TASMANIAN RACING APPEAL BOARD

Appeal No 30 of 2017/18

Panel:	**Tom Cox (Chair)** **Kate Cuthbertson** **Wendy Kennedy**	**Appellant:**	**Troy Blacker**
Appearances:	**Paul O'Sullivan (on behalf of the Appellant)** **Paul Turner (on behalf of the Stewards)** **Scott Quill (on behalf of the Stewards)**	**Rules:**	**Australian Racing Rule 178**
Heard at:	**TasRacing** **Glenorchy** **Tasmania**	**Penalty:**	**12 month disqualification**
Date:	**12 September 2018**	**Result:**	**Penalty Varied:** **9 month disqualification, with three months suspended on the condition that the appellant not breach AR.178 for a period two years**

REASONS FOR DECISION

1. The appellant, Mr Troy Blacker, was the trainer of a thoroughbred horse, *Isere*, which placed 3rd in Race 3 "The Sky Racing Launceston Cup" maiden over 1,220 metres at the Tasmanian Turf Club meeting on 14 February 2018. 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, to wit 167 micrograms per litre. Confirmatory testing by Queensland Racing Integrity Commission detected the presence of cobalt again in excess of the threshold, to wit 161 micrograms per litre.

2. Following a stewards' inquiry, Mr Blacker was charged with breaching AR178 by presenting his horse, *Isere*, to race with a prohibited substance. The appellant accepted he was in breach of the rule. The stewards proceeded to disqualify the appellant for a period of 12 months. It is against that determination only that Mr Blacker has appealed.

3. In arriving at penalty, the stewards stated the following:

   Thanks Mr Blacker, Stewards have thought quite long and hard about this decision and it hasn't been an easy decision for us to make, however after

considering the submissions on penalty, which was received on the 28th June, and also the submissions you have put forward today, we have taken into account the following, we have taken into account your guilty plea, your co-operation from the time of notification of this matter, your long standing interest within the industry, your family association with, within the industry, we have taken into account your record relating to prohibited substances, which shows two convictions in 2006 for caffeine with the penalty of four months for each to be served concurrently, we place some weight on this, however are mindful that these offences occurred 12 years ago. We have taken into account the reference letter provided by you at the inquiry, we find, find you to be a person of good character. Also taken into account the serious nature of the breach, the nature of the prohibited substance, we have taken into account your financial and personal circumstances, we have taken into that you are unable to provide any explanation for the elevated cobalt reading from ISERE, which was above the current permitted threshold and considerably higher than any other cobalt reading returned by horses trained by you. Stewards are not satisfied that any yard contamination resulted in the cobalt level being the permitted, being above the permitted threshold. We have taken into account the onus and responsibility is on the trainer to present horses free of prohibited substances, we have also taken into account previous cases and precedence's relating to cobalt from Tasmania and interstate, the need for industry and public confidence that horses are competing on a level playing field and that any penalty act as an individual and general deterrent. Stewards do not believe a fine or a suspension is the appropriate penalty and in this case believe a disqualification of 18 months as a starting point, however after considering all submissions Stewards believe that the appropriate penalty is to disqu, to disqualify your licence for a period of 12 months and to commence immediately and expire on the 5th July 2019. Under the provisions of AR177 ISERE is disqualified from its third placing in race 3, the Sky Racing Launceston Cup, 28th February Maiden, 1200m conducted at the Tasmanian Turf Club Meeting on the 14th February 2018. Stewards direct that any horses trained or any horses owned by you are to be transferred within 7 days and against this decision, you do have your right of appeal within 14 days. Now this matter is concluded, I will forward these reasons for our decision on to Mr O'Sullivan and like I say you have 14 days from today to lodge any, any appeal, okay. Thank you for your time, and for your honesty.

4. 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]:

   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.

5. 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 regime was the probable cause of the elevated reading or whether the appellant has convinced us to the requisite degree that there is alternate probable cause that demonstrates that the appellant was not culpable. Taking the categories referred to by Justice Garde in *Kavanagh*, there is a contest between 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.

