TASMANIAN RACING APPEAL BOARD

Appeal No 22 of 2017/18

Panel:	**Tom Cox (Chair)** **Kate Cuthbertson** **Wendy Kennedy**	**Appellant:**	**Ken Rattray**
Appearances:	**Anthony O'Connell (on behalf of the Appellant)** **Ray Murrihy (on behalf of the Stewards)** **Adrian Crowther (on behalf of the Stewards)**	**Rules:**	**Australian Harness Racing Rule 190 (1), (2) and (4)**
Heard at:	**TasRacing** **Glenorchy** **Tasmania**	**Penalty:**	**Disqualification for a period of 5 years**
Date:	**30 August 2018**	**Result:**	**Penalty Varied: Disqualification for a period of 3 years**

REASONS FOR DECISION

1. The appellant, Mr Ken Rattray, was the trainer of a harness racing horse, *Destreos NZ*, which placed fourth in Race 3 "Destreos Pace" over 2,150 metres at the Carrick Park Pacing Club race meeting held on 31 December 2017. A pre-race urine sample was taken from the horse and subsequent analysis by Racing Analytical Services Limited (RASL) detected the presence of cobalt at a level above the permitted threshold of 100 micrograms, namely 156 micrograms per litre. Confirmatory testing conducted by the Racing Science Centre, Queensland Racing Integrity Commission (RSC), detected the presence of cobalt again in excess of the threshold, namely 162 micrograms per litre.

2. Following receipt of certificates of analysis from both RASL and RSC, Stewards issued a charge to the appellant pursuant to AHRR190. The rule relevantly provides as follows:

> *"(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) … is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse."*

3. The particulars of the charge were that as the trainer of *Destreos NZ*, the appellant presented that gelding to a race at the Carrick Park Pacing Club race meeting on 31 December 2017 when a pre-race urine sample taken from the gelding has, upon analysis, been found to contain the prohibited substance cobalt at a level in excess of the permitted threshold.

4. Following a number of requests for adjournments and other discussions, the inquiry in relation to the matter was ultimately held on 7 June 2018. The appellant reserved his pleas. Stewards heard evidence from a number of witnesses, including some called by the appellant. They found the charge proved and proceeded to disqualify the appellant for a period of 5 years.

5. Initially the appellant appealed against both his conviction and penalty. During the course of the hearing of the appeal, the conviction appeal was withdrawn. As a consequence, this decision concerns only the appellant's appeal against penalty.

6. In arriving at penalty, Stewards stated the following:

> *"Okay, and we have made, reached a determination in penalty today, and determining the penalty we considered the following,*
>
> 1. *The needs for specific and general deterrence, both to deter you from reoffending and to deter others from presenting horses to race when not free of prohibited substances,*
>
> 2. *We have considered the … negative impact that prohibited substance matters have upon the public perception of harness racing,*
>
> 3. *We have considered you have …. not entered a plea to the charge, in fact you reserved your plea to the charge and as such are not entitled to any reduction in penalty that a guilty may have afforded you,*
>
> 4. *I have taken the consideration that this is your sixth prohibited substance offence and your third such offence in less than 7 years,*
>
> 5. *we have also taken into consideration your personal, your personal subjective circumstances you have outlines (sic) today.*
>
> *It is our decision today that the appropriate penalty is disqualification of your trainer's licence and that you be disqualified for a period of 5 years, commencing immediately and expiring at midnight on the 6th June 2023."*

7. In relation to his penalty appeal, the appellant submitted that his culpability should be assessed at a low level. The appellant put forward a good deal of evidence before stewards during the course of the inquiry directed at explaining how cobalt may have found its way into *Destreos NZ's* system other than as a consequence of administration and submitted that no credit

was given to any of that information. That information included the following:

- That he had changed his feeding regime on moving to Tasmania. The feed that he introduced, he asserted, was delivered without a batch number. No information was put before the Board to establish that had in any way contributed to the issues being faced by the appellant. It was apparent that the ingredients of the feed were well displayed and contained cobalt based substances. Stewards approached the manufacturer and sought samples of batches that had been delivered to Tasmania during the relevant period of time that the appellant had purchased his feed. Analysis of those samples showed that the cobalt containing substances were either below or only slightly higher than the levels stated on the product's label. A representative of the company gave evidence that the variation was explicable due to the mixing of the grains and supplements constituting the product leading to different results from testing depending upon what portion of the product was tested. The variability was within an acceptable range and none of the results explained the elevated cobalt reading in the horse;

