TASMANIAN RACING APPEAL BOARD

Appeal No. 02 of 2019/2020

Panel:	**Kate Brown (Chair)** **Wendy Kennedy (Member)** **Rod Lester (Member)**	**Appellant:**	**Douglas Nettlefold**
Appearances:	**Steven Shinn (on behalf of the Stewards)** **Anthony O'Connell (on behalf of the Appellant)**	**Rules:**	**AHRR 190 (1)(2)(4)**
Heard at:	**Office of Racing Integrity** **Launceston** **Tasmania**	**Penalty:**	**Fine of $2,000 with $1,000 wholly suspended for 12 months**
Date:	**20 November 2019, reconvened on 17 December 2019, and 11 February 2020**	**Result:**	**Dismissed**

REASONS FOR DECISION

1. The Tasmanian Racing Appeals Board heard an appeal against the conviction and penalty imposed on licenced harness trainer Douglas Nettlefold for an offence under Australian Harness Racing Rules (AHRR) 190 (1)(2)(4), which states that:

   190. (1) A horse shall be presented for a race free of prohibited substances.
   (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.
   ….
   (4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.

2. The particulars of the charge were detailed by the stewards as follows:

   CHAIRMAN: *… that you Mr Douglas Nettlefold as the recorded trainer of the Standardbred Blame It On Me when it raced at the Tasmanian Trotting Club in race four, the Tasracing Invictus Final on the 14th of July 2019 presented that filly to race when not free of a prohibited substance, as evidenced by a pre-race urine sample taken on that night returning arsenic at a level greater than 0.30 nanograms per millilitre as detailed on the evidentiary certificates from Racing Analytical*

Services and ChemCentre for sample V619415, the level greater than 0.3 nanograms per millilitre being a prohibited substance under Australian Harness Racing Rule 188A(2)(b).

3. The appellant was found in breach of AHRR 190 (1)(2)(4), and fined $2000 with $1000 wholly suspended for a period of 12 months under AR 190(1)(2)(4).

4. The hearing was characterized by obfuscation, irrelevant material, and confusing and ever changing grounds of appeal and submissions. The Board gained very little assistance from either party. What was essentially in dispute was what use could be made of the results of testing on the samples taken from *Blame it On Me* on the 14th of July 2019, however the appellant's grounds of appeal in their final form (settled upon with the leave of the Board at the end of the first day of hearing) were more prolix than that.

5. It is worth noting that pursuant to s.30(6) of the *Racing Regulation Act 2004* hearings before the Board are to be conducted with as little formality and technicality, and with as much expedition as a proper consideration of the appeal permits, and in accordance with the rules of natural justice amongst other considerations.

Ground One

That there is no properly approved drug testing laboratory, therefore, there can be no certificate to give rise to the evidentiary presumption in Australian Harness Racing Rule (AHRR) 191.

6. In Tasmania there is no procedure set out in the rules for approval of a testing laboratory. That being the case the approval process and its outcomes are at the discretion of the Controlling Body, in this case the Office of Racing Integrity (ORI). The fact that other states have approved processes for appointment of such laboratories does not have any bearing on that. The evidence was clear that ORI routinely engages both testing laboratories used to test the samples taken from *Blame It On Me*, and it is implicit that in so engaging those organisations ORI has exercised its discretion to approve them, and they therefore can issue evidentiary certificates in accordance with AHRR 191(1). The ground fails.

Ground Two

That Denise McMaster who officiated as a Steward at the Tasmanian Trotting Club meeting conducted on the 14th of July 2019 had no such power under the AHRR to physically take a swab sample from Blame It On Me. Given that no such power exists under the AHRR the swab is therefore non-compliant and has been taken by Ms McMaster outside the AHRR.

7. AHRR 189 provides:

(1) The Stewards may carry out tests and examinations to determine whether a prohibited substance was or is in or on a horse.

