RACING NEW SOUTH WALES

APPEAL PANEL

Date of Hearing: 9 October 2015

Date of Decision: 9 October 2015

Mr R Clugston - Principal Member

Mr J Fletcher

Mr T Carlton

IN THE MATTER OF THE APPEAL OF KEVIN MOSES

REASONS FOR DECISION

PRINCIPAL MEMBER: This is an appeal by licensed trainer Kevin Moses (hereinafter referred to as "the Appellant") against the severity of a penalty imposed by Stewards at the offices of Racing New South Wales, Druitt Street, Sydney on 21 August 2015 for a breach of AR178. That rule provides that:

> "*AR 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."*

The particulars of the charge were that the Appellant did bring Felix Bay to Hawkesbury Racecourse for the purpose of engaging in race 7, the Benchmark 75 Handicap, on 16 April 2015 and a prohibited substance was detected in the sample taken from Felix Bay prior to it running in that race as:

a. cobalt was detected in a sample taken from Felix Bay prior to that gelding running in race 7, the Benchmark 75 Handicap, conducted at Hawkesbury Racecourse on 16 April 2015;

b. cobalt is a prohibited substance pursuant to AR178B(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 AR178C(1)(l), excepted from the provisions of AR178B;

c. further or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is a haematopoietic agent and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B.

The Appellant pleaded guilty to the charge before the Stewards and the Stewards imposed a disqualification period of 12 months to commence on 21 August 2015 and to expire on 21 August 2016 on which day he may reapply for a licence. The Appellant adhered to 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 R Murrihy, Chairman of Stewards, by leave, and Mr G James of Queen's Counsel and Mr E James of Counsel, instructed by Mr B Murphy, Solicitor, appeared for and with the Appellant by leave.

The transcript of the Stewards' inquiry conducted at the offices of Racing New South Wales on 21 August 2015 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 this case are not in dispute. The racehorse Felix Bay was entered to compete in the Benchmark 75 Handicap at Hawkesbury Racecourse on 16 April 2015. The Appellant, who was a licensed trainer with Racing New South Wales, had been the trainer of that horse for some time leading up to that date.

At 12.22pm on 16 April 2015 the Chairman of Stewards received from the General Manager of the Australian Racing Forensic Laboratory ("the ARFL") a number of results for previous race day tests for cobalt. Mr Murrihy observed that the results included results for two horses trained by the Appellant, namely Felix Bay, with a reading of 51 micrograms, and Saddler's Flame, with a reading of 94 micrograms. Mr Murrihy also noted that Felix Bay was entered to race at Hawkesbury that same afternoon. As a result, he arranged for members of the Racing New South Wales Surveillance and Intelligence Unit to attend the Appellant's Randwick stables and for Stewards on duty at Hawkesbury to interview the Appellant's foreperson, Ms J Moses.

The Appellant attended his stables and was informed by Racing New South Wales officers of the elevated cobalt reading for Felix Bay. The Appellant responded by informing those officers that "he was happy to let the horse run." Those officers then inspected the feed room and the treatment cabinet at the Appellant's stables where they located various products containing cobalt but no substances that were of concern.

The Appellant's foreperson was interviewed by Stewards at Hawkesbury racecourse in the presence of the race day veterinarian, Dr Emily Streckfuss. Dr Streckfuss indicated to Stewards that she had inspected Felix Bay at the racecourse and observed a small haematoma on the side anterior jugular vein where there was a lump consistent with a needle. Ms Moses informed the Stewards that the most recent needle received by the horse was on the morning of the previous day when it was injected with Pentosan. Ms Moses gave an undertaking to Stewards that Felix Bay was drug free and that she was content for the horse to run.

The horse Felix Bay was presented to run and did run in the Benchmark 75 Handicap on 16 April 2015 at Hawkesbury. A pre-race urine sample was taken from that horse at 2.13pm and a post-race blood sample was taken at 4.40pm. Both samples were forwarded to the ARFL which then forwarded them to the National Measurement Institute ("the NMI") for analysis.

In Report of Analysis number RN1066985 dated 14 May 2015 the NMI reported that the pre-race urine sample taken from Felix Bay on 16 April 2015 was found to contain cobalt at a concentration of 262 micrograms per litre. As a result the ARFL requested Chem Centre of Bentley, Western Australia, to conduct a confirmatory analysis. In Certificate of Analysis number 14RR1087 dated 8 June 2015 Chem Centre certified that the urine sample was found to contain cobalt at a concentration of 250 micrograms per litre.

