

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANTS: MR NORMAN CHAMPION
MR KENADALL LAIDLAW

APPLICATION NO: 23/3309 and 23/3605

PANEL: MR ROBERT NASH (CHAIRPERSON)
MR PHILLIP GLEESON (MEMBER)
MS NATALIE SINTON (MEMBER)

DATE OF HEARING: 29 SEPTMBER 2023

DATE OF DETERMINATION: 19 DECEMBER 2023

IN THE MATTER OF appeals by **NORMAN CHAMPION** and **KENDALL LAIDLAW** against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing to impose a nine month disqualification on Mr Laidlaw and disqualify **NICKYS SON** from winning Race 9 at Gloucester Park on 13 December 2022, for breach of Rule 190(1), (2) and (4) of the Rules of Harness Racing

Mr Norman Champion and Mr Kendall Laidlaw self-represented.

Ms Venetia Bennett and Mr Stephen Waddington represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Background

1. This is an appeal against conviction and penalty.
2. Mr Champion owns a horse named NICKYS SON. Mr Laidlaw trains NICKYS SON.
3. NICKYS SON competed in Race 9 at Gloucester Park on 13 December 2022 and won.
4. A sample of NICKYS SON's urine was subsequently tested by ChemCentre and found to contain 118µg of cobalt. 110µg is classified as a positive result. Racing Analytical Services Ltd in Victoria (RASL) also analysed NICKYS SON's urine from 13 December 2022, and it was found to contain 110µg cobalt.
5. As a result, the Racing and Wagering Western Australia (RWWA) Stewards of Harness Racing (the Stewards) held an inquiry and ultimately determined that Mr Laidlaw was guilty of presenting NICKYS SON to race on 13 December 2022 not free of a prohibited substance, namely cobalt, contrary to Harness Racing Rule (HRR) 190.

6. NICKYS SON was disqualified from winning Race 9 at Gloucester Park on 13 December 2022. Mr Laidlaw was disqualified for nine months.
7. Mr Laidlaw now appeals the finding of guilt and his penalty. Mr Champion appeals the decision to disqualify NICKYS SON from Race 9.

The Facts

8. Mr Laidlaw has been a licensed RWWA trainer for four years. He was the trainer for NICKYS SON when he raced at Gloucester Park on 13 December 2022. As at March 2023, Mr Laidlaw had been training NICKYS SON for 12 months.
9. Mr Champion is a licensed B Grade driver and has been involved in the racing industry for 67 years. Mr Champion is the owner of NICKYS SON, and with his wife was NICKYS SON's breeder.
10. After NICKYS SON won Race 9, a sample of his urine was collected. Mr Laidlaw was present and signed a declaration on a sample identity card to the effect that he witnessed and was satisfied with the collection, packaging and sealing procedures.¹
11. On 28 February 2023, ChemCentre issued a certificate to RWWA to the effect that a sample of NICKYS SON's urine was received by them on 14 December 2022 in good order with all seals intact. The sample number matched that on the sample identity card signed by Mr Laidlaw on 13 December 2022.²
12. ChemCentre analysed the sample and found that it contained cobalt at a concentration of 118µg per litre. This figure was reached as the mean of four measurements.³
13. The cut off for cobalt is set out at HRR 188A(2)(k) which provides that cobalt is a prohibited substance at a concentration of 100 micrograms per litre in urine or 25 micrograms per litre in plasma.
14. The expanded measurement uncertainty for cobalt at the threshold of 100µg is 10µg. As such, a result of over 110µg is considered positive.⁴
15. RASL provided RWWA with a certificate confirming that it received a sample on 1 March 2023 in good condition with all seals intact. The sample number matched that on the sample identity card signed by Mr Laidlaw on 13 December 2022.⁵
16. RASL analysed the sample and found that it contained cobalt at a concentration of 110µg per litre. This figure was reached as the mean of four measurements.⁶
17. Having received the results of both ChemCentre and RASL's analysis of the sample, the Stewards convened an inquiry on 27 March 2023.

