APPEAL PANEL OF RACING NEW SOUTH WALES

THE APPEAL OF MR BEN SMITH

Appeal Panel:	**Mr R. Beasley SC – Principal Member; Mr C. Tuck; Mr L. Vellis**
Appearances:	**Mr Marc Van Gestel, Chairman of Stewards**
	Mr P. O'Sullivan for the Appellant
Date of Hearing:	**26 August 2019**
Date of Reasons and Orders:	**30 October 2019**

REASONS FOR DECISION

Introduction

1. On 28 March 2018, Racing NSW Stewards issued 10 charges against Licensed Trainer Mr Ben Smith ("the Appellant") under the Australian Rules of Racing ("the Rules"). Some of the charges alleged more than one breach of the particular rule involved.

2. The charges issued against the Appellant followed from a Stewards' Inquiry which commenced on 11 September 2018. That Inquiry was established after two horses trained by the Appellant – Iron Duke and Elaborate – were found to have elevated levels of cobalt in their urine, significantly in excess of the threshold allowed under the Rules.

3. On 10 May 2019, the Stewards found the Appellant guilty of all 10 charges brought against him. In relation to some alleged breaches of the Rules, the Appellant pleaded guilty. Others he contested. The various charges, and the particulars of each, are annexed to these Reasons for Decision and marked "A".

4. In summary, the Appellant pleaded guilty to the following charges:

Charge 1 (two breaches alleged) – giving false evidence to Stewards during the course of an investigation on 11 September 2018, in breach of AR 232(i).

Charge 2 – refusing to give evidence during a Stewards' Inquiry on 11 September 2018 concerning the failure to pass on the name of a supplier of certain products, in breach of AR 232(h).

Charge 4 – bringing a horse (Iron Duke) to a racecourse for the purpose of that horse starting in a race (on 25/8/18) when a prohibited substance (cobalt) was detected above the level of 100 ug/l in a urine sample taken from that horse, in breach of AR 240(2).

Charge 6 - bringing a horse (Elaborate) to a racecourse for the purpose of that horse starting in a race (on 26/8/18) when a prohibited substance (cobalt) was detected above the level of 100 ug/l in a urine sample taken from that horse, in breach of AR 240(2).

Charge 7 (breach 2) – causing medication (an electrolyte paste) to be administered to a horse (Anecdote) on a race day (9 March 2018) in breach of AR 249(1)(b).

Charge 8 (breach 1) – attempting to commit a breach of AR 249(1)(b) by instructing Emma Bickley to administer a medication (electrolyte paste) on a race day (26 August 2018) to Elaborate in breach of AR 227(b).

Charge 9 – possession of various medications/substances/preparations that had not been registered and/or labelled and/or prescribed and/or dispensed and/or obtained in accordance with applicable Commonwealth and State legislation (the substances being formaldehyde; hyaluronic acid; levamisole; lignocaine; menthol; eucalyptol; phenylbutazone) in breach of AR 252(1).

5. The Appellant was found guilty of the following charges, to which he pleaded not guilty:

Charge 3 – Administering a prohibited substance (cobalt) detected in a sample of a horse (Iron Duke) above the allowable limit following the running of a race on 25 August 2018, in breach of AR 245(1)(a).

Charge 5 - Administering a prohibited substance (cobalt) detected in a sample of a horse (Elaborate) above the allowable limit following the running of a race on 26 August 2018, in breach of AR 245(1)(a).

Charge 7 (breach 1) – causing medication (electrolyte paste) to be administered to a horse (Dream Charge) on a race day (5 January 2018) in breach of AR 249(1)(b).

Charge 7 (breach 3) – causing medication (electrolyte paste) to be administered to a horse (Elaborate) on a race day (20 July 2018) in breach of AR 249(1)(b).

Charge 8 (breach 2) – attempting to commit a breach of AR 249(1)(b) by attempting to cause a medication (electrolyte paste) to be administered to a horse (In Her Time) on a race day (14 October 2017) in breach of AR 227(b).

