were obviously causing pain, without any positive reaction. Allie demonstrated an understanding and fear of the hotshot by visibly jolting after the hotshot re-entered the stall after the break.<sup>580</sup>

With the exception of Dr. Doering, who assisted in Allie's treatment, no testifying veterinarian said that they would have used the hotshot in the same manner as Respondent. Most troubling, Respondent's own expert could not say whether she had met the standard of care when presented with the video of Allie's treatment.<sup>581</sup> To be sure, Dr. Green (and Respondent) correctly noted that the video, which has no audio, has limitations. For example, the video itself provides no visible indication as to whether the prods are electrified or dry. However, the video is far from the only evidence that was presented, as a number of witnesses testified to what they saw, heard, and felt about the events, including Respondent's own descriptions.

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<sup>579</sup> Dr. Vallon testified that Allie visibly reacted when the hotshot reentered the stall after the break. Tr. Vol. I at 129.

<sup>580</sup> Tr. Vol. I at 129.

<sup>581</sup> Tr. Vol. I at 273-74.



The evidence was undisputed that there were many charged shocks administered to Allie’s flank, rump, and shoulder, as well as more sensitive areas,<sup>582</sup> yet they were not effective at getting Allie to stand. Dr. Vallon testified to hearing the ringing and buzzing of the hotshot as well as the loud pops when it discharged and hit Allie.<sup>583</sup> He and other witnesses also testified that they believed the strong reactions from Allie where she recoiled indicated the hotshot had been administered.<sup>584</sup> Even Respondent’s own interrogatory response indicated that she believed “*repeated shocks* are required to induce a horse to stand when it will not otherwise” and that she believed hotshot use is not justified if “a single or only a few shocks works.”<sup>585</sup> She also “knew [her use of hotshots on Allie] was painful.”<sup>586</sup> That some of the prods may have been less painful does not change the fact that many, if not most, of them were.<sup>587</sup> The eyewitness testimony was compelling that Allie was suffering, in agony, and showing no attempts to stand in response to the hotshot after several minutes of use.

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<sup>582</sup> Respondent’s applications of hotshots to sensitive areas of Allie’s body are further addressed *infra*.

<sup>583</sup> Tr. Vol. 1 at 103.

<sup>584</sup> Tr. Vol. 1 at 101-02, 106.

<sup>585</sup> Staff Ex. 2 at 0058 (Interrogatory 5).

<sup>586</sup> Staff Ex. 2 at 0059 (Interrogatory 11).

<sup>587</sup> Although it is not necessary to determine exactly how many hotshots were administered in deciding whether the standard of care was violated, the preponderance of the evidence indicates that Respondent applied well more than six hotshots—most likely dozens, if not hundreds—on Allie.

Respondent's evidence, moreover, did not indicate that Respondent had complied with the objective standard of care presented through Staff's experts. Even those hesitant to condemn Respondent's actions—namely, Drs. Doering and Green—respectively admitted that one “could say that it's alarming how long the cattle prod was used”<sup>588</sup> and that it and “certainly looked excessive.”<sup>589</sup> And while they tried to suggest otherwise, the evidence did not show that that Respondent only used the hotshot as a training tool, that Allie displayed positive signs throughout the ordeal, or that Allie continued attempting to stand after the first few minutes.<sup>590</sup> This is especially true during the second round of hotshotting on December 19, when Allie had given up, lowered herself to ground to try to avoid the hotshot, and would occasionally wail in pain.<sup>591</sup> In fact, Respondent herself admitted that, after the first hotshot session on December 19, she “did not think it would work,”<sup>592</sup> but continued despite knowing the hotshot was painful.<sup>593</sup>

Dr. Green and Dr. Doering's opinions regarding the reasonableness and appropriateness of Respondent's actions, moreover, relied primarily on the

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<sup>588</sup> Tr. Vol. III at 636.

<sup>589</sup> Tr. Vol. I at 305.

<sup>590</sup> Tr. Vol. I at 284, 286, 304; Tr. Vol. II at 573, 574, 577, 578, 579-80, 581. Dr. Doering testified that she did not believe the hotshot use on Allie was excessive, though hotshot use could be excessive if the horse was no longer responding over a given period of time. Tr. Vol. II at 547. The evidence shows that is exactly what occurred here.

<sup>591</sup> Tr. Vol. I at 130, 133, 140; Tr. Vol. II at 366.

<sup>592</sup> Staff Ex. 2 at 0061 (Interrogatory 19); *see also* Staff Ex. 5 at 0109 (“I told him her response to the hotshot made me think she would just hang in the sling and not try to stand.”). She also indicated that Allie “was completely non-responsive to the hotshot” and not making efforts to stand on December 18, after surgery. Staff Ex. 2 at 0058 (Interrogatory 8).

<sup>593</sup> Staff Ex. 2 at 0059 (Interrogatory 11).

knowledge that Allie would die if she did not stand. They emphasized that Respondent had the best of intentions and was hoping to save Allie’s life. Dr. Green further testified that draft horses are known for having “a high [pain] tolerance and a low reactivity,” which makes them slower to respond to painful stimuli and makes their pain difficult for veterinarians to assess.<sup>594</sup> While the ALJs do not dispute that Respondent was motivated to try to help Allie live and may have *subjectively* believed she was giving Allie the best chance at surviving, no reasonable veterinarian would have continued hotshotting Allie in this manner given Allie’s demeanor and reaction to the hotshots, which clearly indicated she was in pain and showing signs of despair while no longer attempting to stand.

Dr. Green’s testimony appeared to impermissibly suggest that any amount of pain and suffering from a hotshot is justified so long as the treatment might avoid euthanasia. This opinion not only fails to establish any baseline standard of care, but also neglects to consider that some horses—including, potentially, Allie—may be so compromised that no amount of hotshotting will ever cause them to stand. Relatedly, the evidence suggests that Respondent was mistaken in her assessment of Allie’s ability to stand, and that Respondent’s prior experience in getting a horse to stand after using the hotshot may have clouded her judgment.<sup>595</sup> A veterinarian operating within the standard of care, however, would have stopped after the first few minutes upon determining that the hotshot treatment was no longer having the intended effect and was starting to cause detriment to the patient. In Respondent’s extreme

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<sup>594</sup> Tr. Vol. I at 305-06.

<sup>595</sup> Tr. Vol. II at 434; Staff Ex. 2 at 0058 (Interrogatory 7).

efforts to ward off the “lions” she said were “coming” for Allie,<sup>596</sup> she failed to appreciate that, as far as Allie knew, the hotshot *was* the lion.

Staff further argues that Respondent’s failure to properly use the animal lift fell below the standard of care. But Staff did not raise this argument in its Complaint, which only included a glancing reference to the lift being used on December 19 and failed to provide sufficient notice of the underlying facts argued in Staff’s closing briefs regarding placement of the straps on the sling.<sup>597</sup> Because Staff did not properly plead additional claims relating to the lift, the ALJs do not find a separate standard of care violation for this allegation.

#### **4. Hotshot Use on the Face, Muzzle, Eyes, Ears, and Tailhead**

The manner in which Respondent applied repeated hotshots—both live and as a prod—to sensitive areas of Allie’s body on December 19 likewise violated the standard of care. Undisputed expert testimony indicated that the face, ears, eyes, and perineum of horses are extremely sensitive,<sup>598</sup> and that horses resort to “touch sensing” in areas under their noses and behind their tails.<sup>599</sup> Horses also generally have thinner skin than production animals like cattle, making hotshots to sensitive

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<sup>596</sup> Tr. Vol. I at 167.

<sup>597</sup> See Tex. Gov’t Code §§ 2001.051-.052.

<sup>598</sup> Tr. Vol. I at 100, 102, 104, 192-93; Tr. Vol. II at 391-94; Tr. Vol. II at 355, 356, 394-95.

<sup>599</sup> Tr. Vol. I at 100.

areas other than the flank or rump more painful.<sup>600</sup> Because the shocks cause damage at the cellular level and impact the nerves, a horse will also experience more pain from a hotshot than other noxious stimuli like a rope, twitch, or slap.<sup>601</sup>

Staff's experts universally disapproved of Respondent's hotshot use on the more sensitive locations<sup>602</sup> on Allie's body.<sup>603</sup> None had ever seen a hotshot applied to a horse's ears, lips, face, muzzle, vulva, and/or perineum, nor did they believe there was a medical indication or justification for doing so.<sup>604</sup> Dr. Buchanan explained that a reasonable veterinarian would not do so because it would only stress the horse, and a sufficient stimulus can be achieved by shocking the body.<sup>605</sup> In addition, testimony indicated that guidelines regarding the use of hotshots on production animals prohibit their application in these sensitive locations.<sup>606</sup> Dr. Vallon also emphasized that because Allie was wearing a protective mask that further limited her vision, poking her neck or face would be especially scary because Allie would not be able to see where the prod was coming from.<sup>607</sup>

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<sup>600</sup> Tr. Vol. I at 102; Tr. Vol. II at 391, 394.