¹ Exhibit 2

² Exhibit 3

³ Exhibit 3

⁴ Exhibit 3

⁵ Exhibit 5

⁶ Exhibit 5

The Stewards' Inquiry

18. Mr Laidlaw and Mr Champion were both present at the inquiry on 27 March 2023. A number of witnesses were called to give evidence.
19. Dr Buddhika Dorakumbura, acting team leader for the racing chemistry team at ChemCentre gave evidence of the process and methodology employed by ChemCentre. In summary, the sample tested positive at an initial screening and was therefore sent to the inorganic chemistry section for confirmatory analysis.⁷
20. The confirmatory test was done by Inductively Coupled Plasma Mass Spectrometry (ICPMS). The sample is run in quadruplicate, and each of the four samples is run alongside a urine blank, an externally certified urine control and an inhouse urine control. The analysis will only be accepted if there is a difference of less than 10% between the four samples and if the quality control samples meet specified requirements.⁸
21. The methodology utilised by ChemCentre has been in place since 2014 and is NATA accredited.⁹
22. The results of the four runs, from which the mean of 118µg was calculated, were 118.33µg, 117.64µg, 120.22µg and 116.09µg.¹⁰
23. In the period from 1 January 2017 to 31 December 2022, ChemCentre analysed 7,364 harness racing samples for cobalt; 99.86% had a reading at or below 110µg per litre.¹¹ More than 96% had a reading of less than 10µg per litre. A concentration over 110µg per litre is rare.¹²
24. Paul Criddle, a senior RWWA Investigator, gave evidence that on 2 February 2023 he attended Mr Laidlaw's stables and inspected medications in the feed area. A number of medications containing B12 were located. Mr Laidlaw's medical logbook was observed and it was noted that NICKYS SON was administered B12 on 10 December 2022. Mr Criddle's visit to Mr Laidlaw's stables was recorded on body worn camera and the footage played as part of the inquiry.¹³
25. Mr Laidlaw gave evidence at the inquiry to the effect that he had done nothing different in the lead up to 13 December 2022 and so was shocked when Stewards attended his property.¹⁴
26. Dr Judith Medd, RWWA veterinarian with 20 years' experience in that role, explained in her evidence that heavier molecules in the urine can start to settle in the bottom of the collection pan, which is why the samples go straight into the bottles. In terms of sample sizes, more goes into the A sample than the B sample as a range of tests are performed on the A sample while only confirmatory tests are performed on the B sample, if the A sample shows a positive result.¹⁵

