RACING NEW SOUTH WALES

APPEAL PANEL

17 June 2016

MR R CLUGSTON — PRINCIPAL MEMBER
MR T HALE SC
MR J FLETCHER

IN THE MATTER OF THE APPEAL OF
STEPHEN FARLEY

REASONS FOR DECISION

CHAIRMAN: This is an appeal by licensed trainer Stephen Farley (hereinafter referred to as "the Appellant") against the penalty imposed by Stewards at the offices of Racing NSW, Druitt Street, Sydney on 10 May 2016 in respect of a breach of AR 178. That Rule provides that:

"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 that the Appellant did bring *Di's Diamond* to Taree Racecourse for the purpose of engaging in Race 1 the 3 Year Old Country Plate on 28 February 2016 and a prohibited substance was detected in the sample taken from *Di's Diamond* prior to its running in that race as:

a. Cobalt was detected in a sample taken from *Di's Diamond* prior to that filly running in Race 1 the 3 Year Old Country Plate conducted at Taree Racecourse on 28 February 2016;
b. Cobalt is a prohibited substance pursuant to AR 178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or

both an action and effect, within the blood system and was detected at a level that is not, under AR 178C(1)(l), excepted from the provisions of AR 178B;

c. Further or alternatively, cobalt is a prohibited substance pursuant to AR 178B(2) as it is a haematopoietic agent and was detected at a level that is not, under AR 178C(1)(l), excepted from the provisions of AR 178B.

The Appellant pleaded guilty to the charge before the Stewards and the Stewards imposed a disqualification for a period of twelve (12) months to commence on 10 May 2016 and to expire on 9 May 2017. The Appellant was granted a stay of proceedings on 11 May 2016 until further order of the Panel.

The Appellant maintained his plea of guilty in the proceedings before the Panel. The appeal is therefore a rehearing on the question of penalty. The Stewards were represented in the proceedings before the Panel by Mr M Van Gestel, Chairman of Stewards, by leave and Mr P O'Sullivan, Solicitor, appeared for and with the Appellant by leave. The transcript of the Stewards' inquiry conducted at the offices of Racing NSW on 10 May 2016 and the transcript of the hearing of the charge which took place on the same day and the exhibits tendered in those proceedings have been admitted into evidence in the proceedings before the Panel.

The essential facts of the case are not in dispute. The racehorse *Di's Diamond* was presented to run and did run in the 3 Year Old Country Plate at Taree Racecourse on 28 February 2016. The Appellant who is a licensed trainer with Racing NSW had been the trainer of that horse in the period leading up to and on 28 February 2016. At 11.45am on race day prerace urine samples were taken from *Di's Diamond* by a swab official in the presence of Mr Paul Vilatta, an employee of the Appellant. Those urine samples were then forwarded to the Australian Racing Forensic Laboratory ("the ARFL") for analysis. On 22 March 2016 the ARFL forwarded the urine sample and a control sample to the National Measurement Institute ("the NMI") at North Ryde for analysis for the presence and concentration of cobalt. On 30 March 2016 the NMI reported (RN1107667) to the ARFL that the urine sample was found to contain 377 micrograms/litre of cobalt. The urine sample and a control sample were then forwarded to Chem Centre, Bentley, Western Australia, for confirmatory analysis. In Certificate of Analysis No. 15R0868001 and dated 15 April 2016 Chem Centre certified that the urine sample was found to contain 380

micrograms/litre of cobalt. Each of those cobalt readings exceeded the threshold of 200 micrograms/litre introduced by AR 178C(1)(l) effective from 1 January 2015.

In his evidence before the Stewards the Appellant indicated that he took no issue with the collection, custody, security or analysis of the urine sample taken from *Di's Diamond* on 28 February 2016 and by pleading guilty to the charge the Appellant has accepted that cobalt at a concentration higher than 200 micrograms per litre is a prohibited substance under the Australian Rules of Racing.