<sup>601</sup> Tr. Vol. II at 345-46.

<sup>602</sup> Dr. Vallon also criticized Respondent's application of an electrified hotshot on Allie's bandaged foot, which was recovering from recent surgery, but Staff did not include that as a basis for this claim so it is not considered.

<sup>603</sup> Tr. Vol. I at 137, 171, 192-93; Tr. Vol. II at 355, 356, 366, 394-95; Tr. Vol. III at 701. Respondent's supervisor, Dr. Eades, also believed that use on these sensitive areas was "not indicated," and she testified that a hotshot to the face, muzzle, and perineum would cause "a lot more pain" than other areas of the body. Tr. Vol. I at 260; Staff Ex. 12 at 448; Tr. Vol. III at 651.

<sup>604</sup> *See, e.g.*, Tr. Vol. I at 100, 102, 104, 137; Tr. Vol. II at 394-95.

<sup>605</sup> Tr. Vol. III at 701.

<sup>606</sup> Tr. Vol. I at 192-93; Tr. Vol. II at 394-95.

<sup>607</sup> Tr. Vol. I at 120.

Even assuming Respondent and Dr. Doering's rationale for applying the hotshot to these sensitive areas holds some merit—which every testifying expert disputed—the excessive number and duration of the prods and shocks, as well as the indiscriminate application, fell below the standard of care. Respondent and Dr. Doering suggested that the admittedly painful and strong stimulation of sensitive regions could induce a physical response and desire in Allie to move away and bear weight, or to buck and right herself in the lift while she was suspended.<sup>608</sup> Respondent also insisted that she resorted to this after Allie was non-responsive to hotshots in the flank region, and that she believed Allie was alternatively showing positive signs of attempting to stand and becoming somnolent during hotshot applications to the neck, muzzle, ears, and eyes.<sup>609</sup> Yet expert testimony and the video demonstrate that Respondent continued this painful and unorthodox application despite it having no efficacy and while Allie was showing severe negative responses and distress. It also suggested that these painful stimuli hindered, rather than encouraged, attempts at standing.

Within two minutes of being hotshotted, Allie was sitting in the sling, breathing hard, and showing signs of stress or anxiety, indicating that a different tool

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<sup>608</sup> Staff Ex. 2 at 0059 (Interrogatory 11); Tr. Vol. II at 580-81; Staff Ex. 4 at 12:51. Dr. Dutton questioned whether the teachings cited by Respondent in support of applying the hotshot to those areas was referencing other types of stimulation rather than a hotshot.

<sup>609</sup> Staff Ex. 2 at 0059 (Interrogatory 9).

should be used or hotting shotting should be discontinued to allow a break.<sup>610</sup> By about eight minutes into Respondent using the hotshot, Allie was extremely agitated with her face, head, and ears turned down or away from the hotshot, except when she was engaging in her “last line of defense” and biting at and attacking the hotshot.<sup>611</sup> The video shows that, by this point, Allie was leaning into and laying listlessly in the sling, had given up as far as trying to stand, and looked as if she was merely trying to “survive,”<sup>612</sup> despite having been hotshotted in her muzzle, face, ears, perineum, and eyes. Hotshotting of the face, moreover, engaged Allie’s natural instinct to go backwards and away from the hotshot rather than forwards, and hindered any attempts to bear weight.<sup>613</sup> Respondent nevertheless continued to use the hotshot on Allie’s face and neck.<sup>614</sup>

After a break, Respondent used the hotshot even more aggressively on Allie, often in sensitive areas, for another ten minutes.<sup>615</sup> No reasonable veterinarian would have employed the hotshot on Allie in this manner. The bayonet-like jabbing of Allie’s face that followed was unnecessary and inefficacious, as Allie was not

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<sup>610</sup> Tr. Vol. III at 700-01. Dr. Buchanan’s report states that, “[b]y 12 min [sic] the mare appears to ‘give up’ and has reduced efforts to stand, reduced response to the shocks and primarily displayed avoidance. Dozens more shocks are applied.” Staff Ex. 9B at 0441.

<sup>611</sup> Tr. Vol. II at 361-62, 363-64; Staff Ex. 4 at 17:00.

<sup>612</sup> Tr. Vol. II at 361, 363-64.

<sup>613</sup> Tr. Vol. II at 355.

<sup>614</sup> Tr. Vol. II at 361.

<sup>615</sup> Tr. Vol. I at 130.

attempting to stand and primarily just tried to avoid the hotshot.<sup>616</sup> Allie suffered several minutes of incessant hotshots to her head and underneath her tailhead which, regardless of whether they were electrified or not, were very painful.<sup>617</sup> She responded to the latter not by attempting to stand or buck but by trying to lower and bury herself in the shavings on the stall floor.<sup>618</sup> She likewise reacted “very negatively” when Respondent focused the hotshot on Allie’s face, mouth, muzzle, ears, and eyes by trying to shake her head to make it hard to hit and trying bury her muzzle in the floor shavings.<sup>619</sup>

Allie had grown increasingly exhausted and would be quiet for intervals but then would wail loudly when she was hit with the hotshot.<sup>620</sup> Respondent’s interpretation of these vocalization as encouraging signs is simply unsupported by the evidence, which demonstrated that Allie’s legs were bent and her feet were knuckled over as she made no attempts to stand or even get into the proper position.<sup>621</sup> The evidence demonstrates that there was no reason to believe the “aggressive” hotshot application would benefit Allie or cause her to stand despite

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<sup>616</sup> Tr. Vol. I at 130-31, 133.

<sup>617</sup> Tr. Vol. I at 135. Respondent’s own expert, Dr. Green, testified that merely touching a horse’s muzzle can cause a horse to yank away, even if the touch is not electrified. Tr. Vol. I at 304.

<sup>618</sup> Tr. Vol. I at 140.

<sup>619</sup> Tr. Vol. I at 137.

<sup>620</sup> Tr. Vol. I at 137-38.

<sup>621</sup> Tr. Vol. I at 138-39.



her negative and detrimental reactions. As Dr. Vallon credibly testified, it was “just making Allie’s last moments hell.”<sup>622</sup>

To the extent Respondent or Respondent’s witnesses suggested there is insufficient evidence that Respondent actually engaged the hotshot on Allie’s muzzle, ears, eyes and perineum,<sup>623</sup> Dr. Vallon, who was present, testified that he saw Respondent apply the hotshot to those areas multiple times.<sup>624</sup> What’s more, Staff’s experts credibly testified that Allie’s reactions indicated that the hotshot was engaged for at least some of the prods to these regions.<sup>625</sup> Respondent’s own interrogatories, moreover, describe her intent to use “strong stimulation,” in sensitive areas when Allie did not react to hotshots on the flank, and that she equated “strong stimulation” with use of the hotshot.<sup>626</sup> The ALJs may further make a reasonable negative inference from Respondent’s refusal to answer questions about whether she administered hotshots to Allie’s eyes, ear canal, anus, and vulva.<sup>627</sup> Staff proved by a preponderance of the evidence that Respondent’s application of the hotshot to sensitive areas on Allie’s body violated the standard of care.

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<sup>622</sup> Tr. Vol. I at 133.

<sup>623</sup> Tr. Vol. I at 304-05.

<sup>624</sup> Tr. Vol. I at 193.

<sup>625</sup> Tr. Vol. I at 102-03, 347, 440-41, 702-03.

<sup>626</sup> See Staff Ex. 2 at 0059 (Interrogatory 9) (Respondent discussing how she previously observed another doctor that would “strongly stimulate the anus and/or vulva or the ears and lips to get horses to stand”), at 0059 (Interrogatory 10) (“Allie’s vocalizations indicated to me that she was actually reacting to strong stimulation (the hotshot) ....”).

<sup>627</sup> Tr. Vol. I at 66, 69, 73, 74; see Tex. R. Evid. 513(c); *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007) (factfinder in a civil case may draw negative inferences from a party’s invocation of the Fifth Amendment privilege against self-incrimination).

## 5. Conclusion

For the reasons discussed above, the ALJs conclude that Respondent violated the standard of care in her post-operative treatment of Allie with regards to the manner and duration of her hotshot use on December 19, including her aggressive use of the hotshot on sensitive areas. This constituted a violation of Rule 573.22, for which Respondent is subject to disciplinary action pursuant to Texas Occupations Code section 801.402(a)(6).

The ALJs further find that Staff failed to plead and provide notice of its claims that Respondent fell below the standard of care by not exhausting certain alternative treatments before resorting to using the hotshot, or by misplacing the straps or otherwise misusing the large animal lift.

### **B. UNNECESSARY OR UNAUTHORIZED TREATMENT**

Staff contends that Respondent is subject to disciplinary action for performing “unnecessary or unauthorized treatment” on Allie—“unauthorized” because Allie’s owner never knew or approved of Respondent using a hotshot, and “unnecessary” because Respondent’s use of the hotshot was excessive in extent and duration.<sup>628</sup>

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<sup>628</sup> Staff’s Closing Brief at 40-46; *see also* Tex. Occ. Code § 801.402(12).

