

RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION

APPELLANT: ROSS CHARLES MILLER

APPLICATION NO: A30/08/788

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR J PRIOR (MEMBER)
MS K FARLEY SC (MEMBER)

DATE OF HEARING: 30 MAY 2016

DATE OF DETERMINATION: 25 AUGUST 2016

IN THE MATTER OF an appeal by ROSS CHARLES MILLER against the determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a twelve month disqualification for breach of Rule 190(1) and (2) of the Racing and Wagering Western Australia Rules of Harness Racing.

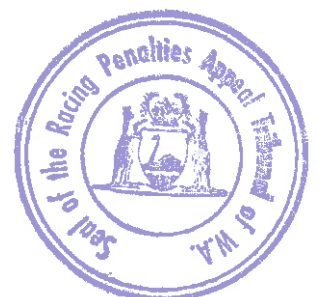
Mr R C Miller represented himself.

Mr D Borovica represented the Racing and Wagering Western Australia Stewards of Harness Racing.

By a unanimous decision of this Tribunal, the appeal by Mr Ross Miller against the penalty of a 12 month disqualification for breach of Rule 190(1) and (2) of the Rules of Harness Racing is dismissed.



DAN MOSSENSON, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL

**DETERMINATION AND REASONS FOR DETERMINATION OF
MR D MOSSENSON (CHAIRPERSON)**

APPELLANT: ROSS CHARLES MILLER

APPLICATION NO: A30/08/788

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Mr R C Miller represented himself.

Mr D Borovica represented the Racing and Wagering Western Australia Stewards of Harness Racing.

STEWARDS' INQUIRY

- 1 This is an appeal by Mr Ross Charles Miller, the holder of both harness and thoroughbred trainers' licences, against the severity of the 12 month disqualification penalty imposed on him on 13 April 2016 by the Racing and Wagering Western Australia (**RWWA**) Stewards of Harness Racing. A Stewards' inquiry had been convened following receipt of a report from Chem Centre in Perth, that the post race urine sample taken from DREAM TO BELIEVE,

after it had competed and won at Northam on 16 January 2016, was found to contain a level of cobalt at a concentration in excess of the prescribed threshold specified in RWWA Harness Racing Rule 188(f)(2)(k). Mr Miller was the trainer of DREAM TO BELIEVE. The threshold level specified in the Rules is 200 micrograms per litre ($\mu\text{g/L}$) in urine. The concentration detected by the Chem Centre was 270 $\mu\text{g/L}$. The reserve portion of the sample as tested by Racing Analytical Services Ltd gave a reading of 246 $\mu\text{g/L}$.

2 Mr Miller was notified by letter dated 3 March 2016 from the RWWA Stewards that, pursuant to Rule 183, his licences were suspended forthwith pending the outcome of a Stewards' inquiry. Mr Miller was at the same time directed to attend an inquiry into the matter to be held on 16 March 2016.

3 After considering the evidence presented on 16 March 2016, the Stewards concluded:

"...we believe that there are two charges appropriate in view of what we've heard so far and the first of those in under rule 190. ... It's the rule that deals with presentation free of prohibited substances and that rule says at part (1), a horse shall be presented for a race free of prohibited substances. Part (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 and part (4) of that rule; An offence under sub-rule (2) or sub-rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse. And the particulars of the charge are as follows: That you Mr Miller as the trainer presented DREAM TO BELIEVE to race in race 7 at Northam on 16th of January 2016, where it raced and finished 1st, not free of the prohibited substance cobalt, evidence (sic) by a concentration of cobalt at a level in excess of 200 micrograms per litre in urine. That's the charge under that rule Mr Miller."

4 Mr Miller refrained from pleading to this charge. Rather he sought and obtained an adjournment to enable him to seek legal advice. Following receipt of that advice Mr Miller pleaded not guilty to the presentation charge.

- 5 The inquiry was concluded on 11 April 2016 at the end of which the Stewards reserved their decision. Two days later the Stewards informed Mr Miller by letter that they found him guilty of breaching Harness Racing Rule 190 and disqualified him for 12 months.
- 6 Mr Miller was granted leave to appeal out of time. Mr Miller appealed against the severity of the disqualification penalty for the following reasons:
 - 6.1 He had never been convicted of an offence in racing during his involvement which extended over 44 years.
 - 6.2 The concentration of cobalt involved was at the lowest end of readings in positive swabs.
 - 6.3 Only vitamins, not cobalt, had been administered to DREAM TO BELIEVE.
 - 6.4 The Stewards had refused to allow Mr Miller to carry out additional tests which would have proven his innocence.
- 7 Mr Miller had also been charged with not maintaining a log book to which he pleaded guilty. He was fined \$300. This matter was not the subject of the appeal to the Tribunal.