(2) A test or examination may be made at any time and place.
(3) A test or examination may be conducted on a horse alive or dead.
(4) For purposes of testing or examining the Stewards may take possession of a horse for such period and subject to such conditions as they think fit.
(5) The connections of a horse shall comply with any directions relating to testing and examining given by the Stewards.
(6) For purposes of testing and examining a horse the Stewards may use the services of a veterinary surgeon or other appropriately qualified person.
(7) Blood, urine, saliva, or other matter or samples or specimens may be taken from a horse for purposes of testing and examining and may be stored, frozen or otherwise dealt with, and shall be disposed of only as the Stewards may direct.
(8) Where the Stewards suspect that a prohibited substance was or is in or on a horse or that blood, urine, saliva, or other matter or sample or specimen taken from a horse may contain a prohibited substance, they may withdraw the horse from a race, bar it from racing for a period, or give such direction about the horse as they consider appropriate.
(9) It is an offence for a person to fail to comply with a direction given under sub rule (5) or sub rule (7) or sub rule (8) or to interfere with or prevent or endeavour to interfere with or prevent the carrying out of a test or examination.

8. Further AHRR 15 provides:

***15**. (1) Stewards are empowered ….*
(k) to inspect, examine or test in such manner as they consider appropriate any person, horse, racetrack, stable, stud, artificial breeding station or other place, item, document, equipment, vehicle or substance;

9. The Dictionary to the AHRR defines swabbing as follows:

***"Swab"** means the taking, or a procedure for the taking, of blood, urine, saliva, or other matter or sample or specimen from a horse for the purpose of testing for the presence of a prohibited substance and "positive swab" means that the swab, when tested, reveals such a presence.*

10. The unchallenged evidence was that Ms Macmaster was employed as a Steward at the race meeting in question. She was assigned swabbing duties.

11. In Tasmania it is the role of the swabbing Steward to take swabs and process them for testing. This is what occurred with respect to *Blame it On Me* on the evening of the 14th of July. Ms McMaster was acting in the course of her stewarding duties when she took the swab.

12. It is clear from the Rules that:

- Stewards are empowered to test or examine any horse as they consider appropriate at any time or place;
- urine may be taken from a horse for the purpose of testing and examining;

- for the purposes of testing or examining Stewards may use the services of a veterinary surgeon or other appropriately qualified person.

13. It was not contended testing or examining does not include swabbing, quite properly in the Board's view as to submit otherwise would make a nonsense of the rules.

14. The "may" in AHRR 189(6) is important. The *Acts Interpretation Act 1931* s.10A provides that *the word "may" is to be construed as being discretionary or enabling, as the context requires*. That is, that Stewards are permitted to use the services of a vet or other appropriately qualified person but it is at their discretion. Further it is implicit that if stewards have the discretion to delegate that function, then they must have the power to carry out that function themselves.

15. The Board finds that Ms McMaster had the power to take a swab sample from *Blame it On Me* in accordance with the powers conferred on Stewards in the AHRR. Ground 2 fails.

Ground three

In the alternative that the Board find that Ms McMaster was not working in the capacity of a Steward or that Stewards do have the power to physically take the swab samples under the AHRR, that Ms McMaster does not hold the status of an "appropriately qualified person" as stated in AHRR189(6).

16. Essentially this ground asserts that Ms McMaster was not appropriately qualified to take the swab. It also alludes to an argument that Ms McMaster was not working in the capacity of a Steward on the evening in question. There was no evidence going to this ground and it was not argued during the hearing. The Board accepts that Ms McMaster was working "in the capacity of a Steward".

17. As to Ms McMaster being an appropriately qualified person, having dismissed Ground 2 and having accepted that Stewards are empowered to take swabs, there is no need for the Board to consider whether or not Ms McMaster was appropriately qualified person for the purpose of the delegation of any power to test or examine. To the extent that the evidence canvassed this issue, the Board notes that Ms McMaster has no formal training or qualifications in either the practical aspects of obtaining a sample, or in the compliance requirements around ensuring the integrity of the sample once taken, but had on the job training when she commenced as a stewards and has a number of years' experience in that role. There was inconsistency between Ms Siggins and Ms McMaster as to whether the period of observation by Ms Siggins on the 26th of May 2019 was "training" or "an assessment". Training implies a level of direction and guidance which was not indicated by either in their evidence. The Board also has some concerns about Ms McMaster's particularity with the completion of the paperwork which will be addressed further below. However having dismissed Ground 2 it is not necessary for the Board to determine

whether the hands on training and experience of Ms McMaster amounts to "appropriate qualifications". Ground 3 fails.