## 1. Unnecessary Treatment

Respondent is subject to discipline under Texas Occupations Code section 801.402(12) for performing an unnecessary treatment<sup>629</sup> for the same reasons that the hotshot treatment fell below the standard of care. When Respondent first administered the hotshot, Allie responded by attempting to stand. After several minutes of hotshotting, however, Staff's experts credibly testified that the horse's demeanor, behavior, and responses indicated the hotshot was having a detrimental effect on Allie, who began engaging in flight and fight responses, rather than attempting to stand.<sup>630</sup>

The remainder of Respondent's hotshot treatment after, at most, the first five to six minutes (i.e., minutes 14 or 15 on the video) was not necessary and had no therapeutic benefit or effect, nor did it elicit the desired response.<sup>631</sup> Respondent nonetheless engaged in unnecessary treatment by continuing to use the painful stimulus to administer an excessive number of applications for an excessive amount of time well after the hotshot failed to produce the desired effect. This included taking a break after the first 14 minutes of hotshotting and then resuming for another 10 minutes, this time even more aggressively and concentrated in sensitive areas like Allie's face and tailhead. Staff's experts testified that this "treatment" was

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<sup>629</sup> Although Dr. Doering hesitated at points to label the hotshot a "treatment," instead preferring to call it a "training tool," she later appeared to acquiesce to the description. *See, e.g.*, Tr. Vol. II at 556-58, 559; Tr. Vol. III at 631, 634-35. Staff's witnesses, moreover, described the use of the hotshot as a treatment. Tr. Vol. II at 351, 387, 389; Tr. Vol. III at 723. Consequently, the ALJs find there the preponderance of the evidence indicates that the hotshot was used as a treatment for purposes of this allegation.

<sup>630</sup> Tr. Vol. II at 349-52; Tr. Vol. III at 701-02, 705-07.

<sup>631</sup> Tr. Vol. II at 349, 351, 354, 356-57, 367; Tr. Vol. III at 706-07.

unnecessary and detrimental to the patient,<sup>632</sup> and that a veterinarian should stop a treatment that causes an adverse reaction.<sup>633</sup> Respondent, moreover, invoked her right against self-incrimination when asked whether the hotshot treatment after the first five minutes was unnecessary and excessive, allowing the ALJs to draw a negative inference.<sup>634</sup> The preponderance of the evidence indicates that Respondent performed a prolonged and unnecessary treatment on Allie.

## 2. Unauthorized Treatment

In its closing brief, Staff argues that Allie's owner, Mr. Berry, did not authorize Respondent to use a hotshot and was unaware until long after Allie's death that a hotshot had been used.<sup>635</sup> Mr. Berry testified that he would never approve of using a hotshot, and he denied that Respondent had discussed the hotshot with him when Allie was under her care and recovering from surgery.<sup>636</sup> He asserted that the client communication notes, where Respondent mentioned speaking to Mr. Berry about the hotshot in conversations on December 18 and 19, were false.<sup>637</sup> Further, the case summary he received after Allie died made no mention of the hotshot having been used.<sup>638</sup> According to Mr. Berry, he learned about the hotshot for the first time

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<sup>632</sup> Tr. Vol. I at 100, 104, 123, 131, 199; Tr. Vol. II at 349, 350, 351-52, 356-57, 366-67, 398, 440, 441; Tr. Vol. III at 693, 701.

<sup>633</sup> Tr. Vol. I at 197.

<sup>634</sup> Tr. Vol. I at 68.

<sup>635</sup> Staff's Closing Brief at 41-43.

<sup>636</sup> Tr. Vol. III at 750-51, 756.

<sup>637</sup> Tr. Vol. III at 753-55.

<sup>638</sup> Tr. Vol. III at 761-62.

over a year later, when a Board investigator approached him about the pending complaint against Respondent.<sup>639</sup>

In response, Respondent argues that the client communication notes should be accepted as an accurate record of her conversations with Mr. Berry, and that those notes reflect he was aware Respondent had used the hotshot on December 18 and planned to use it on December 19. “If it is documented in the record [then] it happened,” Respondent argues.<sup>640</sup> Respondent also argues that Mr. Berry had authorized her to do anything she could to save Allie, which implicitly included using the hotshot to coax her to stand.<sup>641</sup>

This claim that the hotshot was “unauthorized” was raised for the first time in Staff’s closing brief. The Complaint makes no allegation of a failure to obtain owner authorization for using the hotshot. Indeed, the Complaint does not mention Allie’s owner at all, let alone address whether he knew about or consented to any of the care she received. The Administrative Procedure Act requires Staff to give notice in advance of the hearing that includes both the “particular sections of the statutes and rules involved” and “a short, plain statement of the factual matters asserted.”<sup>642</sup> Here, the notice of hearing and Complaint gave no notice that Staff was alleging

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<sup>639</sup> Tr. Vol. III at 757, 788-89.

<sup>640</sup> Respondent’s Closing Brief at 15.

<sup>641</sup> Respondent also suggested that Mr. Berry had incentive to lie because he might face legal or employment consequences if he admitted having approved the use of a hotshot. Respondent’s Closing Brief at 16. The ALJs found Mr. Berry credible and convincing and give no credence to Respondent’s assertion that he perjured himself.

<sup>642</sup> Tex. Gov’t Code § 2001.051(3), (4)(A).

owner consent was required to use the hotshot, or that Allie’s owner had not given that consent. Additionally, no witness addressed when authorization is required, or how specific that authorization must be.

The ALJs share Staff’s concerns about where and how the hotshot was mentioned (or not) in Allie’s patient record, and the implications of Respondent’s omissions are addressed in the discussion below relating to recordkeeping. However, for purposes of Texas Occupations Code section 801.402(12), Staff has not pleaded its theory that Respondent’s use of the hotshot was “unauthorized.”

### **C. DISHONEST OR ILLEGAL PRACTICES (ANIMAL CRUELTY)**

Staff alleges that Respondent engaged in illegal conduct and violated Texas law by engaging in animal cruelty. Staff’s briefs do not specify what law it contends she violated, but the Complaint references Respondent’s indictment on a felony criminal charge of Cruelty to Livestock Animals, quoting the indictment’s allegation that she “intentionally and knowingly torture[d] a livestock animal, to-wit: a horse named Allie[,] by excessively contacting her with a device designed to deliver an electric shock upon contact....”<sup>643</sup> Though not specifically cited in the Complaint, the quoted language corresponds to Texas Penal Code section 42.09(a)(1), which provides that a person who “intentionally or knowingly ... tortures a livestock animal” commits an offense. A horse is a “livestock animal” and “torture” includes

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<sup>643</sup> Complaint at 6-7.

“any act that causes unjustifiable pain or suffering.”<sup>644</sup> The offense is a state jail felony.<sup>645</sup>

In a criminal context, the standard of proof is more stringent than in a civil or administrative context. The prosecutor must establish each element of the crime by proof beyond a reasonable doubt in order to obtain a conviction.<sup>646</sup> Rule 573.4—which prohibits commission of illegal acts, including animal cruelty—states that a conviction is not required for enforcement of the rule.<sup>647</sup> Instead, Rule 573.4 permits disciplinary action based on “[p]roof of the commission of the act while in the practice of, or under the guise of the practice of ... veterinary medicine.” Accordingly, the rule permits sanctions based on the preponderance of the evidence standard that applies in this administrative context.

Several witnesses at the hearing expressly characterized Respondent’s use of the hotshot as “cruel” and causing Allie unnecessary pain and suffering. Dr. Dutton thought Respondent’s use of the hotshot after five minutes constituted animal cruelty because it was causing Allie pain and suffering without any reasonable hope of beneficial effect.<sup>648</sup> Dr. Buchanan also thought Respondent was “approaching

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<sup>644</sup> Tex. Penal Code § 42.09(b)(5)(B), (7).

<sup>645</sup> Tex. Penal Code § 42.09(c).

<sup>646</sup> See Tex. Penal Code § 2.01 (“All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.”).

<sup>647</sup> 22 Tex. Admin. Code § 573.4.

<sup>648</sup> Tr. Vol. II at 353-54, 357, 362.

cruelty and torture” by that point.<sup>649</sup> Dr. Dutton particularly felt that it was cruel and causing unnecessary pain and suffering to repeatedly use the hotshot on Allie’s eyes, nose, mouth, ears, and perineum, particularly towards the end of the video when Allie had completely given up and was just trying to hide her head in the shavings on the floor to get away from the hotshot.<sup>650</sup> Dr. Vallon said it was “unnecessary” and “cruel” to use the hotshot after Allie had been allowed to rest for seven minutes, adding “continuing to hit her with that hot-shot is just causing pain, and I don’t think there was any chance this was going to benefit her in any way.”<sup>651</sup> Dr. Buchanan also opined that Respondent’s use of the hotshot was “cruel and potentially torture.”<sup>652</sup>

It is indisputable that the hotshot caused Allie tremendous pain and suffering, which she displayed by bucking, jerking, biting, pulling away, trying to hide in shavings, and emitting loud, deep, guttural wails. Respondent, moreover, admitted that she “knew [her hotshot treatment of Allie] was painful,” explaining that “the reason the hotshot works ... is because it is painful and induces a physical response and a desire in the horse to move away.”<sup>653</sup> The ALJs have already found that Respondent’s use of the hotshot fell below the standard of care because she continued using it past the point where there was any reasonable hope of therapeutic

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<sup>649</sup> Tr. Vol. III at 712.