6. We can immediately put to one side the appellant's position. Apart from some evidence to demonstrate that other horses in his stables returned readings for cobalt which did not exceed the threshold on various occasions at times surrounding the subject offence, and the appellant's claim that his feeding regime has remained unaltered throughout the period those horses were tested and *Isere* was tested, there is no evidence to suggest any particular cause for why the horse presented with the elevated reading. That state of affairs is not sufficient for this Board to be positively satisfied the horse presented with the elevated reading in circumstances where the appellant was not culpable or that his culpability should be viewed any differently from a category 2 type of case.

7. By contrast, the stewards say that the substance must have got into the horse somehow and ingestion through the feeding regime is the most likely source especially in circumstances where that regime included supplements which contained cobalt. The inference could also be more readily drawn because contamination had been excluded.

8. They are fair submissions, but fall short of satisfying this Board of any factual basis upon which ingestion occurred. The how, when, and what are simply unknown and we would only be guessing as to those matters in any attempt to then describe the

appellant's conduct. It could have been deliberate or reckless or negligent conduct by the appellant. Indeed, ignorance on his part may have played a role or, perhaps, inadvertence. Moreover, some other person in the stables may have been involved and that would impact our assessment of the appellant's conduct in varying ways.

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

10. The balance of the matters raised by the parties are not particularly contentious.

11. The appellant contends:

    (a) The reading was low *vis a vis* the threshold;
    (b) Only one horse in one race was involved;
    (c) The appellant co-operated with the stewards and admitted he was in breach of the rule at the inquiry;
    (d) The appellant attempted to identify the source of the elevated reading but was unsuccessful;
    (e) The appellant's two prior matters, resulting in a disqualification for four months for administering caffeine, was over 12 years ago when the appellant was young and, failed to stand up to an owner who provided him with an unregistered product to administer to the horse;
    (f) The appellant will suffer significant financial loss, training horses being his sole source of income and skill;
    (g) The appellant is a well-respected trainer in Tasmania with almost 20 years as a trainer and another 10 years as a licensed participant.

12. The stewards did not seem to dispute the factual matters raised by the appellant, but simply say that the penalty was appropriate; that they took into account every factor raised by the appellant and the "usual" considerations such as the integrity of the industry and the need for general and personal deterrence.

13. The appellant says that the matters, coupled with the following submissions, warrant a lesser penalty:

    (a) The stewards starting point at 18 months was too severe;
    (b) The authorities, particularly those involving administration, suggest that the tariff for second offenders should be lower;
    (c) The authorities demonstrate a trend that penalties for offences involving cobalt are lessening.

14. It is not necessary to go through the various cases and the varying penalties imposed in this and other jurisdictions. Each case turns on its own facts. We accept the appellant's factual submissions above subject to the following observation. A cobalt reading over the threshold is always a concern. The expert evidence presented in this case clearly demonstrated that horses subjected to normal feeding practices record median cobalt levels of around 3 to 3.4 micrograms per litre with a mean of 8 micrograms. We do not accept that there is any particular trend in cases of this type or that the authorities concerning administration offences provide any definitive guidance. Where the stewards started may be criticised, but it is where they ended up that matters.

15. In our view, this is a case where we have not been able to make any factual finding that, in turn, could inform our assessment of the appellant's culpability one way or the other. For the avoidance of doubt, we have not found any factual explanation that is mitigatory or aggravating. It is effectively the appellant's second offence. Disqualification rather than suspension usually attends a breach of the rule of this type. That is so because of the serious harm such breaches cause to the perception of the industry. There may be occasions where suspension is appropriate, but not in this case, not when the appellant has fallen foul of the rule before. Having regard to the matters set out in the stewards' determination and the additional factual matter raised by the appellant we consider that a period of disqualification of nine months is appropriate. Further, three months of the disqualification will be suspended on condition that the appellant not breach AR178 for a period of two years.

16. The appellant's deposit will be returned.