

TASMANIAN RACING APPEAL BOARD

Appeal No. 03 of 2021-22

Panel:	Dr Kim Backhouse (Chair) Patrick O'Halloran (Deputy Chair) Dr Suzanne Martin	Appellant:	Mr Vernon Poke
Adviser:	Nil		
Appearances:	Mr Ross Neal (Chair of Stewards - Thoroughbred) Mr Anthony O'Connell (on behalf of the appellant)	Rules:	AR 240 (2)
Heard at:	Elwick Racecourse GLENORCHY TAS	Penalty:	Fined \$2500 with \$1500 suspended for 12 months
Date:	8 November, 2021	Result:	Penalty varied to a fine of \$2000 with \$1000 suspended for 12 months

REASONS FOR DECISION

BACKGROUND

1. The appellant, Mr Poke was charged under AR 240 (2) as a result of an incident in Race 2 at Devonport Racecourse on 20 June 2021.

2) Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.

2. The charge was that Mr Poke, as the trainer of *Sizzkye* presented the mare to race when the mare was allegedly not free of a prohibited substance as evidenced by certificates¹ from Racing Analytical Services Ltd and ChemCentre Export Solutions.

¹ Certificate of Analysis 21R0089 – 6 August 2021.

3. The prohibited substance was Arsenic at a level above the prescribed threshold level of 0.30mg/l.
4. A Stewards' inquiry was held on 22 September 2021 at the Tasmanian Racing Club at the Devonport Racing Club on 20 June 2021.
5. This inquiry received documentary evidence from two laboratories mentioned above, as well as evidence tabled from an inspection of Mr Poke's stables. Stewards took into consideration the positive sample that was consistent with environmental contamination from CCA timber and noted that Mr Poke was aware of the problems with the use of CCA timber in racing stables.
6. The analysis of the urine sample taken from the mare disclosed the presence of arsenic in excess of the threshold limit prescribed in Part 2 Division 3 of Schedule 1 of the Australian Rules of Racing, namely 0.3- mg per litre in urine. The testing conducted by Racing Analytical Services Ltd (RASL) detected arsenic at a concentration level of 0.57mg/L.² The confirmatory analysis was conducted by ChemCentre and the detected arsenic contained in sample V728732 was 0.52 mg/L.
7. The appellant, Mr Poke submitted evidence at the inquiry of his husbandry practices in addition to a study into arsenic contamination in horses from the University of Melbourne.
8. Mr Poke was fined the sum of \$2500 with \$1500 suspended for 12 months on the provision that he does not reoffend under this Rule during this time.
9. Under the provisions of Rule AR240 (1) *Sizzkye* was disqualified from its first place in the MDN/Class 1 - 1880 metres at Devonport on 20 June 2021.

APPEAL

10. Mr Poke appealed the penalty he received for the breach of Rule AR 240 (2) on the basis the 'penalty was excessive given the circumstances of my case'.
11. The appellant and his representative Mr Anthony O'Connell were afforded the opportunity to present their case to the Panel members. In a similar vein, Mr Ross Neal on behalf of the Stewards was afforded the opportunity to discuss evidence from the race meet and Stewards' inquiry held on 20 June 2021.
12. During the course of the inquiry, the Mr Anthony O'Connell on behalf of the appellant explained that the arsenic poisoning may have been the result of *Sizzkye* chewing timber.
13. Further Mr O'Connell agreed that the prohibited substance offences were serious. Mr O'Connell acknowledged that the Regulator (ORI) initially took the

² Certificate Number: RS21/08744-B.

view that where it found that an ARSENIC positive was caused by the ingestion of CCA timber (through no fault of the trainer) that an education and counselling process occur.