<sup>650</sup> Tr. Vol. II at 366, 395.

<sup>651</sup> Tr. Vol. I at 131-32.

<sup>652</sup> Tr. Vol. III at 693.

<sup>653</sup> Staff Ex. 2 at 0059 (Interrogatory 11).



benefit. This also means that the pain and suffering Respondent inflicted was unjustifiable.

The ALJs offer no opinion of the merits of the felony charge against Respondent and are mindful of the much higher burden of proof required to secure a criminal conviction. Under the lower standard of proof in this administrative proceeding, however, the preponderance of the evidence establishes that Respondent intentionally and knowingly caused Allie unjustifiable pain or suffering, which is an illegal act pursuant to Texas Penal Code section 42.09(a)(1). Because this act was committed in connection with Respondent’s veterinary practice, it constitutes a violation of Rule 573.4, which requires adherence to law, including criminal statutes prohibiting animal cruelty. Respondent is therefore subject to disciplinary action pursuant to Texas Occupations Code section 801.402(4) for committing an illegal practice, and section 801.402(6) for violating the rule of professional conduct that requires adherence to the law.

#### **D. RECORD KEEPING**

Staff alleges that Respondent is subject to disciplinary action because her patient records for Allie did not contain information describing “procedures performed/treatment given and results” as required by the Board’s rule on veterinarian patient record keeping.<sup>654</sup> Specifically, Staff alleges that (1) the records from December 17, 2019, when Allie was admitted, were inconsistent insofar as they described her as “bright and alert” but also having concerning symptoms, and

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<sup>654</sup> 22 Tex. Admin. Code § 573.52(a)(9).

(2) Respondent failed to adequately document her use of the hotshot on December 18 and 19.

### **1. Alleged Inconsistency in the Records**

Staff contends that describing Allie as “bright and alert upon presentation” was inconsistent with her actual condition.<sup>655</sup> In support of this argument, Staff relies on Dr. Dutton’s testimony, claiming he took the position that calling Allie “bright and alert” was “inconsistent with her having an elevated temperature and increased respiratory effort during her admission.”<sup>656</sup> In fact, Dr. Dutton wavered on this point in his testimony. He said that a patient could be described as “bright and alert, but have ... an elevated body temperature,” then added that an increased respiratory rate “doesn’t fit, necessarily” with the “bright and alert” description.<sup>657</sup> However, on cross-examination, he acknowledged that a horse “potentially could” be bright and alert but still have increased respiratory effort.<sup>658</sup>

Staff also argues that, because Dr. Doering wrote that Allie had been “very compromised” when she arrived,<sup>659</sup> the “bright and alert” description in the records from December 17 must have been inaccurate.<sup>660</sup> Dr. Dutton initially supported this

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<sup>655</sup> Staff Ex. 5 at 0075, 0098.

<sup>656</sup> Staff’s Closing Brief at 51.

<sup>657</sup> Tr. Vol. II at 370.

<sup>658</sup> Tr. Vol. II at 420.

<sup>659</sup> Staff Ex. 7 at 0141.

<sup>660</sup> Staff’s Closing Brief at 51-52, 54.

proposition in his testimony,<sup>661</sup> but then later conceded that veterinarians use the term “compromised” in different ways and that it would be difficult to say whether it is contradictory to call a horse both “compromised and “bright and alert.”<sup>662</sup> Indeed, Dr. Dutton himself described Allie as being both “bright and alert” *and* “compromised” when she was lifted in the sling on December 19.<sup>663</sup> Staff’s evidence failed to establish that these terms are mutually exclusive and the ALJs do not find any recordkeeping violation associated with how Allie’s condition was characterized upon admission.<sup>664</sup>

## **2. Failure to Document Hotshot Use**

Staff also alleges that Respondent failed to document her use of the hotshot. Respondent counters the hotshot is discussed or depicted in the video and in the client communications report, both of which she contends are part of the patient’s medical record.<sup>665</sup> Staff denies that the video and client communications report can be properly considered part of the patient record and argues that, because the hotshot is not referenced anywhere else, the patient records are deficient.

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<sup>661</sup> Tr. Vol. II at 371.

<sup>662</sup> Tr. Vol. II at 452-53.

<sup>663</sup> Tr. Vol. II at 418.

<sup>664</sup> The ALJs also note that the only recordkeeping rule cited in Staff’s Complaint and briefs is Rule 573.52(a)(9), which requires records of “procedures performed/treatment given and results.” This subsection would not encompass an error or inconsistency in describing Allie’s condition.

<sup>665</sup> Respondent’s Closing Brief at 13-14.

As an initial matter, the ALJs agree with Staff that the video taken in Allie’s stall is not a part of the patient record. First, Rule 573.53 requires a veterinarian to prepare “a legible written record or computer record” with the required contents.<sup>666</sup> The video footage is neither written nor a computer record. There is also no evidence that Texas A&M includes security videos as part of an animal’s patient record. Ms. Baker testified that Texas A&M “keeps all videos from certain stalls” and that she downloaded the video of Allie out of concern that it would be deleted.<sup>667</sup> No witness claimed that those videos are typically saved to or included with patient files, only that Texas A&M maintains them. Dr. Dutton testified that, in his experience, stall videos are not part of a patient’s medical record.<sup>668</sup> In her interrogatory responses, when Respondent was asked to identify where the hotshot was mentioned in Allie’s records, she cited only the client communication log, not the video.<sup>669</sup> Though the video is indisputably a Texas A&M record, the evidence does not support Respondent’s contention that the video was ever intended to be part of Allie’s patient record.

Whether the client communications report is part of the patient record is a closer call. Staff’s expert, Dr. Dutton, testified that he considers client communications to be a part of the medical record.<sup>670</sup> However, Dr. Vallon, who

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<sup>666</sup> 22 Tex. Admin. Code § 573.52(a).

<sup>667</sup> Tr. Vol. II at 499-50.

<sup>668</sup> Tr. Vol. II at 444.

<sup>669</sup> Staff Ex. 2 at 0060.

<sup>670</sup> Tr. Vol. II at 417, 423,

worked at Texas A&M much more recently than Dr. Dutton,<sup>671</sup> testified that Texas A&M retains client communications for its own records and does not typically disclose those summaries to an animal's owner.<sup>672</sup> This practice is consistent with the requirements of the Board's rules, which require a veterinarian to furnish a copy of patient records upon request of a client or their representative, and defines "patient records" with reference to Rule 573.52.<sup>673</sup> Rule 573.52 lists twelve categories of information that must be included in the patient record, but client communications are not included in that list.<sup>674</sup> Therefore, the ALJs conclude that, while the client communications report was maintained by Respondent in the course of her care for Allie, it is not part of the "patient record" as defined by the Board's rules on recordkeeping.

Without including the client communications report, there no dispute that Respondent's use of the hotshot is entirely omitted from Allie's patient record. Respondent admitted as much in her interrogatory response identifying the client communications as the only place she recorded her hotshot use.<sup>675</sup> In the patient record, Respondent's surgical notes and surgical report both state that there had been multiple "failed attempts to stand" after surgery, but there is no mention that

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<sup>671</sup> Dr. Dutton completed his residency at Texas A&M in 1999, over two decades before Dr. Vallon graduated in 2020. Tr. Vol. I at 85; Staff Ex. 6 at 0127.

<sup>672</sup> Tr. Vol. I at 203. Dr. Vallon said that employees are required to maintain the communications log but they are used only for Texas A&M's internal records.

<sup>673</sup> 22 Tex. Admin. Code § 573.54(a)-(b).

<sup>674</sup> 22 Tex. Admin. Code § 573.52(a)(1)-(12).

<sup>675</sup> Staff Ex. 2 at 0060.

she used a hotshot during those efforts.<sup>676</sup> Likewise, the progress notes recorded on December 18 and 19 do not mention the hotshot had been used.<sup>677</sup>

Most glaringly, the four-page case summary that summarized Allie's treatment and care during her time at Texas A&M said that, following surgery, Allie had been "assisted with head and tail ropes" in efforts to get her to stand (on December 18), without also mentioning that Respondent had used a hotshot that day. And in describing the events of December 19, the case summary says only that "the large animal lift was used to assist the mare to stand" and that the effort was unsuccessful.<sup>678</sup> There is no mention of Allie's ordeal in that animal lift, when the hotshot was used relentlessly for over half an hour. Given Respondent's refusal to testify at the hearing,<sup>679</sup> Dr. Vallon's testimony that Respondent had taken the highly unusual step of preparing the records herself instead of having a student draft them,<sup>680</sup> and the fact that Respondent only discussed the hotshot in a part of the medical records that she knew Texas A&M would not provide to Allie's owners as part of her patient record, the ALJs find that Respondent's failure to mention the hotshot was, most likely, deliberate.