Charge 8 (breach 3) – attempting to commit a breach of AR 249(1)(b) by attempting to cause a medication (electrolyte paste) to be administered to horses (Kyoko, Golly Miss Solly, Libertine Miss, Tabrobane) on a race day (29 October 2017) in breach of AR 227(b).

Charge 10 – engaged in "improper conduct" in breach of AR 228(b) by administering the carcinogenic substance formaldehyde to the horses Anecdote, Kristensen and Marksfield.

6. On 11 June 2019, following further evidence and submissions, the Appellant was penalised by having his licence disqualified for a period of 4 years 6 months. That penalty commenced on 18 September 2018, and will expire on 18 March 2023, on which day the Appellant may re-apply for his licence.

7. The Appellant has appealed to the Panel against the Stewards' findings of guilt in relation to each of the charges he pleaded not guilty to set out above in [5]. He has further appealed against the severity of the penalty imposed upon him.

8. On the appeal, the Stewards were represented by Mr Marc Van Gestel, the Chairman of Stewards. The Appellant was represented by his solicitor, Mr Paul O'Sullivan.

9. The appeal is a rehearing: s.43(1) *Thoroughbred Racing Act 1996* (NSW). Tendered on the appeal hearing was an Appeal Book (Exhibit A) which contains some of the transcript of the evidence from the Stewards' Inquiry. Also tendered was a bundle of over 800 pages, containing the exhibits from the Stewards' Inquiry, which retain the number allocated to them at the Inquiry. This bundle contains further transcript of evidence from the Inquiry. The book and bundle are referred to as AB 1 and AB 2 in these reasons.

10. Oral evidence was given at the appeal hearing from Dr T. Koenig, the Chief Veterinarian of Racing New South Wales. The Appellant also gave evidence.

11. Some documents and oral evidence on this Appeal relate to the appeal against penalty, rather than the appeals against the finding of breach of the various Rules. By agreement with the parties, it was decided that the Panel would deal with the appeal in relation to penalty at a later time. These Reasons for Decision relate only to the Stewards' findings of guilt to which the Appellant pleaded not guilty.

12. At the conclusion of the evidence on the appeal, the parties agreed to file written submissions. Mr Van Gestel lodged submissions dated 18 September 2019 on behalf of Racing New South Wales ("Stewards' Submissions"). Mr O'Sullivan provided submissions for the Appellant dated 8 October 2019 ("Appellant's Submissions"). Mr Van Gestel then lodged written submissions in reply by the Stewards dated 9 October 2019 ("Stewards' Reply Submissions").

Charges 3 and 5 - cobalt administration to Iron Duke and Elaborate

13. These charges both involve alleged breaches of AR 245(1)(a). In charge 3 it is alleged that the Appellant administered the prohibited substance cobalt to the racehorse Iron Duke prior to it running in a race at Newcastle on 25 August 2018,

resulting in that horse having in its urine an amount of cobalt above the allowable limit of 100ug/l.

14. Charge 5 is in similar terms. Through it, it is alleged that the Appellant breached AR 245(1)(a) by administering cobalt to the horse Elaborate prior to it running at a race at Wyong on 26 August 2018, resulting in that horse having an amount of cobalt detected in its urine above the allowable limit.

15. The Appellant pleaded not guilty to the charges, and denies administering the prohibited substance.

16. There are some matters not in dispute. The Appellant is the trainer of both Iron Duke and Elaborate: Appellant's Submissions at [6]. There is no dispute that cobalt is a prohibited substance under the Rules, nor that it was detected in the urine of both horses above the 100ug/l level: Appellant's submissions at [7]. The level detected for Iron Duke by the National Measurement Institute was 261ug/l: AB 2, Exhibit 6, page 11. For Elaborate it was 567ug/l: AB 2, Exhibit 19, page 32.

17. The only matter that the Panel then must resolve is whether the Appellant administered cobalt to these horses prior to them running in the particularised races.