14. Mr O'Connell submitted, with the passage of time, Regulators including ORI have taken a softer approach to the matter of penalty for Arsenic penalties when it has been determined that the chewing of CCA timber by an animal is the cause or probable cause of a positive arsenic sample.
15. Mr O'Connell further submitted that the precedent in Mullan's decision was similar to this case. He stated in writing that this decision fairly establishes a starting point for Arsenic offences given that these offences where CCA is found to be the cause or probable cause are now considered to below low level prohibited substance breaches.
16. Mr O'Connell argued that the penalty issued to the appellant be wholly suspended or if the Panel felt that his low culpability required a penalty for general deterrence, that such penalty be equal to or no greater to that what Mr Mullan received.
17. Mr Neal confirmed the view based on the evidence before the Panel that Mr Poke had breached Rule AR 240 (2) and was of the view that the penalty was reasonable under the circumstances.
18. The Panel spent considerable time listening to the submissions by Mr O'Connell. In the course of the submissions we heard the following four main points:
 - i. Mr Poke had an outstanding reputation in the industry;
 - ii. Mr Poke had an impeccable record in the industry;
 - iii. That personal integrity was important to Mr Poke and this adverse test result had affected his health; and
 - iv. There had been financial implications for his horse being disqualified.
19. Mr Neal provided a verbal submission to the Panel on behalf of the stewards.
20. Mr. Neal and Mr. O'Connell provide copies of various precedents referred to during the hearing. Mr O'Halloran also invited them to provide any further precedents they wish to submit.
21. Mr Anthony O'Connell on behalf of Mr Poke had submitted cases (via email to Susan Witek) to consider and further Mr Neal provided the Panel (via email to Susan Witek) with the decisions of Moss R and Miller B for the Western Australian jurisdiction.
22. Mr O'Connell believes in this instance the penalty is unfair.
23. Mr Neal submitted that the 'Penalties' imposed for Arsenic overages varied at a national level. The penalties levied ranged from fines through to periods of exclusion.

24. Mr Neal, in support of the Stewards position submitted two penalty decisions to consider from West Australia: 'Miller' where the penalty imposed was (\$2,000 fine - \$1,000 suspended).
25. In the decision of Miller a penalty of \$2000 was imposed (\$1000 of this being suspended). The Panel's view is that there are similarities with this Appeal including: -
- a. The strong likelihood that treated timber was the cause of the adverse test result;
 - b. Mr Poke's near unblemished record during his extensive time in the industry.
26. Mr Neal also emphasised the need of both specific and general deterrence and the fact that the industry must reduce the number of adverse drug tests results attributed to Arsenic.
27. Despite warnings being issued, offences in relation to the detection of Arsenic are continuing to occur and there was now a need for penalties to be in place to further encourage all trainers to take the appropriate cautions to prevent horses exceeding the threshold for this substance. In this regard trainers are again reminded to take all necessary steps to avoid horses being exposed to ingestion of CCA treated timber or other products which may contain Arsenic.
28. The Panel considered the following matters are of particular relevance in determining penalty:
- i. The use of prohibited substances in racing has a deleterious effect on the integrity of the industry and its perception by the public, so the principles of general deterrence need to be considered;
 - ii. The elevated arsenic levels in *Sizzkye* appear to be brought about by the mare chewing the timber fencing in her yard;
 - iii. Given the level of notice provided to the industry as a whole as to the risk of arsenic detection if CCA treated timber is used in the construction of horse yards, the trainer ought to have been aware of such risk
 - iv. The appellant's extensive time in the industry, his near unblemished record and the high regard in which he is held within the industry
 - v. Consideration of other penalties imposed for similar arsenic matters within the Australian Racing Industry.
29. The Panel determined that the appellant's appeal against penalty be upheld and that the penalty be varied to a fine of \$2000, with \$1000 wholly suspended for 12 months.
30. In accordance with section 34 of the *Racing Regulation Act 2004* the Board orders that 25% of the appellant's deposit be forfeited to the Secretary of the Department and the appellant is ordered to pay to the Secretary of the Department 25% of the cost of preparing the inquiry transcript.