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<sup>676</sup> Staff Ex. 5 at 0081, 86.

<sup>677</sup> Staff Ex. 5 at 97.

<sup>678</sup> Staff Ex. 5 at 076-77.

<sup>679</sup> See Tex. R. Evid. 513(c); *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007) (factfinder may draw negative inferences from a party's invocation of the Fifth Amendment privilege against self-incrimination).

<sup>680</sup> Tr. Vol. I at 147-48.

Further, even if the client communications report is considered part of the record, the ALJs find that the passing references to the hotshot nonetheless failed to provide the information required by Rule 573.52(a)(9), particularly with respect to its use on December 18. Respondent described speaking to Mr. Berry after Allie's surgery and CT exam and claimed she told him Allie was having trouble recovering from general anesthesia and that:

*I told him I was very concerned that she was giving up, as I had tried the hotshot on her several times and she made no effort to stand. I said the next step is to try slinging her up or move her to our "deep stall," heavily bedded with shavings to give her time. I told him her response to the hotshot made me think she would just hang in the sling and not try to stand."*<sup>681</sup>

Mr. Berry denies this conversation ever occurred, but even assuming Respondent's notes are accurate, they do not really describe the "procedures performed/treatment given and results." When she wrote "I had tried the hotshot on her several times," Respondent did not specify how the hotshot was used, where she had applied it, or how Allie reacted, other than that the horse did not stand on December 18. Put another way, there is no way to glean whether Respondent's hotshot application on December 18 consisted of three hotshots to Allie's rump or an application like the one at issue in this proceeding. Respondent failed to adequately record the treatment given that day.

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<sup>681</sup> Staff Ex. 5 at 0109 (emphasis added).

The communication report goes on to state that, also on December 18, Respondent and Mr. Berry discussed that “[i]f she didn’t get up on her own, then we would have to try to sling her and use the hotshot in the morning.”<sup>682</sup> The next conversation was described as occurring in the morning on December 19. Respondent wrote:

I said she was the same this morning and that we had tried slinging her. During our attempts she was fighting us, kicking, trying to bite, vocalizing and bucking but refused to stand on the front or hind legs. A few times I thought she was responding and about to stand and would support her weight, and then would just slump into the sling and hang there. I told him it didn’t look to me like it was a weakness or coordination problem and that when we gave her a break, she would sit comfortably in sternal and eat hay. I said I thought she had given up. He said that it was such a strange reaction. I said that I had tried as hard as I possibly could and *I really pushed her with the hotshot* to make her want to stand up on her own and she just wouldn’t even try to stand. I told him that my strong recommendation at this point was euthanasia, but if he wanted to keep trying, it was his choice and we could keep going with her. ... he wanted to give her the day on IV fluids. I said that we would turn her with the sling every 2-3 hours and then if her mentation improved, *try again with the hotshot and sling at the end of the day*. He said that if she wasn’t much improved or up by the end of the day he would be able to make a decision at that point.<sup>683</sup>

Again, Mr. Berry denies these conversations occurred, but setting that aside, the notes still omit critical details to explain what “really push[ing] her with the hotshot” had entailed. Respondent did not record how long Allie had been in the

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<sup>682</sup> Staff Ex. 5 at 0109 (emphasis added).

<sup>683</sup> Staff Ex. 5 at 0109 (emphasis added).



sling; how long Respondent had used the hotshot; where she had prodded and shocked Allie with the device, or how many times; how long a break Allie had been given; or how Allie's responses had changed throughout the 34-minute session in the sling.

For these reasons, the ALJs conclude that Respondent failed to provide required information about the "procedures performed/treatment given and results" in Allie's patient record, in violation of Rule 573.52(a)(9). Respondent is therefore subject to disciplinary action pursuant to Texas Occupations Code section 801.402(6), for violating a rule of professional conduct. Because the ALJs have further concluded that Respondent's failure to disclose her hotshot use was deliberate, she is also subject to disciplinary action for engaging in a dishonest practice in connection with her veterinary practice, pursuant to Texas Occupations Code section 801.402(4).

## **V. SANCTIONS RECOMMENDATION**

The Board has adopted a Schedule of Sanctions (Schedule) that must be used in imposing disciplinary sanctions.<sup>684</sup> The Schedule classifies general types of violations as Class A, B, or C, specifies a minimum and maximum sanction for each class, and lists aggravating and mitigating factors to be considered in determining a penalty within that range. Throughout this case, Staff has sought revocation of Respondent's license, but neither its Complaint nor its briefs have addressed the factors that must be considered pursuant to the Schedule. In her closing brief,

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<sup>684</sup> 22 Tex. Admin. Code § 575.25.

Respondent contends that if any sanction is imposed, it should be only an informal reprimand.<sup>685</sup>

### **A. CATEGORIZATION**

For the standard of care violation, Respondent's violation falls within Class A, the category that applies to acts or omissions that cause death or serious harm to an animal. The evidence does not show that Respondent caused Allie's death, but she did cause significant and unnecessary pain and suffering during Allie's final hours. The ALJs find that Allie's agony constituted serious harm, making Class A the appropriate category for this violation.

For providing unnecessary treatment, the Class B and Class C categories apply only to "unauthorized but justifiable" treatments, a description that does not fit Respondent's use of the hotshot. Instead, Respondent's extensive and aggressive use of the hotshot constitutes a Class A violation, which the Schedule applies to a veterinarian who "knowingly performs or prescribes unnecessary treatment."

The Schedule does not have a separate section that specifically addresses dishonest or illegal practices, or failure to adhere to the law. Therefore, the default schedule, which applies to violations that are not specifically enumerated elsewhere in the Schedule, is applied. The default schedule provides that commission of a felony offense connected with the practice of veterinary medicine, or commission of any offense under Texas Penal Code section 42.09, is a Class A violation. The ALJs

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<sup>685</sup> Respondent's Closing Brief at 17.

have determined by a preponderance of the evidence that Respondent committed cruelty to a livestock animal, which is a felony offense under Texas Penal Code section 42.09(a)(1). Therefore, this violation also falls in Class A.

Finally, for the recordkeeping violation, Class A applies to “any falsified record entry” or “any omission made with the intent to avoid discipline or liability.” Because the preponderance of the evidence showed that Respondent deliberately minimized her use of the hotshot in the client communications log, and omitted reference to the hotshot altogether in the parts of the record she knew would be shared with the owner, the ALJs find that this category applies.

## **B. SANCTIONS FACTORS**

Each section of the Schedule prescribes essentially the same penalty range for Class A violations. The minimum sanction is a one-year probated suspension, formal reprimand, and/or a \$1,000 penalty.<sup>686</sup> For a standard-of-care violation, the minimum sanction may also include a continuing education requirement. For an unnecessary-treatment violation, the minimum sanction may include an additional requirement to pass a jurisprudence examination, and the schedule provides that the one-year suspension can also be enforced instead of probated. The maximum sanction for each category of Class A violations is the same: revocation and/or a

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<sup>686</sup> See 22 Tex. Admin. Code § 575.25 (Fig.) (“It is not mandatory that the finder of fact utilize all the sanctions in the appropriate range. The finder of fact may choose one or more sanctions within the appropriate range.”).

“statutory maximum administrative penalty.” The Veterinary Practice Act provides for a maximum administrative penalty of up to \$5,000 per day for each violation.<sup>687</sup>

The Act also provides that any sanction must take into consideration the following factors:

- (1) the seriousness of the violation, including:
  - (A) the nature, circumstances, extent, and gravity of any prohibited act; and
  - (B) the hazard or potential hazard created to the health, safety, or economic welfare of the public;
- (2) the economic harm to property or the environment caused by the violation;
- (3) the history of previous violations;
- (4) the amount of penalty or type of disciplinary action or sanction necessary to deter a future violation;
- (5) efforts to correct the violation; and
- (6) any other matter that justice may require.<sup>688</sup>

The Board’s Schedule also lists aggravating and mitigating factors that must be considered.<sup>689</sup> Several of them echo the statutory factors, but the Schedule also

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<sup>687</sup> Tex. Occ. Code § 801.452(a).

<sup>688</sup> Tex. Occ. Code § 801.411(b).

<sup>689</sup> 22 Tex. Admin. Code § 575.25.

includes “any economic harm or risk of harm to the client or the public” and “any misrepresentations or untruthfulness regarding the violation” as aggravating factors, as well as the following mitigating factors: any restitution made to the client; whether the licensee is new to the practice of veterinary medicine or equine dentistry; and the extent to which facility policies and conditions beyond licensee’s control contributed to the violation.<sup>690</sup>

The parties presented no evidence on most of these factors. Of the factors that tend to support a harsher sanction, there is no evidence that Respondent’s actions posed any hazard to the public health, safety, or welfare; that they threatened or caused economic harm; or that Respondent has a history of previous violations. Of the factors that tend to mitigate against a harsher sanction, it is undisputed that Respondent is not new to the practice of veterinary medicine, and there is no evidence that she tried to correct her violation, made restitution, or that facility policies and conditions contributed to her violations. Neither party addressed the sanction necessary to deter a future violation.

