Appeal decision

Decision date:	22 December 2015
Hearing date:	17 November 2015
Code of racing:	Harness
Appeal panel:	Mr Brock Miller (Chair), Mr Gary Casey and Mr Daryl Kays
Appearances:	Mr J.E. Murdoch QC instructed by O'Connor Ruddy and Garrett Solicitors on behalf of the Appellant Vicki Rasmussen Ms A.C. Freeman of counsel for the Respondent Racing Queensland.
Decision being appealed:	A breach of Australian Harness Racing Rule 190(1) committed on 23 June 2015 in that she presented a horse for a race which was not free of a prohibited substance.
Appeal result:	Appeal against conviction dismissed. Appeal against penalty upheld with the order that there be no penalty.

Ms Vicki Rasmussen is a licensed trainer under the Australian Harness Racing Rules and she presented the standard bred gelding Trikala to race at Albion Park on 23 June when a post-race urine sample taken from the gelding that evening disclosed the presence of the substance arsenic at a level above the prescribed threshold. The Stewards determined that she was guilty and imposed a disqualification period of six months and it is from that determination that this Appeal has been lodged.

The Applicant Ms Rasmussen contends that firstly there should be a not guilty verdict because the charge is not supported by evidence capable of establishing guilt beyond a reasonable doubt or alternatively a declaration that any penalty so assessed should be on the basis that Ms Rasmussen is the innocent victim of an absolute liability rule. The evidence is specific in respect of the circumstances surrounding the presence of the substance in question. She used timber boards that were already upon her stable property when she purchased same to build horse yards for the benefit of her horses and to protect ingress of water into the horses' yard. The horse Trikala was an inveterate chewer of the boards in the stable area and the boards when eventually submitted for assessment and evaluation, revealed that they had previously been treated with arsenic and the evidence supported a contention that the ingestion of arsenic through the wood was the only basis upon which fault could have rested with Ms Rasmussen. For the Respondent it was suggested that she failed to take appropriate steps and was negligent and guilty of the charge as a result.

This Board is aware that the criminal standard of beyond reasonable doubt is the appropriate standard of proof to be identified and Racing Queensland's Policy for Decision making by Stewards is the reference point in that respect.

Counsel for the Appellant argued that the issue of the presence of the substance in question had not been categorically proven to comply with the standard which would identify that the substance categorised or became categorised as a prohibited substance. In particular, it was suggested that the report of Dr Caldwell (Exhibit 6) was sufficiently non-specific as to fail the test of compliance with Section 149 of the Act in that it failed to provide evidence that the horse was presented to race with a **prohibited substance** in its system. Counsel further promulgated the suggestion that the Certificate of Analysis from the Racing Science Centre (Exhibit 5) is invalid in that it is non-compliant with Section 147(2) of the Act because it fails to state the day when, or period over which, the urine sample was analysed in the RSC. In respect to that latter proposition, this Board finds that the Certificate of Analysis is compliant with the relevant section.

Of perhaps more importance is the third element to counsel's argument that *the confirmatory certificate from the Chem Centre in Perth is inadmissible because at the relevant time that Chem Centre was not an approved facility.* There is no doubt that the Respondent accepted the non-approval of the facility and the Respondent, at the outset of this Appeal, confirmed that it had no intention of relying upon that second Certificate. In the opinion of this Board that however is not the end of the matter.

The Certificate of Analysis (Exhibit 5) to be compliant under Section 147 must satisfy various criteria. Section 147 applies if the thing for analysis is delivered to an accredited facility and an analyst at the facility has carried out an analysis relating to the thing and identified the method of analysis and the results of the analysis by identifying the existence of the substance at a certain or specific concentration and the date of analysis or period during which the analysis took place is identified. Sub-section 2 confirms that after completion of the analysis, the analyst must give a notice stating the results to the accredited veterinary surgeon and under sub-section 3 the notice of the results must include a certificate signed by the analyst stating all of the following:

(a) information to identify the thing analysed;

(b) the place at which and a day when or period over which the thing was analysed. It must also include if a drug was found, the fact that the drug was found and its name.