18. The burden of proof in relation to establishing breach is on the Stewards (this applies to all the charges the subject of this appeal). A breach of AR 245(1)(a) is a very serious infringement of the Rules. As such, while the standard of proof remains the "balance of probabilities", the Panel must bear in mind the High Court's decision in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336. Taking into account the seriousness of the alleged breaches of the Rule, the Panel must be comfortably satisfied that breach has occurred.

19. Following the detection of cobalt in the urine samples of Iron Duke and Elaborate above the allowable concentration, the Stewards commenced their Inquiry. During the course of it, the Appellant notified his solicitor, Mr O'Sullivan, as to his treatment/supplement regimes for the two horses. He did so in an email to Mr O'Sullivan dated 11 February 2019, that Mr O'Sullivan then provided to Stewards: AB 2, Exhibit 85, page 676.

20. For Iron Duke, Exhibit 85 outlines an administration regime for Tuesday 21 August, Wednesday 22 August and Thursday 23 August, prior to the horse running on 25 August 2018 (the date the urine sample was taken). 30mls of VAM, amongst other products, was administered to the horse on each day. In relation to Elaborate, 30mls of VAM and other products was also administered to this horse on Wednesday, 22 August, Thursday 23 August and Friday 24 August, before it ran on 26 August (date of sample).

21. In addition to VAM, 30mls of Hemoplex was also administered to each horse on each day outlined above.

22. Both VAM and Hemoplex contain cobalt (see evidence of Dr Koenig, Appeal transcript, T-8 L 338-340).

23. It can be noted that when questioned by Stewards on 11 September 2018, the Appellant indicated that the amount of Hemoplex and VAM administered to each horse on each occasion was 25mls, not 30mls: see Stewards' submissions at [11] and transcript 11/9/18, AB 1 page 300 L 5. It is more likely that the Appellant was mistaken on this occasion, and his email to Mr O'Sullivan that is Exhibit 85 is the better evidence.

24. Expert evidence was given by the Chief Veterinarian of Racing New South Wales, Dr Toby Koenig. That evidence included written evidence contained in a letter from Dr Koenig to Mr Van Gestel dated 22 November 2018, concerning the cobalt concentrations in the urine of the horses Iron Duke and Elaborate, which is in the nature of an expert report: AB 2, Exhibit 83, page 660 (Dr Koenig's report).

25. Dr Koenig's report outlines some history in relation to the scientific literature concerning the administration of cobalt or cobalt containing substances to horses. One of the matters noted by Dr Koenig was that results from clinical trials concerning the administration of commercial cobalt-containing substances such as VAM and Hemoplex have demonstrated *"that the average half-life for washout is in the range of 4-6 hours and that all levels measured returned single digit baseline figures within 24 hours of the last treatment administered"*. Having gone on to then analyse further aspects of the scientific literature, Dr Koenig expressed these opinions:

"23. Based on the literature and scientific studies currently available, it is a reasonable assertion that any thoroughbred horse with a urinary cobalt concentration more than 100mcg per litre on race day has been subject to the administration of excessive cobalt-containing products, for the purpose of affecting performance.

24. In my opinion, having reviewed the available evidence, literature and interviews conducted with the trainer, the evidence clearly demonstrates that on the balance of probabilities cobalt-containing products have been administered with the intention of affecting performance.

25. In summary, the presence of cobalt at the levels detected in these urine samples can only be reasonably assumed to have occurred following excessive supplementation and therefore be reasonably considered a deliberate attempt to enhance performance."

26. Dr Koenig's evidence at the Stewards' Inquiry, and at the Appeal hearing, was consistent with his report. While noting that the Appellant had given twice as much VAM/Hemoplex to each horse than would be recommended - because they are equivalent products (T-8.410-414, and see manufacturers guidelines Ex. 105) - this was not an explanation, in Dr Koenig's view, for the high concentrations of cobalt in each horse's urine. When asked about this, his evidence commencing at T-14.645 was as follows:

"PRINCIPAL MEMBER: Dr Koenig, based on the urine analysis of these two horses, is it likely that the horses were given the administration at the times and in the doses the appellant says?
DR T. KOENIG: No

PRINCIPAL MEMBER: Alright. The reason for that is?
DR T. KOENIG: Based on the science and the excretion profile of injectable cobalt, the expectation that the levels would have been far lower, based on the amount of cobalt that's been administered in those time frames.