⁷ Transcript of inquiry p 7

⁸ Transcript of inquiry p 8

⁹ Transcript of inquiry p 9

¹⁰ Transcript of inquiry p 9

¹¹ Transcript of inquiry p 13

¹² Transcript of inquiry p 14

¹³ Transcript of inquiry p 23

¹⁴ Transcript of inquiry p 26

¹⁵ Transcript of inquiry p 15-16

27. Dr Medd explained that cobalt is an essential component of the B12 molecule and therefore an essential trace element. Horses use dietary cobalt to synthesise B12. Cobalt has been shown to potentially increase endogenous erythropoietin and is therefore potentially performance enhancing in some mammals.¹⁶
28. The inquiry adjourned and resumed on 19 April 2023, at which hearing the Stewards determined to issue a charge pursuant to HRR 190 against Mr Laidlaw.¹⁷ Mr Laidlaw pleaded not guilty.¹⁸
29. At the resumed inquiry on 19 April 2023, Dr Adam Cawley, Scientific Manager of RASL appeared by Teams from Victoria. Dr Cawley confirmed that RASL is NATA accredited and that they, too, used ICPMS to analyse the sample of NICKYS SON's urine.¹⁹
30. The results of RASL's four runs were 109, 110, 111, and 111, and the mean was 110µg/L.²⁰
21
31. An analysis of RASL's results from 2017 to 2021 reveals that the mean cobalt level detected was 7.4µg/L and the median cobalt level detected is 4.0µg/L.²²
32. Mr Laidlaw and Mr Champion's defence to the charge was that NICKYS SON was not presented with a level of cobalt above the threshold, but that the ICPMS process essentially broke apart B12 molecules in the horse's urine sample, increasing the number of free cobalt atoms detected to above that which were actually present in the horse when it raced.
33. Mr Champion tendered four exhibits in support of this - the PhD thesis of Dr Ross Wenzel,²³ a document entitled 'Inquiry into Cobalt Reading – NICKYS SON'²⁴, a letter from Professor Colin Chapman,²⁵ and a marked up copy of pages (not in chronological order) of the transcript of 27 March 2023 with a page from a paper of some kind in the middle.²⁶
34. The inquiry then adjourned so that the Stewards could review the material Mr Champion tendered.
35. Drs Medd and Buddhika attended to give further evidence in response.
36. Much of the evidence at this hearing related to the appropriateness of the threshold proscribed by the Rules. For reasons we will come to, it is not necessary to repeat that evidence here.
37. Dr Medd in her evidence explained that dietary or supplementary doses of B12 were unlikely to be the cause of a high urine cobalt reading, because oral supplementation with B12 has a negligible effect on cobalt levels as only small amounts are absorbed through the gut, and injected B12 only increased urine cobalt levels if given five to six hours before the sample is taken, which is prohibited by the Rules.²⁷

¹⁶ Transcript of inquiry p 31

¹⁷ Transcript of inquiry p 53

¹⁸ Transcript of inquiry p 66

¹⁹ Transcript of inquiry p 70

²⁰ Transcript of inquiry p 70

²¹ The mean of those four results is, in fact, 110.25µg

²² Transcript of inquiry p 74

²³ Exhibit 17

²⁴ Exhibit 18

²⁵ Exhibit 19

²⁶ Exhibit 20

²⁷ Transcript of inquiry p 121

38. Further, the population studies that resulted in the setting of the 100µg threshold included horses being supplemented with B12, yet the median result was 4.3µg.

The Stewards' decision

39. On 27 June 2023, the Stewards wrote to Mr Laidlaw and Mr Champion advising them that they had found Mr Laidlaw guilty of the charge of presenting NICKYS SON not free of prohibited substances, and disqualifying NICKYS SON from winning race 9 at Gloucester Park on 1 December 2022 and enclosing their reasons for decision.
40. Those reasons are comprehensive and cover a number of issues.
41. Relevant to the task for this Tribunal, the Stewards noted the following legal principles.
42. Cobalt above a certain threshold is prohibited by the Rules. It matters not that cobalt may not, as a matter of fact, enhance performance. There is no power for the Stewards or this Tribunal to alter the Rules.²⁸
43. HRR 190 creates an absolute offence. Intent is not an element, and mistake of fact not a defence.²⁹
44. It may be that a horse's urine cobalt level would not have exceeded the threshold but for cobalt from B12. Nothing turns on this, given the nature of the Rules.³⁰
45. Whether the threshold set by the Rules is appropriate is not a matter this Tribunal can consider or take into account.³¹

Appeal Against Conviction

46. Having regard to those principles, and with the greatest of respect to Mr Laidlaw and Mr Champion, who represented themselves at both the inquiry and in the appeal, the appeal against conviction is misconceived and to the extent that the ground of appeal challenges the applicable threshold or seeks to suggest that the cobalt in NICKYS SON's urine came from B12 the appeal must be dismissed.
47. The evidence clearly establishes that NICKYS SON was presented to race on 13 December 2022. A sample of his urine was taken and sent to two testing laboratories. Both laboratories identified cobalt in that urine sample at a concentration greater than 110µg/L. Whether that cobalt entered the horse's system as part of a B12 molecule is not, as the offence created by HRR 190 reads, relevant. The offence is one of absolute liability and based on the results of both ChemCentre and RASL, Mr Laidlaw was guilty of presenting NICKYS SON not free of a prohibited substance.
48. The appeal against conviction must be dismissed.

