TASMANIAN RACING APPEAL BOARD

Appeal No. 06 of 2020-21

Panel:	**Kate Cuthbertson** **Wendy Kennedy** **Sue Martin**	**Appellant:**	**Leanne Gaffney**
Appearances:	**Michael Callanan on behalf of the Appellant** **Scott Quill on behalf of the Stewards**	**Rules:**	**AR 240(2)**
Heard at:	**Tasracing** **Elwick Racecourse** **6 Goodwood Road** **GLENORCHY TAS 7010**	**Penalty:**	**$2,500 fine**
Date:	**21 January 2021**	**Result:**	**Appeal against penalty upheld.**

REASONS FOR DECISION

1. The appellant is a thoroughbred trainer. She has been a trainer for over 20 years.

2. On 21 October 2020, Stewards conducted an inquiry into the results of an analysis carried out on a post-race urine sample taken from *Tessie* following its run in Race 8 at the Devonport Racing Club on 26 July 2020. The appellant is the trainer of *Tessie*.

3. 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 0.30 mg per litre in urine. The initial testing conducted by Racing Analytical Services Limited (RASL) detected arsenic at a concentration of 0.51 mg per litre. The confirmatory analysis was conducted by Racing Chemistry Laboratory (RCL) and detected arsenic at a concentration of 0.52 mg per litre of urine.

4. During the course of the inquiry, the appellant explained her belief that the arsenic positive was the result of *Tessie* chewing timber fencing at the yards she occupied at Tasracing's Spreyton complex.

5. As a result of the appellant's account, Stewards charged her with a breach of AR 240(2) which provides:

Prohibited substance in sample taken from horse at race meeting:

> *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.*

6. The particulars of the charge were:

> *The particulars of the charge that we're going to issue to you today are that, you as Mrs Leanne Gaffney as the trainer of Tessie presented that mare to race at the Devonport Racing Club meeting on the 26th of July 2020. When a urine sample taken from Tessie following it winning race eight upon analysis was found to contain arsenic at a level above the permitted threshold.*

7. The appellant pleaded guilty to the charge. Stewards fined her $2,500.00.

8. The appellant originally appealed against conviction and penalty. She was represented during the hearing of the appeal by Mr Michael Callanan. During the course of the hearing, the appellant abandoned the appeal ground relating to her conviction. The appeal proceeded solely to consider the question of the appropriateness of the penalty imposed by Stewards. The appellant argues that the penalty imposed by Stewards was excessive given the level of the appellant's culpability. It was ultimately submitted that no penalty was required in the circumstances.

The evidence

9. The appellant occupied yards at the Spreyton Park Training Centre (Spreyton Complex) operated by Tasracing Pty Ltd (Tasracing). The appellant held a licence to train and stable horses at the Spreyton Complex. The evidence suggested she had held a stable licence at those premises since at least 2014. It is not clear how long *Tessie* had been stabled at those yards but the mare had been stabled there prior to September 2019.

10. At the time *Tessie* was originally stabled at the Spreyton Complex, the yards occupied by the appellant were fenced with steel posts and electric fencing.

11. In about October 2019, Tasracing organised for new yards to be erected at the Spreyton Complex. Those yards were constructed from treated timber. Following its erection, *Tessie* commenced chewing the timber fencing. The appellant described *Tessie* as a compulsive timber chewer. The appellant put down *Tessie's* chewing to the small size of the yards that had been constructed by Tasracing which increased *Tessie's* boredom.

12. Stewards conducted a stable inspection of the appellant's premises on 21 August 2020 following receipt of the notification that *Tessie* had returned a positive to arsenic. Stewards were directed to the yard that had previously housed *Tessie* and noted that multiple wooden posts used in the construction of the yard had been chewed extensively. Two of those posts were covered in white plastic which the appellant explained had also been chewed

extensively while *Tessie* was stabled there. Stable staff removed the white plastic from the posts and it was apparent that extensive chewing had occurred to the point where their stability was significantly compromised. Samples of the posts were taken by the attending Stewards. The inspection of the appellant's stables did not detect any veterinary medication or substances that contained arsenic.

13. The samples taken from the yards that house *Tessie* were sent for analysis and found to contain arsenic. Photos of the yard that housed *Tessie* showed extensive chew marks and a significant quantity of timber removed from the posts.

