TASMANIAN RACING APPEAL BOARD

Appeal No 7 of 2014/15

Panel:	**Mr Tom Cox (Chairman)** **Mr Graham Elliott** **Mr William Burnett**	**Appellant:**	**Ms Hayley McCarthy**
Appearances:	**Mr Paul O'Sullivan on behalf of the appellant** **Mr Anthony O'Connell on behalf of the stewards**	**Rule:**	**Thoroughbred Rule AR81A(1)(a)**
Heard at:	**Launceston**	**Penalty:**	**A 6 week suspension**
Date:	**28 October 2014**	**Result:**	**(1) Appeal upheld** **(2) Penalty reduced to a three week suspension**

REASONS FOR DECISION

1. This is an appeal by apprentice jockey, Hayley McCarthy (the appellant), against the severity of the imposition of a six week suspension of her jockey's licence.

2. The penalty was handed down by stewards at an inquiry held on 20 October 2014, and the imposition of the penalty back dated to 11 October 2014.

3. At the inquiry the appellant pleaded guilty to a charge under AR81A(1)(a) which relevantly provides:

   "Any rider commits an offence and may be penalised if – a sample taken from him (her) is found upon analysis to contain a substance banned under AR81B."

4. An analysis of a sample of urine taken from the appellant at the Devonport Racing Club meeting on 28 September 2014 disclosed the presence of O*xazepam* and *Temazepam*.

5. In July 2013 the appellant attended her general practitioner, Dr Lyall, complaining of insomnia. Dr Lyall prescribed one course of *Temazepam* (10mg tablets) without repeat. From that time until the date of this offence – over one year –the appellant, from time to time, would take one or two tablets to assist her to sleep. By her counsel, she submitted, and we accept, that her use of *Temazepam* was sparing throughout this extended period.

6. In December 2013 the appellant returned a positive reading for a prohibited substance, namely a diuretic. As a result of that contravention of the rules, she was suspended for a period of three weeks. After her suspension in December 2013 she was required to undertake further testing to satisfy the stewards that she was not taking the banned diuretic substance. In the course of that testing, she so satisfied the stewards, but also returned a positive test for *Temazepam*.

7. The appellant's mother gave the following evidence as to this matter:

"*When Hayley returned the same positive test for Temaz in December 2013, Mr O'Connell advised me of the test and I told him it was a sleeping tablet, his casual reply was "oh okay". On Friday 10 October I mentioned this (to) Mr O'Connell, he said to me that he could not remember any such result from Hayley's previous sample.*

... because she was having trouble sleeping and he actually asked me about it, and I said it was a sleeping tablet Temaz at the time. He really showed no concern then, so I ... and I sort of feel like I'm remiss because I didn't look it up. He didn't show me any concern so he sort of brushed it off."

8. Mr O'Connell gave evidence, which we accept, that he has no recollection of the content of that conversation.

9. We have no evidence relating to the earlier testing.

10. The appellant's counsel contends that we should find that as far as the appellant's knowledge was concerned, from December 2013, she did not consider herself to be in breach of the rules for taking a prohibited substance, namely *Temazepam*, for she did not regard it as a prohibited substance on account of her mother's discussion with Mr O'Connell and other matters, which we will refer to shortly.

11. We do not find that Mr O'Connell acquiesced in any breach of the rules or that he expressly or implicitly approved the appellant's taking of *Tamazepan*. We do find though that it is likely that the appellant believed that the substance was not prohibited, having regard to her mother's understanding of the conversation with Mr O'Connell.

12. The other specific matters of note, referred to above, include:

    a) That the appellant disclosed "*Tamazepan*" on the sample provided.

    b) That her doctor prescribed the substance and that if it were prohibited he would have, in the appellant's mind, advised her.

13. More generally, we note the appellant, only 15 days after testing positive, submitted to testing, which was clear of any prohibited substance. Further, that she took just one tablet on the night before the race and, although the reading was high, that is explicable on account of her dehydration.

14. Having regard to these matters, this case does not present as a typical breach of this rule. The appellant did not hide her use of the substance from the stewards. On the contrary, she disclosed it on the sample. She laboured under a misapprehension that the substance she was taking, albeit sparingly, was not prohibited. It was prescribed by a general practitioner.

15. Finally, we acknowledge the evidence of Dr Lyall that the appellant's use of *Tamazepam*, in accordance with the script, would not have posed a risk of harm to her or other jockeys competing in a race. This evidence should not be elevated too far. The use of prohibited substances carries with it the risk that a jockey may be affected and pose a risk to him or herself and others in a race. The quantity of such a substance and the time when it is taken, along with other variables, would no doubt impact on the degree to which it may affect the consumer. We do not accept Dr Lyall's statement without reservation.

16. Although the appellant was in breach of this rule before, and acknowledging the protective nature of the rule, we consider that the circumstances of this case warrant a reduction in the period of suspension.

17. In all the circumstances, the Board upholds the appeal, quashes the penalty imposed by the stewards and imposes a substitute penalty of a three week suspension.

18. We order that the appellant have her deposit returned to her pursuant to Section 34(2) of the *Racing Regulation Act 2004*. The appeal having been successful we make no order as to transcription costs.