In our opinion, the Certificate of Analysis complies with the provisions of the legislation and Section 147 of the Act. It identifies the thing that was analysed, namely arsenic. It specifies the place at which and a period over which the thing was analysed – in this respect it notes that the sample was analysed between 24 June and 1 July. It did not specify a particular time or specific date but it did specify a place and period of time during which the analysis was undertaken. This Board is satisfied that the period between 24 June and 1 July is sufficient not to contravene the provisions of the Act. It has also identified if a drug was found, the fact that the drug was found and the name of the drug in question. Thereafter, the Certificate of an Accredited Veterinary Surgeon under Section 149 is required. That section applies in circumstances of the following:

(a) If a Control body delivers a thing for analysis to an Accredited Facility – this was done by delivery to the RSC; and

(b) A drug or code substance is found in or on the thing – arsenic was so found in a concentration above the threshold; and

(c) A Notice of Results was given to an Accredited Surgeon as mentioned in Section 147.

Thereafter, the Veterinary Surgeon issued the Certificate under Section 149 and stated the pharmacology of the drug – in paragraph 1 she referred to it being a chemical element with a wide variety of applications in various industries including pesticides and in sufficient levels that arsenic is toxic to mammals with inorganic arsenic generally more toxic than organic arsenic. She has satisfied that requirement. She is obliged also under sub-section (b) to make a statement to the effect of the use of the drug or code substance on the behaviour or performance or physical condition of a stated type of animal and she has referred in that respect to mammals as a type of animal and stipulates that there is evidence of the manufacturers of certain products to identify that such compounds aid in the maintenance of healthy skin and coat and recovery from illness and other stressors and stimulation of appetite and red blood cell production. That satisfies sub-section (b) of Section 149.

Lastly, she then has to state if a drug is found in or on the thing and the drug is mentioned in the standard for the uniform scheduling of medicine and poisons published, then the schedule in which the drug is mentioned and she has also done that by confirming that it can be classified in either Schedule 4, Schedule 6 or Schedule 7 in accordance with the Standard for the Uniform of Scheduling of Medicines and Poisons. The fact of the matter is that she has satisfied the requirements and therefore both the Certificate of Analysis and the Certificate of the Accredited Veterinary Surgeon are proven and valid. It is in fact the opinion of this Board that even were one or other of those Certificates to have been declared invalid, that evidence was certainly obtained of the existence of the substance through Ms Rasmussen that the horse in question ate the wood panelling in the stable stall. That wood panelling was tested for levels of arsenic and it was shown to contain significant levels.

In all other respects then the only remaining question to be decided is whether the fault or culpability lies with Ms Rasmussen. It is the opinion of this Board that no such fault or culpability lies. She did not know that the wood she used for construction of part of the stabling complex had been treated with arsenic. That wood was on the property when she bought it and she had no reason to know that it had been treated for arsenic. No warnings had ever been received by her or given by Racing Queensland or anyone else that arsenic was of a significant concern and that people should be on the lookout for wood or other substances that may have been treated with arsenic and that certain horses were prone to chew on panels of wood. Her regimen of feeding him did not involve any substance that contained arsenic in any quantity that would manifest itself and the only plausible and reasonable explanation is that the horse ingested the wood and subsequently the arsenic by chewing upon it thereby ingesting arsenic into its system which has resulted in a positive finding being made in the evaluation of the sample.

That of itself is, in the opinion of this Board, sufficient to satisfy the requirements of the Rules of Harness Racing that the Stewards should have imposed no penalty whatsoever. We accept that the presentation of the horse with the substance in its system is sufficient to satisfy a determination that she was in breach of the relevant Rule. The Rule carries with it a finding of strict liability for breach but that of itself does not demand that penalties have to be imposed if the reasons for the presentation of the substance in question are more than satisfactorily explained and are plausible. The Rules allow for discretion and allow also for reasonable excuse. In the opinion of this Board, the evidence of Ms Rasmussen and the investigations that she undertook and the evidence of Dr Hill support the contention that no penalty should have been imposed.

The order of this Board is that the Appeal against conviction be dismissed but that the Appeal against penalty be allowed with a corresponding order that no penalty be imposed and the disqualification is set aside.

Further right of appeal information: The Appellant and the Steward may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **28 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au