14. The North West track manager employed by Tasracing confirmed that the yards which housed *Tessie* were built between 21 and 25 October 2019. He also confirmed that the yards were all made out of the same materials that were utilised to build yards occupied by another participant in October 2018. Further, the manager indicated that they had taken it upon themselves to build the yards out of treated posts "as Leanne had done previously". The manager stated he could not see this being an issue. There was no evidence that this had been discussed with the appellant at any stage prior to the yards being built. The comment *"as Leanne had done previously"* has never been explained.

15. A record of *Tessie's* historical arsenic levels showed that on 29 September 2019, a sample taken from her returned a reading of 0.01 mg per litre of arsenic. On 24 November 2019, approximately one month after the construction of the treated timber yards at the Spreyton Complex occupied by *Tessie*, her reading was 0.14 mg per litre of urine. The next sample, taken on 26 July 2020 following the subject race at Devonport, returned a reading of 0.51 mg per litre. The elevation of the arsenic levels appears to be clearly connected with the construction of the yards at the Spreyton Complex and *Tessie's* chewing of the material used to construct the yards.

16. During the course of the inquiry, evidence was heard from Mr Zahra, the scientific manager at RASL. He gave evidence of studies conducted to investigate the possibility of horses returning elevated urinary arsenic levels following chewing or consuming CCA (chromated copper arsenate) treated timber. The study showed it was possible that if a horse consumed timber that its urinary arsenic levels could go over the prohibited threshold. Mr Zahra also gave evidence that one explanation for *Tessie's* elevated readings in July 2020 was that she had been chewing treated timber.

17. During the course of the inquiry, the appellant acknowledged that she had received an information notice issued by the Office of Racing Integrity in September 2017 advising trainers to be extremely cautious allowing horses access to products that contain arsenic close to racing as this may inadvertently lead to a rise in urinary arsenic levels. Access was described as including the ability to lick, chew and ingest arsenic treated timber that may be in the horse's environment including the stable/paddock/yard construct. The notice indicated that horses known to regularly "wood chew"

are advised to be kept in stables/fields with fences made from substances other than arsenic treated timber. Trainers were further advised to take measures to ensure that racing horses do not have access to environmental sources of arsenic, including treated timber products.

18. This notice was reproduced in the Tasmanian Thoroughbred Racing Calendar, printed and distributed by Tasracing, including for the period April to July 2020.

19. Against this background, the appellant stated that she did not have any treated timber on her own property but that she had no control over the property that she rents. She further stated to Stewards that she:

> *"would have thought the racing authority would have ensured that the fence posts didn't contain any bad substances. I had no reason to think, why would they put it there? You can get these fence posts, they look exactly the same, they had none in them so unless I was advised I didn't even think they would possibly do that".*

Further, she told Stewards the following:

> *"Never, not once did I think they would have put me in that position. We covered the posts and we did what we could because we were told we were responsible for any damage done to any of the property, so our aims for that were to cover it with plastic coating stuff, rubber, crib white, you know the stuff you paint on. It wasn't ever in our mind, it didn't even…no, I just would not have thought the racing authority would have done that. I had no reason to assume that they had a banned substance in them, why would I think that the racing authority would have? Especially when that flyer went out in 2017, they must have known".*

20. The appellant was apparently spoken to by Stewards prior to *Tessie* returning the positive reading in January 2020 when they attended her property and noted the chewed timber. They had told her that she may need to look at the timber but then one of those attending stated something along the lines of *"Why would Tasracing have built the yards out of treated timber when there were so many cases at that time."*

21. The appellant indicated that she had tried removing *Tessie* from the yards and stabling her but she absolutely hated the stable. Her primary concern at that stage was the damage that was being done to the fencing rather than the possibility of any contamination with arsenic occurring. She further indicated that it also took her ages to get permission from Tasracing to cover the posts that *Tessie* had eaten. The nature of the agreement with Tasracing was such that she could not just go and cover them and that it took her a lot of messages and phone calls to everybody before she could even cover the posts or do anything else to prevent *Tessie* causing damage by chewing the posts. Finally, she submitted to Stewards that Tasracing should not be using those posts anywhere on a racing site as *"it just sets you up to fail"*.

22. Later, the appellant told Stewards that she thought Tasracing had failed in their duty of care towards her and that they had set her up to fail.