Ground Four

That the procedure adopted by the Stewards from the time of selecting Blame It On Me to be pre-race swabbed until the time the swab was delivered to RASL was materially flawed. That is it did not conform to the procedures to the procedures used to take swabs and the legislation associated with packing biologic samples for transport (those being the International Air Transport Association procedure P1650 and the Australian Civil Aviation Amendment Regulatory Act 2003 Part 92).

Ground Five

That the procedure adopted by both RASL and ChemCentre was materially flawed in that it did not conform to the requirements of rule 191(7).

18. It is convenient to deal with these two grounds together as they both go to AHRR 191(7) which provides that certificates of analysis *do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed*.

19. Much of hearing was spent on this aspect of the appeal. As well as the evidence from the original enquiry and the appeal papers the Board heard from both Paul Zahra from RASL for the respondent stewards and Ross Tinniswood who was relied upon by the appellant. It is convenient to note at this point that where there was conflict between Mr Zahra's evidence and that of Mr Tinniswood (which there was about almost every aspect of each other's evidence) the Board prefers that of Mr Zahra. That is not solely because Mr Zahra's expertise lies in the daily handling and analysing of samples such as those in question, whereas Mr Tinniswood's qualifications are in public health medicine. It is also because the Board's assessment of the demeanour and credit of each witness. Mr Zahra gave his evidence in a clear and comprehensive manner. He did not evade when challenged and his evidence was clearly founded on his bringing his experience and expertise to bear on the analysis of the samples and the circumstances surrounding those. He made appropriate concessions when he could not properly respond and his evidence was limited to that which was relevant to the appeal in question. At no stage did he cross the line from expert to advocate. He gave consistent and clear responses around the aspects of the evidence challenged by Mr Tinniswood.

20. Mr Tinniswood's evidence was given in such a manner that the Board formed the view that he was an advocate against RASL and Mr Zahra, rather than presenting impartial expert evidence as to the issues before the Board. His expertise is in the area of diagnostic microbiology (unlike Mr Zahra who has qualification in chemistry). Additionally Mr Tinniswood's demeanour significantly undermined his evidence. He was belligerent, dogmatic, and unresponsive when challenged and given to exaggeration. He frequently

interrupted and spoke over the top of others. The substance of his evidence fell well short of that which would persuade the Board that any deficiencies in process that may have been identified could have reasonably considered to have had a material impact upon the reliability of the test results.

21. In terms of the evidence itself, the Board finds:

a) Ms McMaster took the swabs from *Blame It On Me* in the course of her duties at the race meeting.
b) The process she undertook was set out in her statement signed on the 24th of September 2019, which was not prepared by her but was adopted by her
c) That was done in the "swabbing room" at Elwick.
d) Ms McMaster completed the paperwork. The paperwork was poorly completed in a number of respects. It is noted for instance that Sample Collection and Custody Authority (document 002/2 in appeal folder 1) is incomplete in that there is no signature where the swabbing steward should sign. The part of the document to be completed by the officiating steward is signed by Ms McMaster but also refers to having received the samples from "Denise McMaster" as the swabbing steward.
e) The samples taken on the evening were forwarded to RASL in accordance with ORI's standard practice and procedures for so doing.
f) The Certificate of Analysis dated the 13th of August 2019 notes that on receipt at RASL on the 15th of July 2019 the status of Sample number V619415 is described as "All seals intact. Urine leaked". It indicates an Arsenic in Equine Urine level of 0.47 ug/mL.
g) On the 21st of August 2019 a stable inspection was carried out by Steward Laura Lord, and photos taken.
h) The reserve sample was then sent to ChemCentre. Their Certificate of Analysis dated 26 August 2019 indicated an Arsenic level of 0.46ug/mL. The Sample status is described as "sample received in good order with all seals intact".