- The appellant had also obtained an analysis of samples of another product he provided to his horses which he asserted showed levels of cobalt almost twice that displayed on the product. It is not clear that is the case. The product involved indicated that cobalt was added as a trace element at a rate of .5 mg per kilogram. The product also contained B12 at a rate of 40 micrograms per kilogram. The three samples tested returned readings of .824 and .979 ppm w/w (parts per million). No expert evidence was adduced to explain how these results demonstrated the presence of cobalt in the product in excess of the amount stated on the label;

- In respect of the analysis of feed, the expert evidence did not address how the particular feeds and the amount of cobalt contained in them could have, if at all, contributed to the elevated reading;

- The appellant had also sought to establish that the presence of cobalt in his horse may have been the result of airborne contamination. This was not satisfactorily established. Although his stables are close to a nickel mine, and soil analysis established that cobalt was present in the soil on the training track used by the appellant, other horses in his stable did not appear to have had similar problems. There was no evidence presented that explained what the results of the analysis meant, i.e. was it abnormal or at a level ordinarily found in soil samples. A schedule of results of testing conducted on all of the appellant's horses between October 2017 and June 2018 showed that *Destreos NZ* had returned cobalt readings from 2 micrograms per litre to the positive test of 156 micrograms per litre. A previous urine sample taken on 3 December 2017 returned a reading of 107 micrograms. This was some four weeks prior to the testing that

resulted in the charge. Interestingly, a test conducted a week after *Destreos NZ* returned the reading of 107 micrograms per litre, returned a reading of 12 micrograms per litre. Three months after the positive swab on 31 December 2017, *Destreos NZ* returned a reading of 6 micrograms per litre. Subsequent tests have returned readings of 3 and 2 micrograms respectively. Other horses in his stable had returned readings of 14 micrograms per litre and less over that same period of time. This would tend to suggest that there was nothing in the horse's environment, which was common to other horses in the stable, that was contributing to these readings;

- The appellant did tell the Board and Stewards that he had changed his feeding regime since the positive swab. This also coincides with a reduction in the levels of cobalt in the samples taken from *Destreos NZ* after the positive result;

- The appellant provided a report from a Dr Major which addressed the elevated cobalt levels in *Destreos NZ*. The report contains a number of assertions about whether cobalt was in fact performance enhancing and whether urine was an appropriate medium to test for the presence of cobalt. In respect of *Destreos NZ*, Dr Major noted that possible causes of elevated urinary cobalt levels included:

    - Ingestion of cobalt salts;

    - Cumulative effects of cobalt exposure in feed, water, supplements and the environment;

    - Sample contamination at the time of collection.

  He provided examples of some of these possible causes which either did not directly relate to *Destreos NZ* or were not capable of demonstrating how and why there was an elevated reading in this case. For example, he referred to the presence of the nickel mine nearby but no data was provided about how and in what circumstances that would lead to cobalt contamination in *Destreos NZ's* case. He concluded by stating "In my opinion the particular circumstances of the findings in the horse *Destreos* should be considered in the light of the facts listed above". The report in no way assists in explaining how the elevated reading came about in this particular horse at this particular time.

8. Before considering the appellant's submissions, we record and gratefully adopt the observations and matters of principle set out below by Justice Garde in *Kavanagh v Racing Victoria Limited (No.2)* [2018] VCAT 291 at [15]:

Kavanagh and O'Brien rely on the decision of the Racing Appeals Tribunal in *McDonough v Harness Racing Victoria,* where Judge Williams said:

> ... from the point of view of penalty the ability of a trainer to demonstrate to a Tribunal, and the onus is on the trainer, that he lacks culpability because he did not administer the substance himself or is not

otherwise responsible in any way, that is still of course a significant factor in terms of penalty. But I emphasise the evidentiary onus remains in my view, on the trainer, to avail himself of the benefits of proof of reduced or absent culpability. That conclusion, from a legal point of view, is consistent with the criminal law, in the case of *Storey* and it is also referred to in a thoroughbred case that I was reading of the *New South Wales Authority v Graeme Rogerson* ... a case in which His Honour Mr Barry Thorley presided...:

In the view which this Tribunal takes of the structure of AR178, it is however for the trainer to carry the evidentiary onus of proving facts which serve to reduce the primary inference that would be drawn by the fact of the finding of a prohibited substance in a horse within his charge which has been brought to a race course.

