TASMANIAN RACING APPEAL BOARD

Appeal No 06 of 2017/18

Panel:	**Tom Cox (Chair)** **Rod Lester** **Wendy Kennedy**	**Appellant:**	**Zane Medhurst**
Appearances:	**Ian Swain of behalf of the Appellant** **Reid Sanders on behalf of the Office of Racing Integrity** **Adrian Crowther on behalf of the Stewards**	**Rules:**	**(1) Australian Harness Racing Rule 196A(1)(ii)** **(2) Australian Harness Racing Rule 190(1), (2), (4)**
Heard at:	**Launceston**	**Penalty:**	**(1) 18 month Disqualification** **(2) 12 month disqualification**
Date:	**8 November 2017**	**Result:**	**VARIED:** **(1) 8-Month Disqualification** **(2) 8-month Disqualification** **Penalties to be served concurrently**

REASONS FOR DECISION

1. Stewards conducted an inquiry on 12 October 2017 into the results of an analysis carried out on pre-race urine samples taken from *Sun Classique* prior to its run at the Tasmanian Pacing Club race meeting on 6 August 2017. The appellant is the trainer of *Sun Classique*. The analysis of the pre-race urine samples disclosed the presence of cobalt in excess of the threshold limit of 100 micrograms per litre of urine. The initial testing conducted by Racing Analytical Services Limited (RASL) revealed a reading of 161 micrograms per litre of urine. Confirmatory analysis undertaken by Racing Science Centre (RSC) yielded a result of in excess of 200 micrograms per litre of urine. This analysis did not stipulate an actual concentration of cobalt. It merely certified that the concentration was in excess of 200 micrograms.

2. At the Stewards inquiry on 12 October 2017, the appellant provided an explanation of his treatment and feeding regimes for *Sun Classique*. It was apparent that in those regimes the horse was administered supplements containing cobalt. Nevertheless, the appellant denied that he had administered cobalt to *Sun Classique*.

3. The Stewards found the appellant to be in breach of the rules in two respects: first, that he presented *Sun Classique* to race when it was not free from a prohibited

substance contrary to AHRR.190(1); and, secondly, that he administered or caused to be administered a prohibited substance, namely cobalt, contrary to AHRR196A(1)(ii). The appellant pleaded not guilty. The Stewards found otherwise and imposed a period of disqualification of 12 months for the first charge and a period of disqualification of 18 months for the second charge.

4. The periods of disqualification were to be served concurrently, that is, the total period of disqualification was 18 months.

5. The appellant originally appealed against both findings of the Stewards that he was in breach of the rules, but now concedes that he has no defence to the charge contrary to AHRR190 that he presented *Sun Classique* not free from a prohibited substance. We accept that concession and, as noted by the Stewards, will have regard to it when forming a view as to an appropriate penalty to be imposed for that breach of the rules. We also note the Stewards submission that any discount for what is effectively a change of plea should be tempered having regard to the time at which it was made and, of course, the inevitability that the Stewards found and indeed this Board would find that the appellant was in breach of AHRR190.

6. The appellant maintains that he was not in breach of the second rule and that the penalties imposed, in combination, were excessive.

Appeal - Administering a Prohibited Substance

7. It is necessary to first deal with the appellant's appeal against the stewards' finding that he administered or caused to be administered a prohibited substance, namely, cobalt.

8. The evidence from which an inference could be drawn that the appellant caused a prohibited substance to be administered was compelling:

   (a) The appellant's own logbooks demonstrated that he administered his horses, including *Sun Classique*, with a substance, IRONCYL, that contained cobalt.

   (b) The label on IRONCYL stated in bold type: "Iron, Cobalt and Manganese Supplement."

   (c) It was readily available for use in the stable.

   (d) Professor Mills gave evidence that given the amounts identified in the analyses, it was highly probable that cobalt had been administered a lot closer than three days before the race and more likely within a day of the race.

   (e) Cobalt is not naturally occurring within horses. Its presence must result from either an administration of a substance containing cobalt or from ingestion of a substance containing cobalt.

9. Although the stewards did not identify any of these matters at the inquiry when forming their view that the appellant had administered a substance containing cobalt to the horse, these matters were all available and all support the inference that cobalt, in some form, must have been administered to the horse, and the appellant must have caused that to occur.

10. The appellant contends that he did not administer anything to the horse on race day; that his stable hands may have done so without his knowledge and approval; that

some other unknown possibility may exist for the horse's reading; and, ultimately, that because of these possibilities and his denial the charge could not be proved.

11. It is worth setting out the law as it relates to the drawing of inferences in circumstantial cases. In *Langmaid v Dobsons Vegetable Machinery Pty Ltd* [2014] TASFC 6 Porter J at [119-126] stated:

> 119. The discharge of the civil burden of proof was discussed by McDougall J (with whom McColl and Bell JJA agreed) in *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246. At [55], his Honour summarised the position as follows:
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> "(1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
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> (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
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> (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and
>
> (4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue."
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> 120. In *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 – 6, the High Court noted the distinction between the application of the criminal and the civil standards of proof to circumstantial evidence, saying as to the civil standard:
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> " ... you need only circumstances raising a more probable inference in favour of what is alleged. ... [W]here direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture ...
>
> All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than upon a balance of probabilities such an inference might reasonable be considered to have some greater degree of likelihood."
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> 121. In *Jones v Dunkel* (1959) 101 CLR 298 Dixon CJ at 304 said that an inference must not be drawn where it is but "a choice among rival

conjectures". There must be "... evidence supporting some positive inference ... and it must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one which they establish to the reasonable satisfaction of a judicial mind". His Honour referred to the above extract from *Bradshaw* (then unreported but the passage was set out in *Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR 470 at 480 – 481), and observed:

> "But the law which this passage attempts to explain does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied."