In his evidence before the Stewards the Appellant took no issue with the collection, custody, transportation and analysis of the urine sample taken from Felix Bay on 16 April 2015 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 rely on the evidence of Dr C Suann, Senior Official Veterinarian, Racing New South Wales. Dr Suann's evidence in exhibit 24 was that:

> "Cobalt, when evidenced by its detection in excessive quantities in a urine sample, will 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 AR178B(1), and it would also be categorised as a haematopoietic agent, thereby fulfilling the requirements of AR178B(2).
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> 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-inductible factor-1 alpha. Under normoxic conditions HIF-1A is rapidly degraded. However, under hypoxic conditions or following cobalt administration, degradation of HIF-1A is inhibited, leading to an 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 cells and haemoglobin.
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> Excessive levels of cobalt are capable of improving performance since stabilisation of HIF-1A 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 energy performance on the horse.
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> 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 would be detected in equine urine and blood."

In his evidence before the Stewards the Appellant said that he and his wife, being his foreperson, had never used cobalt on their horses and he sought to explain the elevated cobalt reading for Felix Bay by contending that it was caused by treatment and injections of vitamin B12 administered to the horse.

On the other hand, Dr Suann's evidence was that the elevated cobalt reading for the horse could have been caused by a race day administration of the substance.
Dr Suann based his conclusion on the results recorded in a vitamin B12 trial (exhibit 29) and a Racing Victoria study (exhibit 30). Dr Suann's evidence in relation to the vitamin B12 trial was as follows (at pages 12 and 13 lines 587 to 616 inclusive):

> "Basically this trial involved two of our research horses that are hand fed twice daily. They are in a paddock, but they do not get commercial horse feed, which has all of the sort of the balanced vitamins and minerals that are added to commercial horse feed and you will see there that the top part of the table refers to urine levels.
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> So we've got two horses. One is Dance Beat and one is Extagonal and you will see that the levels - basically 4 hour through to 48 hours basically reflects what would be considered to be normal levels in a horse, so they're all less than 10 basically. So that's pretty well the normal level in a horse that doesn't receive any over supplementation with cobalt containing products, vitamin B12 products, et cetera, et cetera, in their feed. Now, as I say, they're getting a balanced feed mix, but no added vitamins and minerals to that feed.
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> So in this particular situation we administered a total of 5 milligrams of vitamin B12 and we'll make some comparisons with the sort of levels that we see in your particular case, but you will see that the part of the table refers to urine samples, so we have a control, which is the level of the urine collected before we administered the vitamin B12, and then you will see that administer the 5 milligrams of vitamin B12 intravenously and what we see is a very sharp sort of upward peak, up to 100 in one horse and 48 in the other, and then there's a rapid decline in those levels, back to 41 in two hours and a dramatic drop in Extagonal back down to baseline levels by the two hour mark.
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> If you go down to the blood samples, you will see that we collected bloods in a closer sort of timeframe. Again, you've got very low levels. In Dance Beat you see 1.2 and Extagonal 0.99, or less than 1, prior to administration and in both horses the levels kick up to about 2.5, 2.3 and then there's decay in those levels very, very quickly. So you get a peak within the first half hour to an hour and then a rapid decay."

Dr Suann's evidence in relation to the Racing Victoria study was as follows (at pages 14 and 15 lines 674 to 716 inclusive):

> "Basically this trial was an attempt to mimic the supplementation regime and injectable regime of horses that are the subject of other inquiries and in this particular case, using injections that do contain - and particularly with the product VAM you will see that on the first page, on 28 April, you will see that there's a list of three treatments that were given to these horses intravenously and that

includes VAM, which is an injectable product that contains cobalt, a cobalt salt and vitamin B12, Ferrocyl, which contains no cobalt or vitamin B12 and Coforta, which does contain a level of vitamin B12.

The total amount of cobalt and vitamin B12 in this particular preparation would be well in excess of the amount that would have been given in your particular case, but what you need to see, if you go to the very far right column, you will see that these horses are tracked over a period of time and you will see the very low levels of cobalt. This is under the heading "NMI Results" and then suddenly you see a level of 590 micrograms per litre, which then reduces to 200, which then reduces to 70.