In that respect the Stewards reply on the evidence of Dr C Suann, Senior Official Veterinarian, Racing NSW. Dr Suann's report dated 26 April 2016 was in evidence before the Stewards (Exhibit 15) and Dr Suann gave oral evidence in support of his written report. In his report Dr Suann opined that:

"Cobalt, when evidenced by its detection in excessive quantities in a urine sample, would be declared as a 'prohibited substance' since it is capable of causing an action and/or an effect principally on the *blood system*, thereby fulfilling the requirements of AR.178B(1), and it would also be categorised as a *haematopoietic agent*, thereby fulfilling the requirements of AR.178B(2).

The element cobalt is essential for normal physiological function, but when administered to and present in the body at levels in excess of normal physiological requirements, cobalt acts and exerts an effect in mammalian species of stabilising the transcription factor hypoxia-inducible factor-1alpha (HIF-1α). Under normoxic conditions, HIF-1α is rapidly degraded. However, under hypoxic conditions, or following cobalt administration, degradation of HIF-1α is inhibited, leading to activation of the erythropoietin (EPO) gene. This leads to an increase in production of endogenous EPO and subsequent erythropoiesis (red blood cell production), including an increase in the number of reticulocytes, red blood cells and haemoglobin.

It is postulated that excessive levels of cobalt are capable of improving performance since stabilisation of HIF-1α will not only enhance endogenous EPO production to cause erythropoiesis but will also stimulate other genes relevant to exercise performance. Excessive cobalt has also been shown to improve the efficiency of energy production, and to restrict oxidative stress which is a known limit to performance in the horse.

Cobalt is also an intrinsic part of vitamin B12 (cobalamin) which is essential for red blood cell production. Horses can synthesise endogenous cobalamin, but require

inorganic cobalt in the diet to facilitate this process. Therefore, a certain physiological level of cobalt will be detected in equine urine and blood.

Chronic administration of excessive cobalt leads to deposition of cobalt in tissues and has been associated with a number of toxic effects. Adverse effects including gastrointestinal sickness, thyroidal dysfunction, and heart muscle toxicity have been reported in people. However, even with the reported adverse effects, the use of cobalt intended as a blood doping agent persists in human athletes.

There are a number of APVMA-registered oral and injectable supplements for use in horses containing cobalt and/or cobalamin. Some of the injectable supplements, particularly those containing a cobalt salt, are known to transiently increase urinary and blood cobalt concentrations, but these levels rapidly decline to baseline levels in a matter of hours."

In the course of their inquiry the Stewards were concerned to ascertain the source of the cobalt detected in the urine sample taken from the Appellant's horse. In his evidence before the Stewards the Appellant maintained that he did not administer cobalt to *Di's Diamond* either on race day or the day before race day or at any time. The Appellant was questioned by Stewards in relation to his treatment records in relation to the horse. Those records disclosed that the horse had been administered 10ml of Hemoplex at approximately 4pm on Friday 26 February 2016 (ie 44 hours prior to the prerace urine sample taken from the horse).

Dr Suann's evidence (at page 7 lines 329-333) was that Hemophex "contains both cobalt gluconate, which is a salt of cobalt, at a concentration of 0.7 milligrams per millilitre and it also does contain vitamin B12 at 150 micrograms per litre. So in terms of - it does - of the injectable that are registered and available for use in horses it's on the high end of the scale of cobalt concentration for a legitimate veterinary product." Dr Suann was asked by Stewards whether an administration of Hemophex 44 hours prior to sampling would cause a level of 380 micrograms per litre. Dr Suann responded (at pages 7 & 8 limes 338-342):

"The available scientific evidence that have looked at administrations of similar preparations are principally Hemoplex, which has an equivalent concentration of cobalt and vitamin B12. The results of any administration trials that involve that product, which is very similar to Hemo-15, would not be consistent with that scenario."