22. Essentially both the A and B samples indicate an amount of leakage. However they had almost the same arsenic level. As Mr Zahra's witness statement of the 3rd of December paragraph 8 provides:

The excellent agreement between the reported concentrations of the "A" and "B" samples provide very strong reassurance that Dr Chapman's theory of possible sample contamination by substances in the sample bags did not occur. If there were "substances" in the sample bag that led to arsenic contamination, the following requirements would have had to be met:
a. Both pockets must have contained "substances" capable of leaching arsenic into urine
b. Both bottles must have leaked urine into their sample pockets
c. Independently, the exact amounts of urine containing the requisite amount of arsenic would have had to have found their way back into the urine bottles to cause both urine samples to have arsenic concentrations in strong agreement (0.47 and 0.46 mg/L)

This scenario is highly unlikely.

23. The Board expressly adopts this analysis of the evidence of Mr Zahra.

24. The photographs taken by Ms Lord on the 21st of August 2019 during the stable inspection show fence posts which have been heavily chewed. It was accepted that those posts were in the paddock that *Blame It On Me* had been in for three quarters of her life. It was accepted that they had almost certainly been chewed by *Blame It On Me*. Samples were taken from the fence posts on that occasion and analysed and showed arsenic levels of 2420mg/kg and 1920 mg/kg.

"Materially flawed"

25. The meaning of this phrase in AHRR 191(7) has been the subject of many appeals. The case of *Tabone v Harness Racing Victoria (Review and Regulation) [2019] VCAT 1701* (31 October 2019) contains a useful analysis of the more significant cases. It distinguishes a line of Queensland authorities and goes on to accept the following as being directly relevant to the interpretation of "materially flawed": *Racing Victoria Limited v Kavanagh [2017] VSCA 334*, *Williamson v Harness Racing Victoria [2013] VCAT 1864*, *Appeal of Mr Roy Roots* Racing Appeals Tribunal NSW 6 July 2012 and *Appeal of Mr Michael Shadlow*, Greyhound and Harness racing Appeals Tribunal NSW, 29 November 2006.

26. *Tabone* (at paragraph 34) adopts what was said by the Racing Appeals Tribunal NSW in *Roots* [at 23] as to what constitutes a "material flaw":

> *"It is therefore necessary to prove more than a failure to comply with guidelines and/or protocols. It is necessary to prove that the failure or failures caused the material flaw in the sampling process and therefore demonstrates a lack of integrity in the sampling process".*

27. The Tribunal in *Roots* went on to find [at 48-49] that:

> *"At its highest Mr [Roots] case is based upon conjecture. The evidence does not go to credible facts linking the failures with contamination.*
> *…Further if there were flaws, then the evidence does not establish that they were material. They are not material, in its plain English meaning, because they do not go to establish contamination or the possibility of it."*

28. In Tabone [at 33] the tribunal refers to *Williamson*, and that in that case the Judge concluded "*that none of the identified breaches [in process] either individually or in aggregate, constituted material flaws which in any way could reasonably undermine the integrity or the reliability of the sampling procedure, having regard to the other evidence".*

29. The Board adopts these interpretations of AHRR 191(7) of what is required to support a finding that a material flaw in process is required for the Certificates of Analysis to be rejected as prima facie evidence of the facts which they certify.

30. In this case the weight of the evidence suggests that there was leakage out of both the sample bottles, but no leakage into the bottles which would have contaminated the results.

31. There were breaches in process. Ms McMaster did not complete the paperwork properly. There was leakage of the sample bottles into the bags containing them. It is possible that there the lids on the bottles were not entirely secured or possibly in the transfer of urine to the sample bottles some urine fell on the outside of those bottles – but that is a matter of speculation. What is clear is that the two samples showed almost exactly the same arsenic level, and for that to be a result of tampering or contamination is highly unlikely as Mr Zahra made clear. The other material evidence before the board was that *Blame It On Me* was in a paddock where the fence posts had been treated with products containing arsenic, and which showed significant evidence of having been chewed.