STEWARDS' PENALTY REASONS

- 8 The Stewards went into considerable detail in spelling out their reasons for imposing the 12 month disqualification in their letter dated 13 April 2016 addressed to Mr Miller. A brief summary of the key matters addressed in the reasons, as well as of some of the Stewards' observations and key findings are as follows:
 - 8.1 Mr Miller, who was a hobby trainer, was passionate about the sport.
 - 8.2 The offence was a presentation rather than an administration offence.
 - 8.3 None of Mr Miller's explanation for the elevated reading was accepted. The treatment of Mr Miller's propositions and arguments, in which he attempted to explain how the level of cobalt might have found its way into DREAM TO BELIEVE's system, had in fact already been responded to point by point with particular clarity in the Stewards' reasons for convicting. Rather than repeating matters, the Stewards' response in the

earlier reasons was simply adopted, so far as it was relevant, in the reasons delivered in respect of the penalty.

- 8.4 The evidence which was presented by the veterinarian Dr Medd as to classification of the substance as being potentially performance enhancing in nature was accepted by the Stewards. Cobalt is a substance that fits a type outlawed by Rule 190A in that it can affect the blood system and other systems. It also falls within the category of being a haematopoietic agent and a hypoxia inducible factor stabiliser.
- 8.5 Cobalt is a substance that is permanently banned, even out of competition. The presence of cobalt represents a higher level of offence than some other prohibited substances. Further, the fact that cobalt was detected in the race day sample placed this offence at a higher level compared with other prohibited substances offences that are not captured by Harness Rule 190A.
- 8.6 The detected levels (of 270 µg/L and 246 µg/L) are considerably above the average level that has been found in the general population of race horses, namely 4.3 µg/L.
- 8.7 In considering the approach adopted elsewhere in Australia to punishing for this offence and the outcomes of various cases both elsewhere and locally, the Stewards concluded the appropriate starting point in arriving at a penalty for presenting a horse with cobalt in its system was a two year disqualification. In reaching this conclusion the Stewards considered and reported the following, amongst other things:
- 8.7.1 In New South Wales a penalty of two years, which was initially imposed on **Michael Kelly** on 16 October 2014, had been regarded as manifestly inadequate. Rather, the starting point of three years disqualification was applied. This led to a period of disqualification of two years after applying the subjective and objective considerations. However, the situation in New South Wales differs from Western Australia as there is a guideline in New South Wales specifying that the starting point is no less than five years disqualification. It was acknowledged this guideline provides guidance only for the New South Wales Stewards and Western Australian Stewards are not bound by it.

- 8.7.2 In South Australia, a two and a half year disqualification penalty was imposed on **Mick Micallef** for levels of 370 µg/L and 287 µg/L.
- 8.7.3 The fact that **Clinton Hall** was disqualified for five years for possessing the drug darbepoietin, albeit a different drug but still one which fell in the classifications of Rules like 190A. Another similar case was that of **Richard Laming**, who was disqualified for three years on each of three charges. His was the first thoroughbred EPO case.
- 8.7.4 **Darren Smith's** case in New South Wales was "an exceptional case" in light of "...the sheer scale of offending..." making "...direct comparisons of penalty problematical...".
- 8.7.5 In Victoria, where a mandatory penalty provision of not less than three years prevails unless special circumstances apply, **Lee and Shannon Hope**, **Danny O'Brien** and **Mark Kavanagh**, all in relation to thoroughbred racing, were disqualified for three years. In O'Brien's case there were four convictions which collectively amounted to 12 years of disqualification in aggregate which were reduced to a total of four years to be served concurrently.
- 8.7.6 **Peter Moody**, also in Victoria, was guilty of a cobalt offence in relation to thoroughbred racing. Mr Moody was given a 12 month suspension of which six months was suspended for one year provided no other offences arose, for breach of AR 175(h)(ii). The Victorian Racing and Disciplinary Board made it clear in imposing that penalty that parity of decision making is of relevance but that each case needs to be determined on its own facts and particular circumstances. It was noted that Mr Moody's facts and circumstances were distinguishable from other cases.
- 8.7.7 **Sharon Taylor's** case was the first cobalt matter dealt with in Western Australia. It resulted in the imposition of two presenting convictions for 280 µg/L and 310 µg/L as analysed by Racing Chemistry Laboratory and 299 µg/L and 336 µg/L as analysed by NMI. Taylor's case established the