Stewards' reasons for imposing a fine

23. In arriving at penalty, Stewards indicated that they accepted the appellant had not deliberately put arsenic in *Tessie's* feed and that they were pretty satisfied that the elevated reading was from chewing the timber fence posts. In arriving at penalty, Stewards stated the following:

> *And in relation to your yards, we believe that you should of* (sic)*, and ought to have made more of an attempt to find out what the timber was made of and what was in the timber, given you were aware that the possibility of arsenic being contained in timber may result in a positive swab given you've had notifications sent out in previous years, and it's been out in the calendar and on our website and everything else. We've also considered that any prohibited substance offence, they're serious matters and they, I suppose you could say they eat at the integrity of the industry and we need to have a deterrent for people to not offend under these matters. But we've also taken into account the most likely cause of Tessie having arsenic in her system was from the ingestion of the timber.*

24. Following a consideration of other penalties imposed for arsenic matters, Stewards determined that a fine of $2,500.00 was the appropriate penalty.

Appellant's submissions

25. The appellant acknowledged that she was subject to the Rules of Racing and that AR 240(2) is an offence of strict liability. It was also noted that the appellant had one previous prohibited substance matter which was nearly 20 years old. It was also noted that as a consequence of the operation of AR 240(1), *Tessie* was disqualified and the prize money for the race was forfeited.

26. The appellant submitted that the *Racing Regulation Act 2004* (the Act) provides that Tasracing is, with respect to racing in Tasmania, responsible for *inter alia* the following:

    a. Developing and maintaining racing and training venues under its control: s. 11(1)(j). It was submitted that the Spreyton Complex is one such venue;

    b. Making (by drawing up its own local rules and by adopting Australian rules of racing), the Rules of Racing, having regard to the recommendations of the Director: s. 11(1)(k); and

    c. Must perform its functions and exercise its powers in accordance with the Rules of Racing: s. 11(11).

27. It was submitted that the import of s. 11(11) is that Tasracing must not provide a training facility with materials containing a prohibited substance.

28. During the course of her submissions, the appellant highlighted the terms of the stable licence that she had been granted by Tasracing in 2014. Annexure C of that licence refers to Tasracing providing stables and training venues to tenants. It was noted that the licence was given by Tasracing to the appellant for valuable consideration, namely the annual licence fee.

29. Against this background, it was submitted that the appellant accepted that the licensed area was fit for the permitted purpose, namely for training and stabling race horses. Various provisions of the licence referred to highlight that the fencing was an improvement provided by Tasracing. Further, it was submitted that Tasracing was aware at the relevant time that trainers should desist from using treated pine on their properties used for the training and stabling of horses (whether leased or owned). Against this background, it was submitted that it was reasonable for the appellant to assume that premises leased by Tasracing would comply with its own expectations.

30. It was submitted that having regard to the objective seriousness of the breach and the objective circumstances giving rise to the ingestion of timber by *Tessie*, the penalty of $2,500.00 was excessive. It was submitted that it was neither reasonable nor practical to expect a licensed trainer to have knowledge of the constituent components of the timber supplied at Tasracing's direction and under a contract between Tasracing and its fencing contractor or to make such enquiries as to what materials had been utilised by Tasracing in the circumstances.

31. Essentially, it was submitted that the cause of the breach was due to matters over which the appellant had no control, namely the materials that were used to construct the yards that stabled *Tessie*. It was submitted that it was reasonable to expect that Tasracing would comply with the Act and the Rules of Racing and that the appellant had no power to ensure that Tasracing did not place her in a position where a prohibited substance was supplied in a concealed timber product within the area licensed for the sole purpose of the training and stabling of race horses. It was submitted that the appellant conducted her business at the Spreyton Complex relying upon an implied warranty that the area was fit for the sole permitted purpose.

32. It was submitted that Tasracing had failed its own high standards by allowing the yards to be constructed out of treated timber. This was particularly so given its knowledge of the risks that horses accessing such timber, including by licking or chewing it, could ingest arsenic and cause the trainer to breach the Rules of Racing.