You will see that these particular products, these injections, were given at 8.27am in the morning and then the first sample that's collected after that particular administration is 10.30, so that's just over two hours later, and you see a level of 590 micrograms per litre. By the four hour mark it's down to 200 and then by the six hour mark it's 70. That cycle is then repeated on 1 May, which is further down that page. Similar amounts of VAM, Ferrocyl and Coforta are given and at the time, in this particular case, three hour mark post-administration you're getting levels of 140. There is an interesting sort of upward shift at two hours later, but then it quickly subsides back down to the baseline levels.

That particular trend is quite evident for the duration of all of these trials where we're getting, after the administration of commercial cobalt and vitamin B12 preparations, we are seeing a spike that goes in excess of threshold, but very, very quickly subsides to levels below the threshold and usually in the space of by four to six hours and the level has subsided back to below the threshold.

So even taking into account in your particular situation where you supplement your horses with a range of vitamin B12 preparations, particularly oral supplements, some oral supplements that contain low levels of cobalt, but obviously there is the issue of the vitamin injections you use on a routine basis, but the only conclusion I can reach, on the basis of our very limited trial and this much more comprehensive trial that was conducted under the auspices of Racing Victoria is that - the only conclusion I can reach is the, in order for the levels to exceed the threshold in your particular case, the injections were administered pre-race on the day of the race."

At a later point in the Stewards' inquiry the Chairman informed Dr Suann that the post-race blood sample taken from Felix Bay had returned a reading of 1.3. Dr Suann responded (at page 26 lines 126 to 128):

> "Well, that blood level is well within normal limits and further supports the concept that we're on the downhill run of levels as time progresses away from a point of administration."

The Panel is satisfied, based on Dr Suann's evidence, that a possible explanation for the elevated cobalt reading in this case was a race day administration of a substance containing cobalt. On the other hand, the Panel is not satisfied that the reading in question was caused by the over use of veterinary supplementation administered by the

Appellant and/or Mrs Moses. The Panel agrees with the remarks made by the Chairman of Stewards at the conclusion of the Stewards' inquiry when he said:

> "The situation of how, when, where and why is not established."

The Panel considers that breaches of AR178 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 New South Wales Racing Appeal Tribunal and the New South Wales Racing Appeal Panel in relation to the general approach to be taken in imposing penalties for a breach of AR178. That approach was outlined by Thorley DCJ in the Appeal of G Rogerson (the decision being given on 24 May 1998). In that appeal his Honour said interalia:

> "It seems to this Tribunal that breaches of AR178 should ordinarily be met with penalties of disqualification or at least suspension and that fines should be reserved for those cases where special circumstances would dictate."

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 co-operation with the Stewards. The Panel has also taken into account that the Appellant has been a licensed trainer for 13 years and that during that period has not incurred any prohibited substance breaches. The Panel notes that in the period 1 January 2005 to 5 October 2015 in excess of 700 swabs have been taken from horses trained by the Appellant with no positive or excessive readings.

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 table includes the cases of trainers D Smith and S Kavanagh in New South Wales. Each of those cases involved numerous breaches, some of which were defended, and the Panel accepts the submission of Mr James that they should not be used as a guide to the appropriate penalty to be applied in this case.

The table also refers to the case of trainer S Taylor in Western Australia who received penalties of 12 months disqualification in respect of two breaches of AR178. The Panel accepts the submission of Mr James in relation to that case that the circumstances, such as the prior record, the plea and the reading in each case were not known and, therefore, the penalty imposed in that case should not be used as a guide in relation to the penalty applicable in this case.

Ultimately the Panel considers that the appropriate penalty, in order to address the seriousness of the breach and taking into account the matters referred to above, such as the Appellant's plea of guilty and his co-operation with the Stewards, is to deal with the breach by way of a suspended period of a licence suspension together with the imposition of a monetary penalty.

The orders of the Panel, therefore, are as follows:

1. Appeal is upheld;

2. Penalty of 12 months disqualification imposed by Stewards is set aside;

3. The Appellant's trainer's licence is suspended for a period of two years commencing on 9 October 2015 and expiring on 8 October 2017, such period of suspension being suspended pursuant to AR196(4) for the whole of the suspension period on condition that the Appellant does not commit a breach of the Australian Rules of Racing involving any use of a prohibited substance during such period;

4. The Appellant is to pay a monetary penalty of $20,000;

5. The appeal deposit of $200 is forfeited.