benchmark penalty for Western Australia in relation to cobalt. The Stewards considered that a starting point for such a serious offence was a disqualification of no less than two years which was then subject to adjustment according to the individual circumstances and mitigations that may apply. Ultimately Ms Taylor received two 12 month disqualifications which were qualified by the direction that six months of each be served concurrently. This resulted in a total period of disqualification of 18 months.

8.7.8 This Tribunal considered an appeal against conviction and penalty regarding two presentation convictions involving cobalt in the recent matter of **Bruce Stanley (Appeal 776)**. An 18 month total disqualification for both convictions (initially 12 months on each, but reduced for totality as had been the Stewards penalty in Taylor), was found by the Tribunal not to manifest error.

8.7.9 Despite the fact that there are uniform Rules of Harness Racing Australia-wide, different individual considerations apply in each respective jurisdiction. Each case involving drugs should only be determined after careful analysis of its own particular facts and circumstances (**G W O'Donnell (Appeals 263 and 264)**). In this context the Stewards made the observation that the Moody case in Victoria highlights the fact that despite the common set of rules that "national parity principles ... is a fallacy".

8.7.10 That the use of cobalt in racing has been the subject of considerable negativity across Australia for reasons that its administration provides substantial benefit to those horses so administered by increasing endurance and lessening fatigue. This fact is reflected in the race results.

9 After evaluating all of the evidence, information and cases referred to and applying all mitigatory factors, the Stewards concluded the appropriate starting point was a penalty of no less than two years disqualification. Then, after adjustment for all the mitigating factors, the Stewards arrived at a period of 12 months disqualification. Finally, they backdated the

penalty to commence on 3 March 2016 in recognition of the fact that Mr Miller had been suspended from that date pursuant to Rule 183.

APPELLANT'S ARGUMENT

10 Mr Miller asserted in the course of his appeal submissions to the Tribunal that:

10.1 No cobalt had been given to DREAM TO BELIEVE, rather only vitamins. No needles had been used on the horse.

10.2 The horse had failed to urinate on the day of the race which accentuated the situation.

10.3 The twelve month period was too long in all of the circumstances, despite the fact that he admitted he deserved to be disqualified.

10.4 He had enjoyed a very long involvement in the industry.

10.5 He had gained nothing from the race.

10.6 He was merely a hobby trainer with one or sometimes two horses under his care.

11 None of the propositions which Mr Miller presented to the Tribunal were in fact new. Mr Miller admitted that they had all previously been presented to the Stewards at the inquiry. I believe that in determining the matter, it is important to bear in mind the fact that Mr Miller readily admitted that he had nothing more to present to the Tribunal than that which he had already presented before the Stewards at the Stewards' inquiry.

STEWARDS' RESPONSE

12 Mr Borovica in the course of his response to Mr Miller's arguments stated that this was the first time that a case involving the detection of cobalt had come before the Tribunal. However, it was not the first such case that had come before the RWWA Stewards as they had already dealt with three other such cases. The Stewards in this State had publicly stated in the first cobalt matter which came before them, namely the Taylor case, that a

disqualification was the appropriate type of penalty and the starting point for setting the length of that penalty is two years.

- 13 It was submitted that it was the role and responsibility of the Stewards rather than the Tribunal to determine the appropriate penalties for cobalt administration or presentation. In so doing the Stewards set the standard for ongoing cases. Unless a particular penalty can be shown to be manifestly excessive or an error by the Stewards in setting the standard had been demonstrated, the Tribunal should not interfere with the penalties imposed by the Stewards.
- 14 A large number of cases involving cobalt had come before and been determined by the Stewards around Australia where a uniform "no nonsense" approach had been universally adopted.
- 15 The industry relies on the confidence and involvement of the betting public. Cobalt had done a great deal of damage to the industry over the last three years. Cobalt offences sit at the top of the range of seriousness as not only is the substance performance enhancing but it is also bad for a horse's welfare. Once the presence of cobalt is discovered the nature of the substance results in the horse being disqualified from racing. The reason for this is the fact that this is the "worst type of offence".
- 16 It was acknowledged that although Mr Miller did not admit the offence by pleading guilty, he did not fight the case as hard as some others.
- 17 It was strongly asserted that the penalty which the Stewards imposed was not outside of the range for this type of offence as is reflected by various decisions around Australia.