122. It follows, of course, that "a court is not authorised to choose between guesses, even on the ground that one guess seems more likely than another or others": *ACCC v Metcash Trading Ltd* [2011] FCAFC 151; (2011) 198 FCR 297 per Buchanan J at 306 [31]. However, a court is entitled to draw an inference from "even slim circumstantial facts that exist so long as that goes beyond speculation": *Progressive Recycling Pty Ltd v Eversham* [2003] NSWCA 268 at [7] per Young CJ in Eq (Ipp JA and Davies AJA agreeing); *Condos v Clycut Pty Ltd* [2009] NSWCA 200 per McColl JA at [68] (Campbell and Macfarlan JJA agreeing).

123. Expert opinion of a possibility can be used as circumstantial evidence, and a finding of factual causation may be made where the expert evidence "does not rise above the opinion that a causal connection is possible"; the evidence will be sufficient if, but only if, the materials justify an inference of probable connection: *Fernandez v Tubemakers of Australia Ltd* [1975] 2 NSWLR 190 per Glass JA at 197. See also *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 per Spigelman CJ at 274 – 275 [79] – [83] and, in the context of a "fire" case, *McDonald v Girkaid Pty Ltd* [2004] NSWCA 297 per McColl JA (with whom Beazley JA and Young CJ in Eq agreed) at [103], [107].

124. Evidence of possibility is capable of supporting a probative inference, and expert evidence of possibility may, as circumstantial evidence, alone or in combination with other evidence, establish causation: *Seltsam* (above) per Spigelman CJ at 276 [89]; *McDonald v Girkaid Pty Ltd* (above) at [104].

125. As to the ultimate question of proof on the balance of probabilities by inference, in *Lithgow City Council v Jackson* (2011) 244 CLR 352 at 386 [94], Crennan J noted that whilst a more probable inference may fall short of certainty, it must be more than an inference of equal degree of probability with other inferences so as to avoid guess or conjecture. Her Honour continued:

> "In establishing an inference of a greater degree of likelihood, it is only necessary to demonstrate that a competing inference is less likely, not that it is inherently improbable."

> 126. It is no answer to the question of whether something has been demonstrated as being more probable than not to say that there is another possibility open; the determination of the question turns on consideration of the probabilities: *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408 per Hayne JA at 430; *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 per French CJ, Gummow, Crennan and Bell JJ at 196 – 197 [34].

12. So, in this case, it is no answer for the appellant to say there is some unknown possibility for why the horse came to have the prohibited substance in its system at levels well in excess of the threshold. It may be that the stable hands administered a substance to the horse and did so without the appellant's approval and knowledge. However, there was no evidence from which any inference could be drawn beyond the possibility of that occurring. Just because it may have been possible for that to occur does not negate a finding that the appellant caused the substance to be administered if the available evidence is sufficient to prove that fact as being more probable than not.

13. Once the factors above are taken into account, along with the appellant's overarching responsibility for the presentation of the horse and the substances with which it is administered and fed, the conclusion that the appellant must have caused the horse to be administered with cobalt is almost irresistible. It may be said that when exactly or by what means the administration occurred or transpired are unknown, but that does not detract from a finding that the appellant administered cobalt, by unknown means and at some unknown time within a day or so of the race.

14. The charge contrary to AHRR196 is proven.

15. For completeness, there was also an attack by the appellant on the discrepancy between the amount of cobalt found in the RASL analysis and that found by RSC. True it is that the concentrations were different and true it is that some of the experts were unable to provide a reason for the discrepancy. However, the mere fact that the results were different does not necessarily suggest any material flaw in the procedure. Some further evidence was needed. In the absence of such evidence, we find that the discrepancy may be accounted for within the ordinary variances attributable to inter laboratory testing

Penalty – Manifestly Excessive

16. In our view this aspect of the appeal must succeed. The appellant, a long standing participant in the industry, has not been in breach of either rule, or any similar rules, in his career. He is deserving of modest credit for his "change of plea" with respect to the first charge, but, moreover, his conduct could not be described as calculating or deceitful, rather it was negligent, or perhaps at worst reckless. Whichever of those descriptors is employed his long standing record required a more lenient penalty.

17. There were extended submissions made by the appellant concerning financial hardship on account of the prospect that he would lose his job as clerk of the course if a period of disqualification was imposed. We accept that he will not be able to undertake that position without an exemption from the Director of Racing. We also accept the Stewards' contention that such is the cost for many offenders because penalties for offending these rules should involve disqualification rather than suspension to mark the seriousness of the offences. That may not be the case in every

case, but as a general rule of thumb, we accept breaches of these rules must be marked with a degree of gravity.

18. In *Ganderton* No 13 of 2015/16 the appellant, a second offender, was disqualified for, effectively, a period of 18 months for breaching both rules. His penalty was reduced on appeal to, effectively, 6 months with a further 6 months left hanging over his head if he was in further breach of the rules. The conduct was described as inadvertent and occurred as a result of the appellant following veterinarian advice.

19. The appellant in this case cannot rely on poor advice. It would be a stretch to say his conduct was merely inadvertent. The products in the stables were clearly marked to contain cobalt. He has claimed difficulty with reading, but we do not understand him to be saying that he did not know what products he was administering. In any event, if a trainer does not know what he or she is administering, they should not administer it.

20. In our view a period of disqualification of eight (8) months for each breach of the rules is warranted. The penalties are to be served concurrently.

21. Pursuant to s.34(2) the Board orders that:
– 50% of the prescribed deposit paid by the appellant is to be forfeited to the Secretary of the department; and
– the appellant pay 50% of the cost incurred in the preparation of the transcript of the Stewards' inquiry.