32. Much was made of the issues around compliance with freight transport standards. It was not clear whether they bound ORI or the entity that ORI engaged to provide transport. More importantly for the purposes of this appeal there was no evidence that the lack of compliance by ORI or their agent was linked to any contamination of the samples.

33. In the context of all that evidence for the Board to be satisfied to the requisite standard that "*that the failure or failures caused the material flaw in the sampling process*" [Roots at 23 as above], would require a contortion of the reasoning that is illogical. However, the Board accepts that the evidence indicated a number of aspects in which ORI's practice falls short in terms of transparency and compliance.

34. The Board is satisfied that AHRR 191(7) is not made out, and accept the Certificates of Analysis from RASL and ChemCentre as prima facie evidence that *Blame It On Me* was presented to race on the 14th of July 2019 in breach of AHRR 190, in that it was presented to race with a urine arsenic level of greater than .30mg/mL - AHRR 188A(2)(b). Even were those certificates not accepted individually as prima facie evidence, when taken together and in the context of all the other evidence the Board would be satisfied to the requisite standard that *Blame it on Me* was presented to race with arsenic greater than the allowed level present in its urine. Grounds four and five of the appeal fail.

Ground Six

In relation to the Stewards issuing a penalty, the Stewards failed to properly consider the circumstances of this matter when determining penalty.

35. Unfortunately that part of the stewards inquiry which dealt with penalty was not recorded. However it is noted that almost all prohibited substance offences involve some form of disqualification. The penalty imposed on Mr Nettlefold was at the lower end of the range, being a $2000 fine with $1000 of that suspended which is on par with TRAB Appeal No. 08 of 2018-19, Steven Davis which was factually very similar.

36. It is noted that during then stable inspection on the 21st August 2019, Ms Lord had the following exchange with the appellant and his wife:

MS LORD:	*…Have you got any thoughts as to how that reading may have occurred?*
MR NETTLEFOLD:	*Just that we got treated posts.*
MS LORD:	*Right.*
MR NETTLEFOLD:	*I know that's the usual story but as you can see all of the posts are treated, like I say I didn't think I had any old ones left I thought they were all new ones.*
MS LORD:	*Right ok I think you still can buy CCA treated timber so you've got to be quite careful what timber you're purchasing.*
MRS NETTLEFOLD:	*We get most of ours from Roberts Bridgewater, we don't know what's got it and what hasn't, we just grab it as we buy it.*
MS LORD:	*I think they still are for rural purposes, still have that type of timber, I'm not sure but I think you can still purchase it.*
MR NETTLEFOD:	*Yep yep right, so we just buy it from Roberts and yeah that's it.*
MS LORD:	*Yeah ok alright. Do you administer any type of arsenic based substance?*
MR NETTLEFOD:	*No no I don't, outside of when she had a cold here she' got nothing…*

37. This exchange was put to Mr Nettlefold at the appeal and he expressly adopted it as being an accurate recording of the conversation and did not dispute its substance. It is noted that at the stewards inquiry he indicated that it was his practice to enquire of Roberts as to arsenic contamination prior to fencepost purchases, but also that posts were replaced as functionally necessary and that there may be older posts that predated any such enquiries. It was not clear whether the chewed and tested posts fell into that category or not. For the

purpose of penalty the Board accepts that Mr Nettlefold had taken some steps to minimise arsenic contamination, and was conscious of the need to do so.

38. The Board takes into account Mr Nettlefold's history within the racing industry and his good record. It also takes into account the loss of stake money which will be significant in this case. However the actual penalty imposed was at the lower end of the scale and did not involve a period of licence disqualification. The loss of prize money is taken into account but cannot take the place of the imposition of a penalty that is appropriate in all of the circumstances. The Board is satisfied the penalty should stand. Ground 6 fails.

39. Although the appeal was unsuccessful it is clear that ORI's processes were less rigorous than they could have been, and were not fully complied with. Whilst the Board found that there was no material flaw that could invalidate the test results, the practices and procedures around the taking and testing of these samples were of concern.

40. In accordance with s.34(1A) and (2)(a) 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) and (4B)(a) of the Act.