TASMANIAN RACING APPEAL BOARD

Appeal No 8 of 2015/16 – Gary Bishop

Panel:	**Mr Tom Cox (Chair)** **Ms Kate Cuthbertson** **Dr Sue Martin**	**Appellant:**	**Mr Gary Bishop**
Appearances:	**Mr Greg Richardson on behalf of the appellant** **Mr Paul Turner on behalf of stewards**	**Rules:**	**Australian Harness Rules** **(1) 196A(1)(ii)** **(2) 193(3)** **(3) 196B (1)**
Heard at:	**Launceston**	**Penalties:**	**Disqualified:** **(1) Three (3) years** **(2) Three (3) months** **(3) Two (2) months** **To be served concurrently**
Hearing Date: **Date decision handed down**	**12 January 2016** **18 January 2016**	**Results:**	**(1) Varied to a two (2) year disqualification** **(2) Dismissed** **(3) Dismissed**

REASONS FOR DECISION

1. The appellant has been a licensed trainer and driver in the harness racing industry since 1961. On 24 November 2015 the stewards conducted an inquiry into the results of an analysis carried out on urine samples taken from *Cheshire Cat* following its run at the Launceston Pacing Club on 23 August 2015. *Cheshire Cat* won the race. The appellant is the trainer of *Cheshire Cat*.

2. The analysis of the urine samples taken from *Cheshire Cat* disclosed the presence of cobalt in excess of the threshold limit of 200 micrograms per litre of urine, as prescribed by r.188A(2). The initial testing conducted by Racing Analytical Services Ltd (RASL) revealed a reading of 279 micrograms per litre of urine. The confirmatory analysis was conducted by Racing Science Centre (RSC) and returned a result of 263 micrograms per litre of urine.

3. The stewards asked the appellant for an explanation and he provided the stewards with a full and frank account of his feeding and treatment regimes, which were supplemented by the provision of comprehensive and meticulous treatment records.

4. As a result of the appellant's account and the supporting documentary evidence, the stewards proceeded to charge and find the appellant in breach of nine offences contrary to the rules of racing.

5. The first charge, contrary to AHR196A(1)(ii), concerned the administration of cobalt to *Cheshire Cat* on 23 August 2015 with the products B12, Hemoplex and Coforta, all of which contain in varying degrees and forms, cobalt. For this breach of the rules the stewards imposed a period of disqualification of three years.

6. A further four charges were laid and found proved, contrary to AHR193(3), for the administration of medications, including Theracalcuim, Coforta, Amino-lite, Hemoplex and French Kyno, to *Cheshire Cat* on four race days, being 20 July 2015, 2 August 2015, 9 August 2015 and 30 August 2015.

7. For these charges the stewards imposed a period of disqualification of three months for each charge with each period of disqualification to be served concurrently with the penalty on the first charge.

8. Further, the stewards charged and found the appellant in breach of four charges in contravention of AHR196B(1) for administering injections of L-carnitine and Coforta to *Cheshire Cat* within one clear day of racing on four occasions, being on 1 August 2015, 8 August 2015, 22 August 2015 and 29 August 2015. In relation to these offences, the stewards imposed a period of disqualification of two months on each charge with each period of disqualification to be served concurrently to the penalties imposed on all other charges.

9. As a result the appellant was disqualified for a period of three years. The appellant does not seek to disturb any penalty other than the period of disqualification of three years imposed on the first charge. Having said that, we are mindful of the circumstances giving rise to the other charges and the penalties that were imposed in determining whether, in all of the circumstances of this case, the effective period of disqualification of three years was warranted or excessive.

The Appellant's Contentions

10. The appellant's contentions, in support of the proposition that the period of disqualification is manifestly excessive, are as follows:

    (a) The quantity of cobalt, upon analysis, was modest. Readings much higher than that obtained in respect of *Cheshire Cat* are well known to have occurred.

    (b) The appellant's personal circumstances, including that he was 70 years of age at the time of the offence, is now 71 years of age, has been a licensed trainer and driver for a considerable period of time, and is generally in poor health, are matters weighing in favour of mitigation.

    (c) The period of disqualification, at this time of the appellant's career and given his state of health, is likely to be career ending.

    (d) The appellant received delivery of *Cheshire Cat* from Melbourne in around May 2015. The horse was in poor condition. The appellant's primary motivation was to improve the horse's condition in order that it could race, which it first did on 20 July 2015 in Devonport.

    (e) The appellant employed a comprehensive treatment regime involving substances containing cobalt without any awareness or comprehension that in doing so there was a risk that the level of cobalt in *Cheshire Cat* could exceed the 200mcg threshold. The substances he administered are approved for use in horses. Cobalt is contained in Cynocobalamin or B12 which is an ingredient in each of the three substances cited in the particulars of the AHR196A(1)(ii) charge. In addition, Hemoplex contains cobalt gluconate, a more readily absorbed cobalt salt. It was acknowledged that cobalt was a prohibited substance and was topical in the industry on account of various high profile trainers having been charged with presenting horses with that substance.

    (f) As part of his treatment regime he consulted a veterinarian on the mainland who provided him with advice on blood samples taken from the appellant's horses and forwarded to that veterinarian for comment and treatment advice. At no stage in that process was he advised that his treatment regime was likely to produce a reading of cobalt in excess of the threshold or that his treatment regime was otherwise likely to result in, or present the risk of, a presentation of one of his horses with a prohibited substance. Having said that, the appellant does not contend that he specifically sought that advice but rather that his practice was to send the samples for comment in order to monitor the condition of his horses and receive general advice on their condition. He says, in that process, he considered he guarded himself against the risk of presenting any horses with a prohibited substance.

