RACING APPEALS TRIBUNAL

RAT 9/2018

DATE OF HEARING: FRIDAY 24 AUGUST 2018

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

IN ATTENDANCE:

MR J PETZER, CHAIRMAN OF STEWARDS, THOROUGHBRED RACING SA LTD

APPELLANT: MR SCOTT WHITTLE

REPRESENTATIVE: MR PAUL D'ANGELO

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

BREACH OF RULE: ARR 178

> *Subject to AR.178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.*

PENALTY: 3 MONTHS SUSPENSION

DETERMINATION

The Appellant Scott Whittle is a licensed trainer.

On Thursday 28 July 2016 the Appellant presented a horse CAPITOLINE to race at Morphettville Racecourse.

Following the race, a post-race urine sample was taken. When the result of the test of that sample became known, the Stewards commenced an Inquiry. The Stewards Inquiry involved hearings on three dates in 2017 and 2018, and a number of investigations.

At the conclusion of the Inquiry, the Stewards resolved to lay a charge against the Appellant for a breach of AR178. AR178 states:

> "Subject to AR.178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited

> substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised."

The particulars of the charge were provided to the Appellant in the following terms:-

> "The particulars of the charge levelled against you being, Mr Scott Whittle, that as a licensed trainer and the trainer of the racehorse CAPITOLINE at all relevant times leading up to and including Thursday 28 July 2016 that is, you did bring the said racehorse to Morphettville Parks Racecourse where it competed in and won race 6, the Evans Faehrmann Pty Ltd Class One Handicap run of 1400 metres after which a urine sample taken from the horse, Sample V414669, disclosed upon analysis the substance arsenic at a level of .46 milligrams per litre in urine, which is above the threshold declared in AR178C(1)(b) of .30 milligrams per litre in urine, which substance is a prohibited substance under the Rules of Racing."

The Appellant pleaded not guilty to the charge.

After considering the available evidence the Stewards found the Appellant guilty of the charge.

The Stewards then heard submissions from the Appellant as to penalty and, having done so imposed a penalty, being a suspension of the Appellant's licence for a period of three months, 10 May 2018 to 31 July 2018.

The Appellant appealed to this Tribunal against both his conviction and the penalty imposed. At the hearing of this appeal, he was represented by his legal counsel. At the outset of the appeal, his counsel indicated that the Appellant no longer pressed the appeal against conviction, conceding that the offence set out in AR178 was an offence of strict liability to which the Appellant had no defence.

The Appellant pressed his appeal against the penalty involved.

In support of the appeal, the Appellant tendered a range of documents which included a number of statements of character evidence, and various photographs of the training property at which CAPITOLINE was trained.

The Appellant submitted that the only offence of which he was convicted was the strict liability offence of presenting. He asserted that the circumstances of that offence pointed to no moral culpability on his behalf, and that he was a man of an unblemished disciplinary record and with a positive reputation for honesty and integrity. The Stewards did not contest these propositions.

In support of the appeal, the Appellant raised three main issues:-

1. The impact of the lengthy investigation and Stewards' Inquiry on the Appellant.

Whilst the length of time between the original offence and this appeal (over two years) was extended, it was incorrectly categorised on occasions by the Appellant as delay. The Inquiry extended over a longer than usual period, but this Inquiry encountered a number of issues which, due to the time at which they arose, took some time to resolve. In investigating those issues, the Stewards moved methodically and carefully, taking time to ensure that the Appellant was kept well informed and that his rights were respected. It should be noted that no criticism of the length of time that the Inquiry took, was made by the Appellant and an examination of the Inquiry transcripts demonstrated no such criticism would have been warranted.

Nevertheless, the Appellant argued that he endured two years of severe personal stress and uncertainty to his business and that that stress ought to be taken into account as a fact or leading to a mitigation of whatever penalty would otherwise be imposed. Undoubtedly the Appellant has suffered a great deal of stress. Due to the conclusion reached below, it is not necessary to decide whether that factor is sufficient to lead to mitigation in penalty but it is acknowledged.

2. Reputation.

The Appellant argued, and cited authorities in support of, the proposition that for a person of demonstrated good character and particularly in a case of an offence of strict liability, the effect of conviction is a punishment in itself.

This was a matter to which some weight should be attached in considering penalty.

3. Parity.

The Appellant argued strongly that an important sentencing principle was parity. On that basis, the Appellant argued that the appropriate outcome for the Tribunal was to record the conviction against the Appellant but to impose no further penalty. In support, the Appellant pointed to a range of cases both in this jurisdiction and in other states in which that approach has been taken in presentation cases involving arsenic.

In response, the Stewards recognised the importance of parity in principle, but submitted that the cases to which the Appellant pointed when seeking parity or had a distinctive factor namely clear and uncontrovertible evidence found at the first visit to the training premises that there was evidence of chewing by the horses of CCA treated posts and timber. The Stewards submitted this factor did not apply in the current case. The Stewards could not point to any other “arsenic” cases for parity purposes and therefore suggested that to look for parity, other general “presentation” cases must be considered and particularly suggested that the “cobalt” cases offend the appropriate benchmark.