Dr Suann's evidence was consistent with the evidence he gave when the Appellant was interviewed by Stewards on 17 March 2016 in relation to the screening level of 410 micrograms per litre reported by NMI from the urine sample taken from *Di's Diamond* on 28 February 2016. On that occasion the Stewards asked Dr Suann "if there was an administration close to the race of Hemoplex, at what point in time do you say that that would be required to be done to get a level in the order of 400 or so?" Dr Suann responded "It would be dose dependent, but say a dose in the order of 10 to 15ml, you're looking at say between two and four hours perhaps."

The Appellant's treatment records for Thursday 25 February 2016 disclosed an entry "20ml Tripart – *Di's Diamond*." The Appellant's evidence was that that entry related to a Tripart injection. Dr Suann's evidence was that "both Tripart injection and Tripart paste contain levels of vitamin B12, but no apparent cobalt salts." Dr Suann's evidence was that the injection of 20ml of Tripart on Thursday 25 February 2016 and the administration of 10mls of Hemoplex at 4pm on Friday 26 February 2016 together would not in his opinion explain the reading of 380 from the urine sample taken at midday on 28 February 2016. The Appellant gave further evidence that the horse was also receiving 10ml of Tripart paste over the tongue twice per day which ceased on Friday 26 February 2016. Dr Suann's evidence was that the administration of Tripart paste twice per day until 48 hours before sampling together with the administration of Hemoplex 40 hours before sampling would not give rise to a finding of 380 micrograms/litre of cobalt in the sample taken from the horse on race day.

The Appellant's stables at Wyong Racecourse were inspected by Mr N Hayward, Chief Investigator Surveillance and Investigation Unit and Mr N Ryan, Investigator, on 8 March 2016. Mr Hayward's report dated 10 March 2016 (Exhibit 10 before the Stewards) indicates that the Appellant was present during that inspection and was cooperative with the investigators. The feed regime for the horse *Di's Diamond* is outlined in that report and included "Equea Pellet" administered both in the morning and the afternoon. The report indicates that "Equea Pellet has 'Mineral Premix' listed as an ingredient. In this premix Cobalt is listed but the amount is not."

Mr Hayward and Mr Ryan visited the Appellant's residence at 439 Tuggerawong Road, Tuggerawong on 1 April 2016. During that visit the Appellant produced to the investigators a tax invoice from Taylor Made Equine dated 22 July 2015 for the

purchase of three (3) products viz Enduro 500, Bio Blocker and Bio Bleeder. Dr Suann's evidence was that those products were not registered veterinary products. Dr Suann also said that testing of those products has indicated that they would not explain the analyst's finding of 380 micrograms per litre of cobalt.

The Panel considers that breaches of AR 178 are serious in the overall framework of the Australian Rules of Racing as they impinge on the level playing field which is fundamental to the overall integrity of racing. The Panel is mindful of the long line of decisions of the NSW Racing Appeals Tribunal and the Racing NSW Appeal Panel in relation to the general starting point when imposing penalties for breaches of AR 178. That approach was outlined by Thorley DCJ in the Appeal of G Rogerson (24 May 1998). In that appeal his Honour said, inter alia:

"It seems to this Tribunal that breaches of AR 178 should ordinarily be met with penalties of disqualification or at least suspensions and that fines should be reserved for those cases where special circumstances would dictate."

The Panel notes however the remarks of the NSW Racing Appeals Tribunal Chairman Mr D Armati in Racing NSW v K Moses (2 December 2015) that Thorley DCJ's words should not be elevated to some sort of test as every case needs to be considered on its merits.

The Panel takes into account the Appellant's plea of guilty first entered in the proceedings before the Stewards and confirmed in the proceedings before the Panel and his cooperation with the Stewards. The Panel has also taken into account that the Appellant has been a licensed trainer for fourteen (14) years and that during that period he has not incurred any prohibited substance breaches. The Panel is also mindful of the Appellant's evidence that he currently has twenty-four (24) horses in work and nine (9) employees.