Appeal Against Penalty

49. On 21 July 2023, the Stewards wrote to Mr Laidlaw enclosing their reasons for decision in imposing penalty on Mr Laidlaw.

²⁸ Citing Appeal 736 Oliveri v RWWA Stewards of Harness Racing

²⁹ Citing Appeal 776 Stanley v RWWA Stewards of Harness Racing

³⁰ Citing Appeal 821 Elson v RWWA Stewards of Harness Racing

³¹ Citing Appeal 858 Anderson v RWWA Stewards of Harness Racing

50. The Stewards noted Mr Laidlaw's occupation as a farrier, which would be significantly impacted by the imposition of a disqualification.³²
51. They further noted that the present offence is Mr Laidlaw's first prohibited substance related offence and that for the purposes of imposing penalty in this matter they considered him to be a first offender.³³

Manifest Excess

52. A penalty will only be manifestly excessive if it is shown to be plainly unreasonable or unjust. The range of penalties customarily imposed is of significance although each case turns on its own facts and circumstances. Sentencing ranges provide a general guide only and is merely one of the factors to be taken into account. The discretion conferred on the primary decision maker is of fundamental importance, and this Tribunal will not substitute its own opinion merely because it would have exercised the discretion differently: *Houghton v The State of Western Australia* [No 2] [2022] WASCA 7 at [224] to [228].

Penalties Provided by the Rules

53. HRR 190 does not provide for either a maximum or a minimum penalty.
54. The penalties available under the Rules are set out in HRR 256, and are:
- a) A fine.
 - b) Suspension, with or without conditions.
 - c) Disqualification, for a fixed period or permanently.
 - d) Warning off, for a fixed period or permanently.
 - e) Exclusion from a racecourse, for a fixed period or permanently.
 - f) A bar from training or driving a horse on a racecourse, track or training ground, for a fixed period or permanently.
 - g) Suspension of registration, with or without conditions, for a fixed period, or cancellation of registration.
 - h) Suspension of a licence, with or without conditions, or cancellation of a licence.
 - i) A severe reprimand.
 - j) A reprimand or caution
55. Some guidance can often be obtained from previous decisions of this Tribunal or from previous decisions of the Stewards. In their reasons for penalty, the Stewards referred to a number of previous examples of penalties imposed for presentation offences.³⁴ It is apparent from these that disqualification is the ordinary penalty imposed for such offences, and that the penalty imposed in this matter of nine months' disqualification is entirely within an appropriate range.
56. However, while the Stewards were of the view that there should be no recognition in the penalty imposed for the period of time Mr Laidlaw was subject to a suspension prior to the imposition of a disqualification, we are of the view that the imposition of a punitive sanction, even one that did not prevent Mr Laidlaw from participation in his profession as a farrier, needs to be recognised in mitigation of the ultimate penalty imposed.

³² Reasons dated 21 July 2023 [3]

³³ Reasons dated 21 July 2023 [4]

³⁴ Reasons dated 21 July 2023 [25]

57. We would therefore reduce the disqualification imposed to one of seven months to reflect the period of three months Mr Laidlaw was subject to a suspension prior to his disqualification. In doing so we make it clear that but for the period of time Mr Laidlaw was subject to a suspension we would not have interfered with what was otherwise an appropriate penalty of nine months' disqualification.

Orders

58. The orders we would therefore make are that the appeal against conviction is dismissed.

59. The appeal against penalty is allowed. The disqualification of nine months imposed on 21 July 2023 is reduced to seven months disqualification from 21 July 2023.


_____ **ROBERT NASH, CHAIRPERSON**


_____ **PHILLIP GLEESON, MEMBER**


_____ **NATALIE SINTON, MEMBER**