I endorse that statement of the onus in respect of not only the thoroughbred rules but also the harness racing rules.

With this background these prohibited substance cases generally, and I emphasise generally, fall into one of three categories. First where through investigation, admission or other direct evidence the Authority, in this case Harness Racing Victoria, can establish before the Tribunal a positive culpability on the part of the person responsible, perhaps the trainer.

For example, the trainer administered the drug to the horse either himself or at his direction or had otherwise acted in some way as to be instrumental in the commission of the offence. Within that category the culpability may be in the class of deliberate wrongdoing or it may be through ignorance or carelessness or something similar.

Secondly, where at the conclusion of any evidence and plea the Tribunal is left in the position of having no real idea as to how the prohibited substance came to get into the horse. This may be with the trainer giving some explanation which the Tribunal is not prepared to accept or the trainer may simple (sic.) concede that he has no explanation.

I might say that this second category is perhaps the most commonly experienced scenario. Indeed as again His Honour Mr Barry Thorley ... said:

"The common experience is of course that the Stewards have no idea as to how it is in the case of any racehorse that the prohibited substance came to be in it. They immediately, as is required, opened an inquiry. It is very seldom indeed that that inquiry demonstrates the actual culprit. Why is that? For the obvious reason that the sole knowledge of what transpires is within the stable and its staff and its professional advisors. No doubt one can speculate that there are many ways in which a horse may present with a prohibited substance. One can contemplate the act of some intruder by stealth of night entering the stable and administering some drug. One can contemplate the consumption by the animal accidentally of some substance left lying around negligently or

the ingestion of some grasses which produce adverse results. One can contemplate that there was an actual, albeit mistaken administration within the stable of some product which was really intended for the horse in the adjoining stall, but mistakenly administered to the horse in question. One can even imagine that the horse might lick a rail or some place which had previously been contaminated. The number of examples one can contemplate is manifold."

As I say, that is perhaps the most common scenario that the Tribunal is left with.

Thirdly, the trainer (or other person being dealt with) may provide an explanation which the Tribunal accepts and which demonstrates that the trainer has no culpability at all. An obvious example would be if the trainer could satisfy the Tribunal that his horse had been nobbled, and it had been nobbled notwithstanding the presence of reasonable measures to prevent same.

And of course there could be various other factual scenarios where the horse could somehow be the subject of the administration or ingestion of a prohibited substance without any culpability either directly or indirectly on the part of the trainer. This category represents cases where the trainer does establish to the Tribunal's satisfaction, the onus being on him, that he is free of blame, that he himself was not instrumental in the administration of the prohibited substance and that he has done all he could be expected to do to prevent same.

Generally cases will fall into one of these three categories of case. Obviously the first category where there is positive evidence of culpability to varying degrees, is the worst from the point of view of the trainer or other person concerned and high penalties as are appropriate would be likely to flow.

The second category, the lack of evidence category, may or may not end up being similar to the first category, every case depending on its own individual facts.

As to the third category where there is little or no culpability, one would expect any penalty to reflect the absence of culpability or its low level. Within this category of cases there may in appropriate situations be instances where it is deemed not to be appropriate that the sentence express denunciation or general deterrence at all and indeed where it is appropriate to impose no penalty at all.

9. Having regard to those observations, it appears to this Board that the only factual issues to be determined are whether the Stewards on the one hand have convinced us to the requisite degree that the appellant's feeding and supplement regime was the probable cause of the elevated reading or, on the other hand, whether the appellant has convinced us to the requisite degree that there is an alternative probable cause that demonstrates that the appellant was not culpable. Taking the categories referred to by Justice

Garde in *Kavanagh*, there is a contest as to whether this case falls within category 1 or 3. If we cannot reach the requisite degree of satisfaction for either position, the case should be assessed as a category 2 case where, effectively, we are left with no affirmative proof of how and why the horse came to present with an elevated reading.

10. We can immediately put to one side the appellant's position. As observed above, there is a pattern of cobalt readings from other horses in his stables which tends to undermine any explanation consistent with environmental contamination. This is further borne out by the fact that the horse has not consistently returned high readings and subsequent to the positive swab has returned lower readings of cobalt in its urine. The reduction in the levels of cobalt in the horses' urine appears to have also coincided with a change in the feeding regime. It is notable that the appellant was using a number of feeding products and supplements that contain forms of cobalt. We are not satisfied that the evidence supports an assertion that the actual level of cobalt in the feed provided to the horse exceeded that stated on the label and that the levels can be explained by inadvertence. Finally, Dr Major's report falls well short of establishing how this particular reading came about in this particular horse at this particular time in light of the circumstances relating to its feeding and supplement regime and the environment in which it was trained, stabled and raced. It throws up ideas, but does not provide any data that would assist in determining what has happened in this case.