(g) Although he provided a variety of substances to *Cheshire Cat*, he did not, at any stage, anticipate that he would be in breach of the rules of racing.

(h) As part of his treatment regime, he kept a meticulous record of any substances given to his horses.

(i) As a result of providing stewards with his records and providing a full and frank account, the additional charges were able to be laid and, indeed, the first charge was able to be levied on the basis that he administered the prohibited substance rather than merely presented the horse with a prohibited substance.

(j) The evidence given by the appellant and contained in his treatment records showed that he was administering Hemoplex to *Cheshire Cat* at levels in excess of those recommended by the manufacturer. He says he did so because his advice from the veterinarian on the mainland was that the blood samples for *Cheshire Cat* were not demonstrating a marked improvement in his condition.

(k) As a result of his admissions and the disqualification of *Cheshire Cat* from other races, he will have to repay Tasracing the sum of approximately $6,000 in prize money won by the horse on the race days to which the 193(3) and 196B(1) breaches relate. This is in addition to the $5,000 prize money he lost as a result of *Cheshire Cat's* disqualification from the race the subject of the first charge.

(l) He has suffered further financial burden as a result of having to agist five of his seven horses at a cost of $15 each per week. The remaining two horses, a brood mare and foal will also need to be agisted or otherwise dealt with once the foal has been weaned.

(m) The appellant has a prior relevant breach for presenting a horse with Valium in 1989. Little further facts were given of this matter, suffice to note that he was disqualified for a period of four months.

(n) There was also a relevant breach of the prohibited substance rules in 2010 when he presented a horse not free from a prohibited substance, namely morphine, as a result of one of his horses ingesting opium poppies on his property without the appellant's knowledge of their presence.

(o) Ultimately, the appellant contended that his present conduct, insofar as it related to the administration and presentation of *Cheshire Cat* with a prohibited substance, namely cobalt in excess of the 200mcg limit, was inadvertent. In that event, and taking into account his personal circumstances, the financial impact caused by all the breaches of the rules of racing and the period of disqualification imposed, the appellant says this Board should intervene and reduce the period of disqualification.

11. In response, the stewards did not take issue with any of the appellant's submissions in so far as they related to the appellant's personal circumstances or the financial impost that has resulted and will result in the future as a result of these proceedings. It was contended, however, that the appellant's culpability ought more accurately be described as "reckless indifference", rather than "inadvertence". The basis for that submission was essentially as follows:

(a) There was no dispute that the appellant engaged in an aggressive treatment regime for this horse in his care.

(b) That regime involved substances which the appellant ought to have known contained cobalt or, at least, may have contained cobalt.

(c) As a trainer, the appellant owed a duty to keep abreast of the rules of racing and the prohibition on the administration and presentation of horses with cobalt in excess of the 200mcg limit. In addition, he was required to take steps to guard against the risk that any of his horses were so administered or presented with a prohibited substance.

(d) There has been no evidence or submission on behalf of the appellant that he took any specific steps to guard against that specific risk. At the very least, the appellant was obliged to review his treatment regime from time to time. By failing to do so, it could not be said that he took any positive steps to advert the risk that has now eventuated.

(e) Compounding matters is the fact that the appellant used some of the cobalt-containing products in excess of the dosage recommended on the label. To take this course was fraught with risk.

12. The stewards also relied on more general matters, including that the use of prohibited substances has a deleterious effect on the integrity of the industry and its perception by the public, and that the welfare of horses is put at risk by the use of prohibited substances. There was no dispute about those propositions, which we accept.

13. It is for this Board to categorise the appellant's conduct within the context of the facts, circumstances and considerations that were generally agreed between the parties before considering what, in all the circumstances, was the appropriate penalty in this case.

14. In our view, the appellant's conduct could not be described as inadvertent for the reasons articulated by the stewards. An aggressive treatment regime should be accompanied by a robust strategy to monitor the risk that a horse will present with a prohibited substance. At no stage did the appellant turn his mind to that risk and review the regime. We do not accept that the appellant's interaction with the mainland veterinarian in any way guarded against that risk.

15. Although one of the products he used, namely Hemoplex, gave clear notice of the presence of cobalt, we are inclined to stop short of categorising the appellant's conduct as reckless and, instead, find it complacent and indifferent to the risk that presented and materialised. It appears that the appellant simply did not turn his mind to the content of the substances that formed part of the treatment regime. This is explicable, but not excusable, by reason of his explanation that he did not believe that cobalt was a substance that was likely to be present in the products he was using, but was a more clandestine substance.

16. We have briefly reviewed a number of mainland decisions concerning, in the main, the presentation of a horse with cobalt in excess of the prescribed limit. It is not necessary to set them out in any detail. It appears that the periods of disqualification in those cases were in the order of two and a half to three years. Nevertheless, we do not consider that those cases set any tariff, nor that in cases of this type this Board should be prescriptive in its approach to what is reasonable and just in the circumstances of each case that comes before it.

17. Having regard to the matters above, in particular the relatively moderate level of the appellant's culpability, the otherwise agreed matters between the parties, the appellant's cooperation leading to the further charges, penalties and financial imposts, and the general matters of principle raised by the stewards, we have formed the view that a period of disqualification of two years for the first charge is appropriate in *this* case. We will not interfere with the penalties imposed on the other charges; they stand as a proper condemnation of the appellant's conduct in administering medications to his horses on race day and injecting his horses with substances within one clear day of racing.

18. In accordance with s.34(1A) of the *Racing Regulation Act 2004*, 50% of the appellant's prescribed deposit is to be forfeited to the Secretary of the Department. The appellant is also ordered to pay 50% of the cost incurred in the preparation of the transcript in accordance with s.34(4A