RACING APPEALS TRIBUNAL

RAT 7/2019

DATE OF HEARING: MONDAY, 14 OCTOBER 2019

TRIBUNAL: **DEPUTY PRESIDENT**: MR M KING

IN ATTENDANCE: MR M SANTORO, DEPUTY CHAIRMAN OF STEWARDS, THOROUGHBRED RACING SA LTD

COUNSEL: MR S WARD

APPELLANT: MR D CARRISON

COUNSEL: MR D SHEALES

IN THE MATTER of an Appeal by **MR DARRYL CARRISON** against a decision of Thoroughbred Racing SA Ltd Stewards.

BREACH OF RULE: AR245

(1) A person must not:

(a) administer; or

(b) cause to be administered,

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of a race.

PENALTY: 8 months suspension

BREACH OF RULE: AR240

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.

PENALTY: 8 months suspension concurrent with the penalty for a breach of rule 245

BREACH OF RULE: AR252

A person must not have in his or her possession or on his or her premises any medication, substance or preparation which has not been registered, labelled, prescribed, dispensed or obtained in accordance with applicable Commonwealth and State legislation.

PENALTY: Fine of $1000

BREACH OF RULE: AR104

A trainer must record any medication or treatment administered to any horse in the trainer's care by midnight on the day on which the administration was given.

PENALTY: Fine of $500

DETERMINATION

The Appellant **DARRYL CARRISON** is a licensed trainer.

On 1 February 2019 the Appellant entered a horse **BUNRO** in a race at Pt Lincoln. Prior to the race, a pre-race blood sample was taken. That sample subsequently revealed a cobalt concentration in excess of the prescribed threshold.

The Stewards of TRSA commenced an Inquiry. The Inquiry concluded on 26 April 2019. At the conclusion of the Inquiry, the Appellant was charged with breaches of AR245, AR240, AR252 and AR104.

The Appellant pleaded guilty to the charges relating to AR245, AR252 and AR104. The Appellant contested the charge under AR240 on the basis that all elements of that offence had been dealt with by the charge under AR245 and that the charge ought not to have been proceeded with.

The Stewards found the Appellant guilty on all counts.

Penalties were imposed. For the breach of AR245, an eight-month suspension was imposed. For the breach of AR240, an eight-month suspension was also imposed with each of the suspensions to be served concurrently. Fines were imposed for the breaches of AR252 and AR104.

On 3 May 2019, the Appellant lodged an appeal against the penalties imposed for the breaches of AR245 and AR240, namely the suspension of eight months.

When the Appeal came before this Tribunal on 14 October 2019 the Appellant was represented by legal counsel, Mr Sheales, and the respondent TRSA was represented by legal counsel, Mr Ward. Each counsel provided the Tribunal with thorough and detailed submissions and assisted the Tribunal in determining the issues raised on appeal.

At the Appeal, the Appellant, in addition to contesting penalty, also submitted that the conviction for a breach of AR240 should be set aside as it represented no more than an alternative finding of the liability for the breach of AR245. The Respondent contested that proposition

The basis of the Appeal was that the severity of the penalty imposed – eight-month suspension – was not warranted in this case. The Appellant submitted that the matter ought to have been dealt with by way of a fine.

In support of that submission, Mr Sheales, on behalf of the Appellant, raised a number of issues which I briefly summarise below:

- Firstly, Mr Sheales devoted significant time to an analysis of the nature of the prescribed substance, - cobalt. By reference to published scientific literature, he argued that the Tribunal ought to find that cobalt was not performance-enhancing and posed no welfare risk to horses. As the scientific publications to which he referred were relatively, recent, he submitted that authorities from the period prior to their publication ought to be given little weight and that the starting point for penalty calculation ought to reflect that.
  Whether the scientific papers to which the Tribunal was referred provided sufficient basis for the propositions urged by the Appellant is moot. Each paper qualified its conclusions by reference to the limits of its own testing.
  In this case, the Stewards had made no finding that the level of cobalt identified in **BUNRO** was performance-enhancing. The Stewards had reserved their view about the horse welfare issue.

  In the face of a similar argument, the Victorian Racing Appeals and Disciplinary Board in the matter of RVS v Xuereb (3 May 2018) stated

  "*Mr Sheales, appearing on your behalf, concentrated considerable attention on whether cobalt does in fact possess the performance-enhancing qualities which, along with some dangers to health, that had been attributed to it. Of course, as we had pointed out, the bottom-line is that it is a prohibited substance. Whether or not it should be is a totally different argument and one into which we should not, and will not, enter.*"

  I propose to follow the same path.

  The Appellant here was penalized for administration of a prescribed substance – cobalt. The Stewards did not need to, and did not, find that the cobalt was performance-enhancing. Penalty was assessed based on cobalt being detected at a level which made it a prescribed substance and a consideration of the

individual circumstances of this breach of the Rules. That is an appropriate approach.