MY CONCLUSION

- 18 The proposition put by Mr Borovica referred to in paragraph 13 as to the respective roles and responsibilities of the Stewards and the Tribunal is clearly correct. The Stewards are charged with the responsibility of ensuring compliance with the Rules and protecting the welfare of the industry. They are trained and experienced in ensuring races are conducted properly without any one competitor receiving an unfair advantage over another. The

Stewards are the guardians of a sport, indeed of an industry, which relies on the support of the betting public. The confidence of the betting public in the integrity of the sport is paramount. Hence there are tough compliance provisions imposed under the Rules and strictly enforced by the Stewards to ensure no unfair advantages are gained. To ensure the Rules are being strictly adhered to by all participants, the Stewards are empowered to impose sanctions at their discretion whether they be by way of disqualification, suspension, fines or a combination of these penalties. The Rules apply not only to deliberate or conscious efforts to cheat the system, but also to inadvertent or unexplained cases where horses have been analysed with prohibited substances in their systems.

- 19 In the case of cobalt, although a naturally occurring substance, because of its properties and potential affects, it is prohibited in a horse beyond the prescribed threshold. The prohibition applies not only in the case of competing horses as its presence above the threshold is outlawed altogether. Stewards around the country have made it clear that cobalt is causing serious problems in the industry. Consequently, the Stewards in the other jurisdictions as well as in this State are imposing tough punitive measures. Not unnaturally, as each case is different and indeed prevailing circumstances in each jurisdiction vary, it is hardly surprising differing periods of disqualification are being imposed across the country.
- 20 When evaluating Mr Miller's case in the light of the other decisions referred to, I am satisfied that it has not been shown that the Stewards have committed any error in arriving at their determination in Mr Miller's case.
- 21 I believe the reasons given and approach adopted by the Stewards are entirely logical and appropriate in the light of all of the facts of the case that they had to deal with. As previously acknowledged, no new facts or issues were raised on appeal by Mr Miller.
- 22 The penalty of disqualification for 12 months was clearly open to the Stewards on the evidence which was before them. The detailed reasons that accompanied the penalty decision provide a clear, cogent and appropriate explanation as to why the Stewards reached their conclusion. I find the Stewards quite properly took into account Mr Miller's personal circumstances; his level of involvement in the sport and the importance of racing to him; his loss of reputation amongst his peers; the fact that there was no acceptable

explanation for the presence of the substance; the sinister nature of the substance at high levels of concentration; the actual levels involved compared to the average level in race horses and the prescribed threshold level; the damage cobalt was doing to the racing industry; the other decided cobalt cases in addition to cases with substances of equivalent pervasiveness.

23 In view of the fact that I could find no fault with the Stewards' treatment of the evidence, the faultless reasoning involved and the appropriate references to other decisions, coupled with the fact that Mr Miller conceded that he had nothing new or different to present to the Tribunal to support his appeal, I believe there is no basis for the Tribunal to be able to find that the Stewards had in any way erred or made any wrong finding.

24 I am satisfied none of the reasons set out in the appeal notice and advanced at the hearing in support of the assertion that the penalty was excessive have merit.

25 Nothing was presented to support the proposition that a 12 month disqualification for the cobalt presentation in this case was excessive or should be interfered with by the Tribunal.

26 In my opinion there is no merit in the appeal.

27 I would therefore for these reasons dismiss the appeal.



DAN MOSSENSON, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:

ROSS CHARLES MILLER

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Mr R C Miller represented himself.

Mr D Borovica represented the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr D Mossenson, Chairperson.

I agree with those reasons and conclusions and have nothing further to add.



JOHN PRIOR, MEMBER



RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS K FARLEY SC (MEMBER)

APPELLANT: ROSS CHARLES MILLER

APPLICATION NO: A30/08/788

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Mr R C Miller represented himself.

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I have read the draft reasons of Mr D Mossenson, Chairperson.

I agree with those reasons and conclusions and have nothing further to add.

Karen Farley

KAREN FARLEY SC, MEMBER