The Panel has also considered the precedent table of penalties in previous cases involving breaches of the prohibited substance provisions of the Australian Rules of Racing involving the substance cobalt. The Panel considers that the decision of the NSW Racing Appeals Tribunal in the case of Moses is directly relevant to the assessment of the appropriate penalty in this case. In paragraph 21 of the Tribunal's Reasons for Decision in Moses Mr Armati referred to his observations made in the Appeal of D Smith (15 August 2015) in relation to the appropriate approach to be taken in determining penalty for breaches of the Australian Rules of Racing as follows:

"……the Tribunal in determining what order is appropriate has regard to what message is to be given to this individual trainer to ensure that in the future this type of conduct is not repeated, but to ensure that there is an appropriate penalty imposed to indicate the response of the community to integrity and welfare issues. In addition, it is a question of what general message is required to be sent to the community at large to indicate to those who might be likeminded to engage in such conduct, what the likely consequences are, and, secondly, to indicate to the broader community who are not likely to engage in the type of conduct that, should it be detected, they, whether they be wagerers or people just generally interested in the individual code, will know that it is operating at the highest possible standards."

In Moses the Tribunal was required to consider the case of a Randwick based trainer of thirteen (13) years unblemished experience who had pleaded guilty to a breach of AR 178 and which involved the prohibited substance cobalt at a reading of 250 micrograms per litre the source of which was unknown. The Stewards had imposed a penalty of twelve (12) months disqualification however on appeal a differently constituted Panel varied the penalty to a suspended two (2) year suspension and a $20,000 fine. On appeal the Tribunal set aside the Panel's decision in relation to penalty and imposed a disqualification period of twelve (12) months.

The Panel has also considered Mr O'Sullivan's submissions to the Panel. Those submissions were as follows:

- the nature of the prohibited substance and its concentration is irrelevant to the question of penalty. The Panel rejects that submission as it considers that the presence of cobalt and its concentration of 377 microgram/litre are directly relevant to the Panel's consideration of the question of the seriousness of the breach in this case;
- that the evidence does not support any finding as to the origins of the prohibited substance detected in the horse. The Panel accepts that submission however the Panel considers that at the very least the evidence supports a finding that there was inadequate supervision of the horse and a failure to keep adequate records of medication administrated to the horse.
- the Tribunal's decision in Moses can be distinguished from the facts of the present case on the following bases:

1. that unlike the position of Mr Moses who had committed a very serious breach whilst a licensed jockey, the Appellant in this case had no significant prior history of breaching the Rules of Racing;
2. that Mr Moses had received a prior warning from Stewards in relation to elevated concentrations of cobalt in some of his horses prior to the horse in question in that case being allowed to run in its race.

The Panel accepts that in determining the penalty in Moses the Tribunal took into account his prior 1995 matter as a jockey however the Tribunal made it plain that it "was not a substantial issue." Further, the Panel accepts that Mr. Moses was given a prior warning by Stewards however the Panel notes that that warning was given on race day and in circumstances which didn't afford him an opportunity to alter his stable practices;

- in the recent case of licensed trainer P Moody before the Victorian Racing Appeals and Disciplinary Board the Board stated that breaches of AR 178 are of lesser gravity than breaches of AR175 (h)(1). In that case the RADB imposed a penalty of twelve (12) months suspension, six (6) months of which was suspended for breach of AR175 (h)(1). The Panel notes however that in the case of Moody the evidence established a likely cause of the elevated cobalt reading and that the breach was caused by significant carelessness in the operation of his stables. However in the present case the "how, when, where and why" are unexplained by the evidence.

The Panel further notes that the concentration of 377 micrograms/litre was in excess of the 250 micrograms per litre concentration in Moses.

Ultimately, the Panel is satisfied that in all the circumstances of this case the appropriate penalty is disqualification for twelve (12) months.

The orders of the Panel are as follows:

1. Appeal against penalty imposed by Stewards is dismissed;
2. Penalty of licence disqualification for twelve (12) months imposed by Stewards is confirmed, such disqualification to commence on 24 June 2016 and to expire on 23 June 2017 on condition that he not start a horse in any race after 1pm on 17 June 2016.
3. Appeal deposit of $200 is forfeited.