PRINCIPAL MEMBER: In fact, that would have almost been down below the 10?
DR T. KOENIG: That would be my expert opinion.

PRINCIPAL MEMBER: So what is the most likely explanation for the cobalt readings that were found in the urine of these horses?
DR T. KOENIG: Certainly to exhibit 261 and 561 [This should be taken as a reference to ug/l and not to Exhibit] as the NMI has measured, in my opinion it would be consistent with an administration

far closer to racing, potentially on race day, at least within one clear day."

27. There is no evidence of a scientific kind that would throw any doubt on the opinion expressed by Dr Koenig. His evidence is accepted. The Panel is comfortably satisfied that cobalt or a cobalt-containing substance was administered to both horses over and above what the Appellant has asserted in Exhibit 85. On the basis of Dr Koenig's evidence, and the concentrations of cobalt in each horses' urine, we are comfortably satisfied that the cobalt was administered to them either on race morning, or at least within 24 hours of the sample being taken.

28. Further, there being no other logical explanation, and noting that the Appellant oversaw the administration of supplements to both horses by his own admission, we are comfortably satisfied that the cobalt was administered by him.

29. The appeals in relation to charges 3 and 5 are dismissed. The finding of breach of AR 245(1)(a) in relation to both charges 3 and 5 is confirmed.

Charges 7.1 and 7.3 – causing race-day administration of electrolyte paste

30. Through charge 7.1, it is alleged that the Appellant breached AR 249(1)(b) by causing the horse Dream Charge to be administered with a medication (an electrolyte paste) on a race day (prior to that horse running at Tamworth on 5 January 2018). Through charge 7.3, the same allegation is made in relation to the horse Elaborate prior to it running in Taree on 20 July 2018. In both instances it is alleged that the medication was administered by a stable-hand, Ms Emma Bickley, at the Appellant's direction.

31. It can be noted, without forming the foundation for a finding of guilt in relation to charges 7.1 and 7.3, that the Appellant pleaded guilty to causing Ms Bickley to administer electrolyte paste to the horse Anecdote on a race day (prior to that horse running at Newcastle on 9 March 2018): Charge 7.2

32. In the Stewards' written submissions, Mr Van Gestel has reminded the Panel of Local Rule 78(1) and (2), which make the licensed trainer responsible for the

administration or conduct of his or her stables, and for the responsibility of the "care, control and supervision of the horses" in their stables.

33. In relation to charges 7.1 and 7.3 (as well as in relation to charges 8.2 and 8.3, discussed below) the Stewards have relied upon evidence given to them by Ms Bickley and by Mr Daniel Smith (another stable-hand, and the Appellant's brother), together with evidence obtained from a forensic examination of phone messages from the Appellant and Ms Bickely's phones: AB 2, Exhibit 74.

34. In an interview conducted by Stewards on 18 September 2018, Ms Bickley told them that she had been asked to give horses a paste on a race day by the Appellant: AB 2, p336, from L 903. The request to Ms Bickley to do this was conveyed to her, she said, by the Appellant via text, phone call and in person: AB 2, p367 L 941.

35. Ms Bickley's evidence was that she thought she was instructed to administer a race day paste to the horse Elaborate in person: AB 2, p368 L991.

36. In relation to evidence the Stewards obtained from Ms Bickley's phone, she confirmed that she gave administrations of race day medication for the Appellant to both Dream Charge and Elaborate: AB 2, p527 L118-137.

37. Mr Daniel Smith also told the Stewards that the Appellant had asked him to administer electrolyte paste to horses on race day: AB 2, p 548.