That leaves only two sanctions factors that are supported by the evidence: the seriousness of the violations, including the nature, circumstances, extent, and gravity of Respondent’s actions; and “misrepresentations or untruthfulness regarding the violation[s].” Most significant is the seriousness of Respondent’s violations. Though the violations involved only one patient and only one incident,

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<sup>690</sup> The Schedule also includes additional factors to be considered where an unauthorized treatment has been performed, but those factors are inapplicable because the ALJs have concluded that Staff did not plead or prove an unauthorized treatment claim.

Respondent's actions were extreme, cruel, and potentially felonious. This weighs strongly in favor of a penalty well above the minimum. Further, one of Respondent's violations—her dishonesty in omitting reference to the hotshot in Allie's patient record—inherently involves a degree of untruthfulness. That effort to obscure or minimize her use of the hotshot also related to Respondent's other violations, and also supports a strong penalty. Some circumstances, on the other hand, mitigate against the maximum penalty. For example, the evidence indicated that Respondent's actions—while clearly improper—were motivated by her desire, however misguided, to save the life of a patient that would otherwise indisputably die.

### **C. RECOMMENDATION**

Respondent's contention that an informal reprimand would be an appropriate sanction is clearly unsupported by the evidence, especially considering the aggravating factors at play. An informal reprimand would also fall below the minimum sanction suggested for any of the violations the ALJs have determined she committed, as the Schedule requires at least a formal reprimand for a Class A violation.<sup>691</sup> At the same time, the ALJs are not persuaded that revocation is appropriate, given that the violations in this case, though egregious, appear to have been isolated. Respondent has been a veterinarian for two decades and has held a Texas license since 2012. The violations in this case involved only one patient, and

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<sup>691</sup> 22 Tex. Admin. Code § 575.25 (Fig.) (“The sanction shall not ... fall below the minimum sanction for the violation class.”).

there is no history of prior disciplinary action against her in Texas or any other state where she has practiced.

Still, as discussed at length, Respondent's violations were very serious. She needlessly inflicted tremendous suffering on a patient. Colleagues who witnessed her actions remain haunted by what they saw and heard. Each of the violations falls in the highest category (Class A) of the Board's Schedule, and they raise deep concerns about Respondent's willingness or ability to respond empathetically and reasonably to her patients, to communicate effectively with colleagues and students, and to truthfully record her actions in patient records. To address these concerns, and deter future violations, the ALJs believe a sanction close to the maximum is warranted.

The ALJs recommend a five-year suspension of Respondent's veterinary license, with two years enforced and three years probated. During the probationary years of the suspension, Respondent's practice should be limited to require supervision in her veterinary practice and teaching, so that another veterinarian is available to consult and intervene for patients or students if needed. Respondent should also be required to complete continuing education in recordkeeping, professional accountability, leadership, and/or other topics the Board deems appropriate.

Finally, the ALJs recommend imposition of the statutory maximum penalty of \$5,000 for each violation. Because the same conduct constituted violations of several rules, the ALJs recommend only one \$5,000 penalty for using the hotshot in a manner that fell below the standard of care, constituted unnecessary treatment, and

violated animal cruelty law. They further recommend additional penalties of \$5,000 for Respondent's failure to accurately document her use of the hotshot, and \$5,000 for her dishonest practice of obscuring or omitting references to the hotshot in the patient record.

In support of these findings and recommendations, the ALJs make the following findings of fact and conclusions of law.

## **VI. FINDINGS OF FACT**

1. Ashlee Watts, D.V.M. (Respondent) is licensed as a veterinarian by the Texas Board of Veterinary Medical Examiners (Board). Respondent holds Texas Veterinary License No. 12437, issued by the Board on April 9, 2012.
2. Since 2018, Respondent has been an Associate Professor at Texas A&M University's Veterinary Medical Teaching Hospital (Texas A&M), where she works in the Department of Large Animal Clinical Sciences.

### ***Background***

3. On December 17, 2019, a large Gypsy Drum mare named Allie, weighing over 1500 pounds, was brought to Texas A&M for treatment. Allie was suffering from an abscessed infection in her right, rear foot. She arrived after hours and was scheduled for surgery the following day.
4. On December 18, 2019, Allie was anesthetized and Respondent treated and debrided her infected wounds. Afterwards, despite efforts to help her rise with head and tail ropes, Allie could not stand.
5. At some point following surgery on December 18, Respondent used a hotshot—an electrified handheld cattle prod—in an unsuccessful effort to coax Allie to stand.



6. A hotshot can be used as an ordinary prod, but when a button in the handle is depressed, the end becomes charged and a painful shock is administered when it comes into contact with the animal.
7. Allie was then moved to a deeply bedded stall to rest overnight and continue recovering from anesthesia, with a plan to try raising her the next day using a large-animal sling.
8. In the evening of December 18, Allie was “bright and eating,” and was able to shift from lateral to sternal recumbency (that is, move from lying on her side to lying on her chest), but she could not stand. By the following morning, Allie was unwilling to even sit sternal.
9. A horse that cannot stand will die.
10. In the morning on December 19, 2019, after Allie had been recumbent for at least 17 hours, she was moved to a stall with a mechanical lift where she was placed in a sling and hoisted to a stand, her weight supported by the sling.
11. At first, as the hoist began lifting her, Allie lifted her head and scraped at the floor with her front legs, seemingly in an effort to get them beneath her or help push herself up. However, once lifted, she did not stand and remained off balance, with her weight supported by the sling.
12. When Allie would not bear weight on her legs, Respondent began using the hotshot to shock her.
13. A video camera mounted in the stall recorded Respondent’s use of the sling and hotshot on December 19.
14. For approximately the first thirty seconds, Respondent only used the hotshot on Allie’s left hip, flank, and side. Allie responded forcefully—she grunted and snorted, and she thrashed and bucked as though trying to run away—but she remained off-balance and did not keep her feet down.
15. Respondent continued using the hotshot—sometimes with an electrical charge, other times just as an uncharged prod—nearly constantly for approximately fourteen minutes.

16. While using the hotshot, Respondent tried to encourage the horse by yelling things at her like “Get up. Get mad. The lions are coming.”
17. Respondent shocked and prodded Allie on both sides of her body; on her neck, chest, belly, muzzle, and mouth; and under her tail. She also used the hotshot directly on Allie’s injured leg and foot.
18. Horses are extremely sensitive on their face, muzzle, ears, and perineum, and using the hotshot in those areas would have been particularly painful for Allie.
19. Allie would jolt, thrash, and pull away after a shock from the hotshot, but she otherwise just sagged in the sling. She never tried to stand or support her own weight.
20. As Respondent continued to use the hotshot, Allie’s snorts and grunts escalated to loud vocalizations and guttural wails. These sounds were unlike anything the other professionals present had ever heard a horse make.
21. After about five minutes, Allie started trying to bite at the hotshot when she saw it approaching. When prey animals like horses bite, it indicates they have realized they cannot escape or outrun a threat or that they are in pain and are attempting to stop the pain.
22. When she was not reacting to the hotshots, Allie moved little in the sling other than to turn and pull away from Respondent and the hotshot. She kept her head low and did not straighten her legs or try to stand, and her wailing got even worse.
23. About fourteen minutes after the hotshot session began, Respondent gave Allie a break. She was lowered from the sling—a task that required six people—and left to rest recumbent on her right side for about seven minutes.
24. While Allie was resting, a veterinary student and a technician adjusted the rump strap of the sling. They also offered Allie some hay which she nibbled at intermittently.

25. After resting, Allie was lifted by the hoist again. She did not try to stand as she was lifted, and Respondent resumed using the hotshot almost immediately, and even more aggressively than before.
26. Allie grew increasingly exhausted and would be quiet for intervals but then would wail loudly when she was hit with the hotshot.
27. For nearly three minutes, Respondent prodded Allie nearly constantly, focusing the hotshot on her muzzle, face, and neck. Allie just hung in the sling and tried to pull her head away. She sometimes scraped her front legs against the floor to try to pull away from the hotshot, but she did not bear weight and did not try to stand or run.
28. Respondent then started prodding under Allie's tail for over a minute. Allie reacted strongly to many of these prods, scraping her hind legs against the floor and waving her tail in agitation, but anytime Respondent relented, Allie would sag back into the sling with her head held low, almost touching the ground.
29. Respondent resumed prodding Allie's ears, nose, and face with the hotshot for the next four minutes. In response, Allie scarcely moved her legs but vigorously shook her head to try to avoid the hotshot.
30. Anytime Respondent paused, Allie would hang limp in the sling with her head low, nose against the ground, legs almost in a crouch. She was trying to bury herself in the shavings on the stall floor.
31. Respondent also used the hotshot for another minute or two on Allie's belly, left hind leg and hoof, and under her tail before finally stopping.
32. After using the hotshot for over half an hour (including the approximately seven-minute break in the middle), Allie was lowered and left alone to rest. She was exhausted and almost nonresponsive.
33. Allie died in the stall approximately an hour and half later.
34. A necropsy revealed that, in addition to the foot infection Respondent was treating, Allie had also been battling severe pneumonia with numerous

abscesses in her organs. Though no one knew it at the time, with these underlying conditions, Allie was unlikely to have survived even if she had been able to stand following surgery.