11. Whilst an explanation consistent with the horse being administered products containing cobalt as a consequence of its feeding and supplement regime is a possible explanation, the evidence before us is not sufficient for us to be positively satisfied that that is the case. As a consequence, we are left in the position of viewing the case as a category 2 type of case.

12. In our view, despite our suspicions that the feeding and supplement regime contributed to the elevated reading, it would be contrary to principle to infer as much from the state of the evidence. In any event, if we made such a finding, it would not assist us in categorising the appellant's culpability.

13. In respect of the penalty imposed, the appellant submitted that it was excessive due to the following:

- he changed his feeding and supplement regime and eliminated any vitamin B from the treatments for his horses to remove any risk of further readings;
- other jurisdictions were looking more closely at issues in respect of cobalt and that this should play some part in the determination of penalty;
- he had a capacity to pay a fine, but a suspension or disqualification would be the end of his working in the industry. He is 63 years old and was only training four horses to keep himself occupied;

- he suffers from anxiety and type 1 diabetes which a doctor has indicated is not well controlled. He advised he suffers depression, but the medical certificates do not refer to such a diagnosis. He is not prescribed antidepressants, but Valium to control his anxiety;

- although *Destreos NZ* recorded a reading of 107 micrograms per litre which was in excess of the threshold but not actioned by Stewards due to the margin of error, no warning was given to him that there might well be a problem with the horse.

14. In respect of the last point, this does not greatly assist him. A week after the horse returned a reading of 107 micrograms per litre, it returned a reading of 12 micrograms per litre.

15. The appellant also submitted that the 5 year disqualification would finish him in the industry. He described the conviction and penalty as a big shock to him and as having ruined his life. Disqualification would mean that he would have to leave the property he shared with his wife so that she could take over care of the horses.

16. Stewards noted that the appellant had five prior prohibited substance charges. In 1998, the appellant received a 5 year period of disqualification. A number of his previous prohibited substance matters related to TCO_2. The impact on the integrity of the industry was referred to by Stewards. They submitted that being a licenced member of the racing community was a privilege and the behaviour of the appellant against the background of five previous prohibited substance convictions was viewed as disentitling. It was noted that cobalt was labelled on each of the products that he was administering to his horse. His history of previous matters must have caused him to understand that he had to have a robust husbandry regime. It was submitted on behalf of Stewards that one could not have painless penalties and reputable racing. The fact that the appellant's breach of the rules put his livelihood in jeopardy was a predictable consequence of offending against the rule.

Consideration

17. A cobalt reading over the threshold is always a concern. The Board is aware that scientific studies have demonstrated that horses subjected to normal feeding practices record median cobalt levels of around 3-3.4 micrograms per litre with a mean of 8 micrograms per litre. The threshold of 100 micrograms per litre is extremely conservative. In this case, we have not been able to make any factual finding that would satisfy us that the appellant's culpability was low. We are not affirmatively satisfied that the appellant's feeding and treatment regime caused the elevated readings, however our suspicion is that it has done so particularly in light of the fact that the horse has returned very much lower readings consequent on the appellant both changing its feeding regime and removing B12 supplements from any treatment of the horse. In the circumstances, we regard this case as one falling within category 2 of those identified by Judge Williams in *McDonough*.

18. Importantly, the appellant is well aware of the prohibited substance offences and the penalties. He has breached those provisions five times. He had previously received a five year disqualification in 1998 for a TCO_2 breach. He subsequently received further periods of disqualification for breaches of the prohibited substance rules. This is not a case where suspension is appropriate. A disqualification is a necessary consequence of the breach of this rule in this case. Having regard to the matters set out in the Stewards' determination, we consider that a period of disqualification of three years is appropriate. Had we found that the appellant administered the prohibited substance knowingly or recklessly, a period of five years would have been appropriate. Because we are unable to make such a finding, and because the breach relates to one horse in one race, the penalty imposed by the stewards should be tempered.

19. Because the appeal against conviction was abandoned, 50% of the appellant's deposit with be forfeited and he will be required to pay 50% of the transcription costs.