38. While denying that he had ever given a medication to a horse on a race day, Daniel Smith indicated that he was aware that Ms Bickley had been asked to do this and that she had: AB 2, p 550-552.

39. In relation to charge 7.3 and Elaborate, there was additional evidence from Ms Bickley's phone concerning text messages she had sent to another stable hand, Ms Paige Stephenson, seeking to assist her find the location of the electrolyte paste. She also confirmed that the Appellant was in her presence when she administered the paste to Elaborate on a race day: AB 2, p 528.

40. In relation to charges 7.1 and 7.3, there is, first, no doubt that the electrolyte paste being referred to is a form of medication: Dr Koenig's evidence was that it is a "branch chain amino acid product that will aid the horse's muscle during racing": AB 1, T 196 L 9721.

41. In relation to charge 7.1, relating to the horse Dream Charge, the Appellant submits that the evidence falls short of that which would leave the Panel comfortably satisfied that he caused the paste to be administered to that horse on 5 January 2018.

42. In support of this submission, the Appellant contends that there is no evidence that he asked Ms Bickley to administer the paste.

43. We do not agree. That submission is in conflict with the evidence at AB 2, p.527 L118-124, in which Ms Bickley specifically remembered treating Dream Charge on a race day for the Appellant. A fair reading of that evidence – and the only logical one available – is that it was Ms Bickley's evidence that she was told to make a race day administration of the paste to Dream Charge by the Appellant. There is no evidence or logical reason as to why Ms Bickley would go off on a frolic of her own, administering paste to race horses on a race day, unless she was told to do this by her employer.

44. In relation to charge 7.3, it is submitted by the Appellant that he was not present when Elaborate was administered the paste on a race day, and that the text messages do not implicate him. It is also submitted by the Appellant that the Panel should bear in mind that he has not been able to test or challenge the evidence given by Ms Bickley or Daniel Smith to the Stewards, as they have failed to comply with summonses served on them to appear at the Appeal Hearing.

45. It is true that Ms Bickley and Mr Daniel Smith failed to comply with summonses served on them to appear at the Appeal Hearing. As a result, the Appellant's counsel was deprived of the opportunity to challenge the evidence given by Ms Bickley and Daniel Smith to the Stewards.

46. The Panel accepts that, consistent with his instructions, Mr O'Sullivan would have been obliged to put to both Ms Bickley and Daniel Smith that they were either mistaken, or that their evidence was not truthful.

47. This is an Administrative Hearing. The rules of evidence do not apply (the "rules" of procedural fairness of course do). While the evidence of Ms Bickley and Mr Daniel Smith may not quite have the weight it would have had, had they attended the appeal hearing and subjected themselves to cross-examination, the evidence that they gave

the Stewards is relevant, and must be taken into account by the Panel. The evidence given to the Stewards by Ms Bickley and Daniel Smith is also, to a degree, corroborated by the phone messages tendered in the evidence. In relation to the totality of the evidence, this includes evidence from the Appellant's phone, tendered primarily in respect to charge 8, and referred to below.

48. The Panel has closely considered the evidence that Ms Bickley and Daniel Smith gave to the Stewards. Although not decisive on its own, we are unable to ascertain any basis as to why Ms Bickley or Daniel Smith would give untruthful evidence to the Stewards on these matters.

49. No reason has been given by the Appellant as to why the evidence given to Stewards by Ms Bickley or Daniel Smith should not be believed, or why it should not be generally considered reliable, as well as credible. There is then the additional evidence from the phones.

50. Based on the totality of the evidence, the Panel is comfortably satisfied that the Appellant directed Ms Bickley to administer the electrolyte paste to both Dream Charge and Elaborate on a race day, as alleged in charges 7.1 and 7.3.