### *Standard of Care*

35. The standard of care for the practice of veterinary medicine authorizes the use of hotshots on horses, albeit rarely, as a noxious stimulus to motivate a horse to stand.
36. The standard of care requires that hotshots be used sparingly, rarely, and as a last resort when applied to horses.
37. The application of approximately one to six hotshots on a horse as a noxious stimulus to motivate the horse to stand may be within the standard of care.
38. The hotshot was developed for use on production or food animals, such as cattle—not horses. Horses generally have thinner skin than cattle, meaning hotshots to horses in areas other than the flank or rump are more painful.
39. The standard of care requires that a veterinarian using a hotshot on a horse as a noxious stimulus consider the properties of the hotshot, the number of applications, the location of the applications, and the horse's demeanor and physiological and psychological responses in evaluating the appropriateness of the use of the hotshot.
40. During the first one to two minutes Respondent used the hotshot on Allie on December 19, Allie's head and ears were up, she was trying to put weight on her limbs, and she demonstrated a positive reaction by making an effort to stand and bear weight after the hotshot was used.
41. The first one to two minutes of Respondent's use of the hotshot on Allie on December 19, 2019, fell within the standard of care.
42. By approximately the third minute of using the hotshot however, Allie's demeanor had changed to show signs of stress and anxiety. She was bearing no weight, with her knees buckled forward and back limbs canted underneath, and she was making guttural wailing sounds.

43. By minute five or six, Respondent's hotshot use had gone beyond any therapeutic benefit or medical justification and fell below the standard of care. At this point, Allie was agitated, her head and ears were down, she was leaning back in the sling, and she was attempting to attack and bite the hotshot, a survival behavior exhibited when horses realize they cannot outrun or escape a threat and/or are in pain.
44. Respondent should have stopped hotshotting Allie by minute five or six and reconsidered how to proceed based on Allie's reactions and responses.
45. Respondent nevertheless continued hotshotting Allie for several more minutes, for a total of approximately 14 minutes, until she lowered Allie from the large animal lift and gave Allie a break.
46. Allie continued to show negative reactions and responses to the hotshot after the first five minutes of its application and before being lowered and given a break. She would attempt to turn away and flee from the painful stimulus rather than attempt to bear weight or stand.
47. When she was lowered to the ground and given a break for approximately seven minutes, Allie was trembling and breathing quick, shallow breaths.
48. Respondent initially believed, after the break, that the hotshot was not going to work.
49. After the break, Respondent again raised Allie in the large animal lift and used the hotshot on Allie for another ten minutes
50. Respondent applied the hotshot despite observing that Allie was not standing or bearing weight, had lowered herself towards the ground to try to avoid the hotshot, was reacting in fear, and was wailing and vocalizing to express her agony.
51. Respondent aggressively employed the hotshot in sensitive areas that were obviously causing pain, including the face, muzzle, ears, eyes, and perineum without any positive reaction.

52. Respondent subjectively believed she was giving Allie the best chance at survival by trying to get Allie to stand with the hotshot and avoid euthanasia.
53. Respondent's subjective intent or belief does not change or inform the standard of care, which is an objective standard.
54. Respondent knew the hotshots she used on Allie were painful.
55. The preponderance of the evidence indicates that Respondent applied dozens, if not hundreds, of hotshots on Allie. She also used the hotshot as an unelectrified prod on Allie dozens to several hundred times.
56. The duration, manner, and extent of Respondent's hotshot use on Allie on December 19 fell below the standard of care for veterinary medicine.
57. Respondent used the hotshot for an excessive amount of time and administered an excessive amount of shocks and prods.
58. Respondent's use of the hotshot on sensitive regions of Allie's body, including the face, muzzle, ears, eyes, and perineum, was not medically indicated, was not reasonable, and was excessive.
59. A veterinarian operating within the standard of care would have discontinued using the hotshot on Allie by the first five or six minutes upon determining that it was no longer having the intended effect and was starting to cause detriment to the patient.

### ***Unnecessary or Unauthorized Treatment***

60. Respondent's application of hotshots to Allie constituted a treatment.
61. Continuing to treat Allie with the hotshot after the first five or six minutes on December 19 was unnecessary and had no therapeutic benefit or effect.
62. Continuing to treat Allie with the hotshot after the first five or six minutes on December 19 did not elicit the desired response.
63. Respondent engaged in unnecessary treatment by continuing to use the painful stimulus to administer an excessive number of hotshots for an

excessive amount of time, and in sensitive areas, well after the hotshot failed to produce the desired effect and after it became detrimental to the patient.

64. Staff did not present any evidence regarding whether or when authorization is required to administer a hotshot as a treatment, nor how specific that authorization must be.

### ***Dishonest or Illegal Practices (Animal Cruelty)***

65. Respondent has been criminally charged with Cruelty to Livestock Animals, a state jail felony, in connection with her use of the hotshot on Allie. At the time of the hearing in this case, Respondent was still awaiting trial on that charge.
66. Respondent's use of the hotshot was cruel when she continued to shock Allie after there was no reasonable hope that she would stand.
67. Respondent's use of the hotshot on Allie's eyes, nose, mouth, muzzle, ears, perineum area, and injured foot was cruel.
68. Respondent's use of the hotshot caused Allie unnecessary pain and suffering.
69. Respondent intentionally and knowingly caused Allie unjustifiable pain and suffering.
70. Respondent used the hotshot on Allie in connection with her veterinary practice.

### ***Record Keeping***

71. The patient record described Allie as "bright and alert upon presentation" when she arrived at Texas A&M. This was not inconsistent with her having an elevated temperature and increased respiratory effort, which were also noted at intake.
72. Allie was accurately described as both "bright and alert" and "very compromised." These are not necessarily contradictory terms.
73. The video recorded in Allie's stall is not part of the patient record that was maintained for Allie.

74. Veterinary students at Texas A&M typically write up patients' medical records, which are later reviewed and edited by the supervising resident and clinician.
75. Following Allie's death, Respondent and Dr. Doering took the unusual step of telling their veterinary student that they would handle all further recordkeeping and communications with Allie's owner.
76. The patient record includes surgical notes and a surgical report that reference Allie's "failed attempts to stand" following surgery on December 18, but they do not disclose that Respondent used a hotshot as part of those efforts.
77. The progress notes in the medical record from December 18 and 19 do not mention that a hotshot was used.
78. A four-page Case Summary summarizing Allie's treatment and care at Texas A&M said only that Allie had been "assisted with head and tail ropes" in efforts to get her to stand on December 18, and that "the large animal lift was used to assist the mare to stand" on December 19, and that those efforts were unsuccessful. The Case Summary did not mention the hotshot at all, let alone disclose the extent of Allie's ordeal while in the animal lift.
79. The only place the hotshot is mentioned in Texas A&M's records is in the client communications report that Respondent prepared on December 20, 2019.
80. Client communications are maintained by Texas A&M but are not part of the patient record and are not provided to a patient's owner.
81. Respondent deliberately failed to mention her use of the hotshot in the records that would be provided to Allie's owners.
82. Even if the client communications report were considered part of the patient record, Respondent failed to adequately describe or disclose her use of the hotshot on December 18, or Allie's response to that use. She stated only, "I had tried the hotshot on her several times and she made no effort to stand," but gave no additional information about her use of the hotshot that day.



83. Even if the client communications report were considered part of the patient record, Respondent failed to adequately describe or disclose the nature and extent of her use of the hotshot on December 19. She stated that “I really pushed her with the hotshot to make her want to stand up on her own and she just wouldn’t even try to stand,” but did not elaborate on how long Allie had been in the sling; how long Respondent had used the hotshot; where she had prodded and shocked Allie with the device, or how many times; how long a break Allie had been given; or how Allie’s responses had changed throughout the approximately 34 minutes she had been in the sling.
84. With respect to her use of the hotshot, Respondent failed to provide required information about the procedures performed/treatment given and results in Allie’s patient record.