- Secondly, Mr Sheales submitted that the Appellant's penalty ought to reflect that the Appellant's level of culpability was low. He contended this on the following grounds:

  - The Appellant had no intention to administer a prescribed substance per se;
  - The Appellant was not aware that the feed and supplement combination he utilised could take the level of cobalt to above the permissible level and it was therefore an innocent administration; and
  - The Appellant did not have the benefit of the information available to the Stewards namely:
    - That the supplementation regime could take a horse to an impermissible cobalt level (due to what he asserted to be inadequacies in the communications by the Stewards to the trainers of the risks associated with supplementation regimes);
    - That levels of cobalt from testing of horses in his stables had been rising (due to the failure of Stewards to advise him of that, as may have occurred in New South Wales).

  In response, the Respondent submitted that:

  - Intent was not required;
  - Ignorance as to the effect of a supplementation regime is not a satisfactory excuse. In that regard the Chief Steward tendered at the Inquiry a selection of warnings published by the Stewards. The publications were dated August 2016, September 2016, November 2016, August 2017, May 2018, and June 2018. They were regular and relatively specific as to risks with cobalt thresholds. In evidence at the Inquiry, the Appellant conceded that he had not taken steps to inform himself of the published warnings.
  - It is the responsibility of the trainer to be vigilant and take appropriate advice (probably veterinarian advice) to avoid practices which might give rise to readings over the permissible limits. For that reason, the Stewards have not, as a matter of practice, warned trainers of rising cobalt levels when detected.

  On that basis, the Respondent asserted that the Appellant's level of culpability was not low or in the Stewards terms, that the Appellant was not "totally blameless."

The individual circumstances of this breach of the AR245 (administration) are that the Appellant embarked on a program of supplementation for **BUNRO** including injections and oral supplements without:

- Taking the trouble to keep himself informed of the Stewards publications on the risks associated with cobalt;

- Properly recording his supplementation program on a regular basis so that he or an advisor could monitor it;
- Seeking advice from a veterinarian as to the advisability of and risks of his program.

The Appellant was not blameless. I find that there was a level of culpability in the breach of this rule which called for a penalty of significance.

For a breach of this rule, penalty options available are fine, suspension or disqualification. In considering the appropriate penalty, issues of general deterrence, specific deterrence, and sentencing parity must be considered in conjunction with the individual circumstances of this case.

On the issue of specific deterrence, it is to be noted that the Appellant had two prior convictions for "presentation " offences in 2009 and 2016, for which fines were imposed."

In the only prior decision of this Tribunal in a "cobalt case", for a lesser charge of "presentation", being the decision of the Racing Appeal Tribunal on 30 June 2017 (RAT 21/2017) in the matter of **FORSTER** a fine was not considered appropriate and a penalty of suspension was imposed.

On behalf of the Respondent, Mr Ward provided detail of five relatively recent (July 2017 to February 2019) Victorian decisions involving presentation offences. In each case a suspension or disqualification was imposed.

In this case, taking into account the level of culpability of the Appellant referred to above, I reject the Appellant's submission that a fine is the appropriate penalty. To achieve the sentencing goals of general deterrence and special deterrence and bearing in mind the desirability of a level of sentencing parity, a period of suspension is required.

The Stewards chose a starting point for calculation of the period of suspension at 12 months. In the previous South Australian decision of **FORSTER** (above), the Stewards had also chosen a starting point of 12 months. On appeal that starting point was varied to eight months, but it appears that the reason was that the offence had occurred relatively soon after the alteration of the prescribed levels for cobalt and it was the first such case to come before the Tribunal. The recent Victorian cobalt decisions cited by the Respondent offer support for a starting point of 12 months, and in considering the appropriate penalty I intend to use 12 months as the starting point for the calculation.

In **FORSTER** (above) the starting point was then reduced by the Stewards and again on Appeal by 50% to reflect the Appellant's guilty plea and good record in the industry. In convicting the Appellant here, the Stewards reduced the starting point by approximately 33% to reflect the guilty plea and no prior offence against this rule. But the Stewards noted that the Appellant had two prior presentation offences.

At the core of this Appellant's offence was negligence, a culpably negligent approach to husbandry leading to this offence. Taking that into account, I

consider that an overall discount of 50% for the guilty plea and lack of previous offence under this Rule is appropriate.

The Appeal against the penalty imposed for breach of AR245 is allowed to the extent that discount of 50% is applied to the starting point penalty of 12 months, leading to a 6-month suspension.

As to the conviction for a breach of AR240, the Respondent submitted that all elements of the AR240 breach were not subsumed in the finding of guilt on the AR245 charge. I accept that there are components of the AR240 charge which are not necessarily components of the AR245 charge.

Yet here the offences arise out of substantially the same set of facts and a non-concurrent penalty would not be appropriate.

The penalty for the breach of AR240 is varied to six months suspension to run concurrently with the suspension imposed for the breach of rule AR245.

The appeal is upheld.

A penalty of 6-months suspension is imposed for the breach of AR245, and a penalty of 6 months suspension for the breach of AR240, each suspension to run concurrently.

As they were not challenged, the fines for the breaches of AR252 and AR104 stand.

There will be an order that the Appellant have a refund of the applicable portion of the bond.