33. The appellant referred to the matter of *Reggett* TRAB Appeal No. 26 of 2017/18 which was distinguished on the basis that the trainer in that case was a builder and well qualified to identify treated pine. The appellant in this case had no such qualifications or experience. In *Reggett*, the Board noted that there may be matters and facts which suggest how the horse came to present with a prohibited substance and that those matters and facts may inform the Stewards' and the Board's determination as to the appropriate penalty.

34. In this case, it was submitted that there was no evidence of intent or carelessness in the appellant's conduct, there were no aggravating circumstances such as lax stable standards and deterrence was a muted consideration given that the appellant had no control over the material utilised to construct the yards.

Stewards' submissions

35. First, Stewards indicated that none of the evidence was in dispute. It was also acknowledged that Tasracing was the owner of the Spreyton Complex. It was submitted that the appellant had the responsibility to do the best for the horses. The Stewards' criticism was that the appellant had not felt the need to take any action in spite of *Tessie's* compulsive chewing of the posts and that the action she in fact took was only to protect the posts from damage and to mitigate the financial consequences that would flow from being required to make good any damage caused by the mare. It was essentially submitted that it was incumbent on the appellant to ask questions about the construction of the timber yards if her horse was chewing that timber. The failure to do so led Stewards to impose the penalty they did. It was submitted that trainers are expected to exercise a high level of vigilance and that the appellant had failed to do so in these circumstances. If no penalty was imposed this would suggest no culpability. According to Stewards, a $2,500.00 fine was at the low end of the scale.

Discussion

36. The use of prohibited substances in racing has a deleterious effect on the integrity of the industry and its perception by the public. Principles of general deterrence generally loom large when considering the appropriate penalty to impose for breaches of rules such as AR 240(2).

37. Nevertheless, it is important that each case be determined on its facts. The Board is required to categorise the appellant's conduct within the context of the facts, circumstances and considerations that are relevant to the case. In our view, the following matters are of particular relevance in determining penalty:

- The elevated arsenic levels in *Tessie* appear to have been brought about by the mare's chewing of the timber fencing in her yard;
- That yard was contained within the Spreyton Complex. That complex is a facility owned and maintained by Tasracing;
- Tasracing is a government business enterprise that, *inter alia*, has several functions and powers under the Act. Those include developing and maintaining racing and training venues under its control, including the Spreyton Complex;
- Further, Tasracing is responsible for making the rules of racing, including those relating to prohibited substances: see s.11(1)(k) of the Act;

- Tasracing constructed the yards at the Spreyton Complex and caused them to be constructed out of CCA treated timber. CCA treated timber is known to be a possible source of elevated arsenic readings in horses that come into contact with that timber, including by licking or ingesting or chewing the timber;

- Tasracing as an organisation, through its directors and employees, must be taken to be aware of this risk;

- The Board accepts that the appellant believed that Tasracing would not construct its yards out of a material that could bring about a risk of elevated arsenic levels in horses that were stabled or trained at its yards;

- Given the level of notice provided to the industry as a whole as to this risk, it raises the question why Tasracing would even consider constructing yards at its facility that were made out of arsenic containing substances;

- Although a trainer ought usually be alive to such risk, in these circumstances the appellant was aware that the yards had been recently constructed by an entity that knew that the use of treated timbers was known to be problematic. Her expectation that materials that did not contain arsenic would be used by Tasracing was not unreasonable in the circumstances.

38. In our view, in those circumstances the appellant's culpability was extremely low. There is no evidence that the appellant was advised that treated pine was being used in constructing the yards occupied by her in accordance with the licence issued by Tasracing. Stewards' view that the appellant ought to have done more to ascertain the nature of the timber used to construct the fencing at the Spreyton Complex is one that relies too heavily on the benefit of hindsight. The objective and unusual circumstances of this case suggests that the risk that CCA treated timber had been used by Tasracing to construct the yards occupied by the appellant was understandably one that she had not apprehended.

39. As a consequence, the Board determines that the appellant's appeal against penalty be upheld and the decision of Stewards fining her be quashed. The Board determined, however, that the appellant should be reprimanded. The reason for imposing a reprimand is to send a message to the industry that no trainer can be complacent about horses chewing timber. The need to be vigilant against the risk of arsenic contamination from timber fencing applies to all trainers, even in respect of fencing erected by Tasracing.

40. As the appellant's appeal was wholly successful and the decision of stewards in respect of penalty was quashed, the whole of the prescribed deposit is to be refunded to the appellant.