This incident occurred in mid-2016 at a time when the industry was just starting to appreciate the risk of horses presenting with elevated arsenic levels due to exposure to chewing on CCA treated posts. The state of industry knowledge developed even during the period of this Inquiry.

Testing for arsenic is a relatively recent development. Added to that is the recent increase in knowledge as to the risks posed by CCA treated posts. The combination of these factors has led to a series of decisions in SA and elsewhere, in which, where there has been evidence of post chewing, the approach taken to presentation of a horse with an elevated arsenic level has been to impose a conviction but no further penalty. One reason for this may be that it is considered appropriate to record the breach of the Rules, but not to penalise the trainer until the trainer has had a reasonable opportunity to remove CCA treated posts from the vicinity of the horses, particularly horses with any propensity to chew. The research regarding the risks arising from CCA treated posts has now been available for some time, and it has been widely publicised to the industry by the Stewards. So it may be that in the future, "presentation" cases involving arsenic will be dealt with differently and a penalty regime will emerge. But for the present there are apparently no decisions regarding presentation of horses with increased levels of arsenic other than the "post" cases.

So the Appellant's submission was effectively that the Appellant's case should be dealt with in line with the cited "post" cases. He pressed that it was for the Stewards to exclude the possibility of the arsenic level being elevated because of post chewing before the case should be dealt with otherwise.

The Stewards argued that they bore no such burden, but that in any event, in the "post" cases at the first inspection of each training venue by the Stewards there was clear and uncontrovertible evidence of CCA posts and chewing. By contrast, in the Appellant's case, there was no such evidence and in fact there was evidence of apparently untouched posts.

The Stewards inspected the Appellant's property on 5 September 2016, some five weeks after the race in question. The inspection was carried out by a Steward Mr J Adams who had been briefed by the Chief Steward on matters to be alert for. Included amongst those matters was to look for evidence of chewing of CCA treated posts etc. At the time of that inspection, and indeed even many months later at the Stewards' Inquiry, the Appellant clearly had no understanding of the possibility of involvement of CCA treated post.

Mr Adams discussed with the Appellant where CAPITOLINE had been kept prior to the race. Initially his evidence at the Inquiry was that the Appellant indicated a paddock. In his evidence when called at the appeal, some two years later, he added potentially most significant evidence that the Appellant advised him that CAPITOLINE was kept only in that paddock and not moved around at all. When giving further evidence at the appeal in response to the above, to his credit, the Appellant candidly conceded that he could not remember the exact words of the exchange with Mr Adams two years prior, but he disputed that would have said that CAPITOLINE was only kept in one paddock and not moved around as that did not accord with the management

practice of the property then or now. He described the pattern in which horses were moved from paddock to paddock reasonably frequently, potentially as often as once per week.

Whilst Mr Adams was clear in the evidence he gave about his conversation with the Appellant, it is difficult to reconcile the Appellant making that definite assertion in light of his evidence about the management processes on the property. Whether, due to his lack of understanding of the significance of the issue, the Appellant inadvertently misled Mr Adams, or whether the passage of time has affected Mr Adams's memory of the conversation, I cannot say, but I am not able to conclude that the paddock photographed by Mr Adams was the only paddock in which CAPITOLINE was kept and I conclude that it is likely that CAPITOLINE had access to and spent time in other parts of the property.

As part of the Stewards Inquiry Mr Adams took careful photographs of all posts in the nominated paddock. They bore no visible signs of chewing. At the hearing of the appeal the Appellant tendered photographs of other posts on the property, which did bear evidence chewing and some of which appear to be CCA treated posts.

The issue to be determined was whether there was a sufficient likelihood that the presentation of CAPITOLINE with an elevated arsenic level was due to CCA treated post chewing, so as to mandate a penalty treatment in parity with the other "post" cases.

The evidence of post chewing was relatively weak. In the paddock carefully documented by Mr Adams there appeared no evidence of chewing. It seems that CAPITOLINE spent at least some time in that paddock, so some evidence of chewing might have been expected. But there was evidence of chewing of CCA treated posts elsewhere on the property and in areas to which, the Appellant said in his evidence at the appeal, CAPITOLINE would have had access.

The evidence in this case is apparently not as clear and obvious as was available and the other "post" cases. But in some part, that may be explained by the Appellant's failure to understand at the time of the race, the inspection and even at the first Steward's Inquiry, the significance of evidence of chewing. With such awareness, he may have been better able to assist the Stewards understanding of the areas to which CAPITOLINE had access so that a broader range of investigation could have been carried out.

On balance, I consider that the prospect that CAPITOLINE had been exposed to arsenic by chewing on CCA treated posts at the property remains a real possibility. I do not consider that it can be discarded on the basis for Mr Adams's evidence. I therefore find, taking a sympathetic view of the evidence of CCA post chewing (as I am prepared to do because of the Appellant's previous unblemished record and a good character) that there is reason to consider the Appellant's case is sufficiently aligned with the previously decided "post" cases as to warrant penalty parity with them.

The finding of this Tribunal is that the Appellant's appeal against penalty is upheld and that in place that the penalty imposed by the Stewards, the Appellant is to be found guilty but with no further penalty imposed.

Clearly the disqualification of CAPITOLINE must stand.

I order that there be a refund of the applicable portion of the bond.