### ***Sanctions Factors***

85. There is no evidence that Respondent’s actions posed any hazard to the public health, safety, or welfare; that they threatened or caused economic harm; or that Respondent has a history of previous violations.
86. Respondent is not new to the practice of veterinary medicine.
87. Respondent did not try to correct her violations or make restitution.
88. Facility policies and conditions did not contribute to Respondent’s violations.
89. Respondent’s actions were extreme, cruel, and potentially felonious.
90. One of Respondent’s violations—her dishonesty in omitting reference to the hotshot in Allie’s patient record—inherently involves a degree of untruthfulness that is related to Respondent’s other violations.
91. The violations in this case were isolated and involved only one patient.
92. There is no history of prior disciplinary action against Respondent in Texas or any other state where she has been licensed to practice.
93. Respondent’s violations are very serious and raise deep concerns about her willingness or ability to respond empathetically and reasonably to her patients,

to communicate effectively with colleagues and students, and to truthfully record her actions in patient records.

### ***Procedural Background***

94. A Texas A&M veterinary technician filed a complaint with the Board regarding Respondent's use of the hotshot on Allie. The technician downloaded a copy of the video and provided it to the Board with her complaint.
95. On March 11, 2022, Staff referred this case to the State Office of Administrative Hearings (SOAH) and filed its Complaint. The Complaint was not subsequently amended.
96. Respondent moved for a protective order and asked to postpone setting the hearing and avoid discovery because she was under criminal indictment for charges related to Staff's claims in this case. Staff opposed that relief, and the request for a protective order was denied by the Administrative Law Judges (ALJs).
97. No further motion seeking delay or protection was made prior to the hearing, nor did either party apprise the ALJs of any further developments in the criminal proceeding.
98. On May 3, 2022, the Board's staff (Staff) issued its Notice of Administrative Hearing to Respondent, which attached and incorporated the Complaint. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and either a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
99. The hearing on the merits was held via Zoom videoconference on February 7-9, 2023, before SOAH ALJs Sarah Starnes and Shelly M. Doggett. Assistant Attorneys General Jerry Bergman and Glen Imes represented Staff, and attorney Donald Ferrill represented Respondent.

100. At the outset of the hearing, Respondent re-urged her argument that the hearing should be postponed until the related criminal proceeding had concluded. The ALJs denied that request.
101. The record closed on June 26, 2023, after submission of written closing arguments by the parties.
102. Staff raised several claims in its closing briefs that were not alleged in the Complaint. Specifically, Staff did not plead claims that Respondent fell below the standard of care because she did not try all other reasonably available avenues of treatment before resorting to use of the hotshot; that Respondent fell below the standard of care because she did not properly apply and/or use the large animal lift; or that Allie's treatment was unauthorized by her owner.

## VII. CONCLUSIONS OF LAW

1. The Board has jurisdiction and authority to take disciplinary action against a licensee who engages in dishonest or illegal practices in, or connected with, the practice of veterinary medicine; who violates the Board's rules of professional conduct; or performs or prescribes unauthorized treatment. Tex. Occ. Code §§ 801.401, .402(4), (6), (12).
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code Ch. 2003; Tex. Occ. Code § 801.407.
3. Pendency of criminal investigation does not affect a contemporaneous administrative proceeding based on the same facts or parties. *Gebhardt v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App.—San Antonio 1995, no writ); *Closs v. Goose Creek Consol. Indep. Sch. Dist.*, 874 S.W.2d 859, 874 (Tex. App.—Texarkana 1994, no writ); *McInnis v. State*, 618 S.W.2d 389, 392–93 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.).
4. Respondent received proper and timely notice of the hearing and of the claims Staff asserted in its Complaint. Tex. Gov't Code §§ 2001.051-.052.

5. Staff had the burden of proving the case by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427. *Granek v. Tex. St. Bd. of Med. Examn'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).
6. Respondent is subject to disciplinary action because the manner and duration of her hotshot use on December 19, including her aggressive use of the hotshot on sensitive areas, fell below the standard of care, in violation of the Board's rules of professional conduct. Tex. Occ. Code § 801.402(6); 22 Tex. Admin. Code § 573.22.
7. A person commits the criminal offense of cruelty to livestock animals if they intentionally and knowingly torture a livestock animal, including a horse. Torture includes any act that causes unjustifiable pain or suffering. Tex. Penal Code § 42.09.
8. A preponderance of the evidence shows that Respondent committed the offense of cruelty to a livestock animal. Tex. Penal Code § 42.09; 22 Tex. Admin. Code § 573.4.
9. Respondent is subject to disciplinary action because by committing the offense of cruelty to a livestock animal, she engaged in an illegal practice connected with her practice of veterinary medicine. Tex. Occ. Code § 801.402(4).
10. Respondent is subject to disciplinary action because by committing the offense of cruelty to a livestock animal, she failed to adhere to the law in her professional practice, in violation of the Board's rules of professional conduct. Tex. Occ. Code § 801.402(6); 22 Tex. Admin. Code § 573.4.
11. Respondent is subject to disciplinary action because in excessively using the hotshot, she performed unnecessary treatment on Allie. Tex. Occ. Code § 801.402(12).
12. Respondent is subject to disciplinary action because her patient record for Allie did not include the hotshot treatment given to Allie or the results of that treatment, in violation of the Board's rules of professional conduct. Tex. Occ. Code § 801.402(6); 22 Tex. Admin. Code § 573.52(a)(9).

13. Respondent is subject to disciplinary action because her failure to disclose her extensive use of the hotshot in the patient record was a dishonest practice in connection with her veterinary practice, in violation of Texas Occupations Code § 801.402(4).
14. The Board has promulgated a Schedule of Sanctions that must be considered by the ALJs and the Board in determining the appropriate sanctions. Tex. Occ. Code §§ 801.407(c), .411; 22 Tex. Admin. Code § 575.25.
15. Under the Board's Schedule of Sanctions, Respondent's violations each constitute Class A violations. 22 Tex. Admin. Code § 575.25.
16. As a sanction for her violations, and pursuant to its authority in Texas Occupations Code section 801.401, the Board should:
  - impose a five-year suspension of Respondent's veterinary license, with two years enforced and three years probated, and with reasonable practice limitations during the probationary term, such as requiring supervision in Respondent's veterinary practice and teaching;
  - require Respondent to complete continuing education in recordkeeping, professional accountability, leadership, and/or other topics the Board deems appropriate; and
  - impose \$15,000 in administrative penalties: \$5,000 for using the hotshot in a manner that fell below the standard of care, constituted unnecessary treatment, and violated animal cruelty law; \$5,000 for Respondent's failure to accurately document her use of the hotshot; and \$5,000 for her dishonest practice of obscuring or omitting references to the hotshot in the patient record.

**Signed August 22, 2023**

*Sarah Starnes*

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Sarah Starnes

Administrative Law Judge

*Shelly M. Doggett*

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Shelly M. Doggett

Administrative Law Judge

**AGENDA ITEM 9**

**TAB 9**

**CONSIDERATION AND POSSIBLE RECOMMENDATION TO THE  
TEXAS COMMISSION OF LICENSING AND REGULATION  
REGARDING APPROVAL OF AGREED ORDERS**

*(Ms. Phelps)*

**AGENDA ITEM 10**

**TAB 10**

**CONSIDERATION AND POSSIBLE RECOMMENDATION TO THE  
COMMISSION OF LICENSING AND REGULATION REGARDING  
DISMISSAL OF CASES FROM INFORMAL CONFERENCE**

*(Ms. Phelps)*



**AGENDA ITEM 11**

**TAB 11**

**CONSIDERATION AND POSSIBLE RECOMMENDATION TO  
THE TEXAS COMMISSION OF LICENSING AND REGULATION  
REGARDING DISMISSAL OF CASES FROM STAFF  
CONFERENCE**

*(Ms. Phelps)*

**AGENDA ITEM 12**

**TAB 12**

**CONSIDERATION AND POSSIBLE RECOMMENDATION TO THE  
TEXAS COMMISSION OF LICENSING AND REGULATION  
REGARDING DISMISSAL OF CASES FROM MEDICAL REVIEW**

*(Ms. Phelps)*

## **AGENDA ITEM 13**

### **DISCUSSION OF POSSIBLE AGENDA ITEMS FOR FUTURE BOARD MEETINGS**

*(Dr. Golla)*

## **AGENDA ITEM 14**

### **EXECUTIVE SESSION TO DISCUSS PENDING AND CONTEMPLATED LITIGATION**

*(Dr. Golla)*

I move that we go into Executive Session for private consultation and advice of counsel concerning pending or contemplated litigation, including administrative proceedings, or settlement offer and/or possible disciplinary actions under the authority of the Texas Open Meetings Act, Chapter 551 of the Government Code.

**AGENDA ITEM 15**

**RETURN FROM EXECUTIVE SESSION**

**RETURN TO OPEN SESSION STATEMENT:**

There was no final action, decision, or vote with regard to any matter considered or discussed in executive session. The executive session ended at (\_\_\_\_) on (\_\_\_\_). A certified agenda of the executive session was made.

**Motion to approve all orders:**

*I move that we approve all Agreed Orders as presented.*

**Motion regarding orders that were pulled and not approved as a group:**

*I move that we do not approve Agreed Order(s) \_\_\_\_\_  
and direct staff to \_\_\_\_\_.*

**AGENDA ITEM 16**

**MEETING ADJOURN**