51. The Appeals in relation to charges 7.1 and 7.3 are dismissed.

52. The finding of breach of AR 249(1)(b) in relation to these charges are confirmed.

Charges 8.2 and 8.3 – attempts to cause race-day administration of paste

53. The Appellant pleaded guilty to a breach of AR 227(b) of the Rules, in that he attempted to commit a breach of AR 249(1)(b) by attempting to cause a medication to be administered to the horse Elaborate on the day of it racing at Wyong on 26 August 2018.

54. However, he has pleaded not guilty of having attempted to cause the horse In Her Time to be administered with a race day medication on 14 October 2017, and to the horses Kyoko, Golly Miss Solly, Libertine Miss and Tabrobane, all on 29 October 2017. It is alleged that the attempt was made through the Appellant's stable-hand and brother, Mr Daniel Smith.

55. At 10:07 am on 14 October 2017, the Appellant sent the following text message to his brother:

> Ben Smith: U give the paste.
>
> Daniel Smith: [Thumbs Up symbol]: AB 2, Ex 74, p 590.

56. There is no dispute that the horse In Her Time raced at Randwick that afternoon, on 14 October 2017 (Everest Stakes Day). It was the Appellant's only runner that day.

57. While Daniel Smith denied administering the race day paste to In Her Time, his evidence to Stewards was that he was in no doubt that the message from the Appellant related to administering the paste to In Her Time on a race day: AB 2, p 558.

58. The Appellant denies that it was an instruction to administer paste to In Her Time. He says it was an instruction to give paste to a different horse, after track work.

59. The Appellant points out in his submission, correctly, that the text message does not name the horse In Her Time. The Appellant's evidence is also that the horse In Her Time left the Appellant's Broadmeadow stables for Randwick, sometime between 8.00 am and 9.00 am, while Daniel Smith remained behind at the stables. The Appellant also, again, raises the issue of being unable to test the evidence of Daniel Smith. Accordingly, the submission is made that the Panel would not be comfortably satisfied that the Rule has been breached.

60. The Appellant's submission ignores the fact that the Panel is entitled to consider the totality of the evidence. The totality of that evidence includes the evidence of Ms Bickley, which the Panel accepts, that she was instructed by the Appellant, on occasions, to administer medications to horses on race days. It includes the totality of the text messages. It includes the fact that In Her Time was the only horse entered in a race by the Appellant on 14 October 2017. It includes the fact that Daniel Smith's clear understanding was that he was being told by the Appellant to give a horse a race-day administration of electrolyte paste. That understanding could only have come from a prior knowledge that this was what the Appellant wanted done. This is unsurprising, given Daniel Smith knew the Appellant directed Ms Bickley to give race-day administrations of paste.

61. Taking into account the totality of the evidence, the Panel is comfortably satisfied that the text message sent by the Appellant to Daniel Smith at 10:07 am on 14 October 2017 was, as Daniel Smith considered, evidence of a request by the Appellant for Daniel Smith to administer a medication to the horse In Her Time on a race day.

62. The Appeal in relation to charge 8.2 must be dismissed. The finding of breach of AR 227(b) in relation to charge 8.2 is confirmed.

63. In relation to charge 8.3, it is not disputed that the horses Kyoko, Golly Miss Solly, Libertine Miss and Tabrobane all raced at Tuncurry on 29 October 2017. On that day, the following text exchange took place between the Appellant and Daniel Smith commencing at 7:31 am.

> Appellant: The runners can all have that race paste too.
>
> D. Smith: Yep, got 6 left.
>
> Appellant: Sweet.

64. When questioned about these text messages, Daniel Smith denied that he followed the Appellant's instructions: AB 2, p 407 and pp 535-536. Despite his denial of administering the paste, it would appear that Daniel Smith led the Appellant into believing that the paste had been administered because: "I just thought he would blast me and give me – you know, give me hell": AB 2, p 407 L301-303. In this exchange, Daniel Smith confirmed that the Appellant asked him on occasions to give race day administrations to horses and gave similar instructions to Ms Bickley: AB 2, p 408L 308 - 312.

65. For his part, the Appellant told Stewards that the instruction in relation to these pastes was not intended to be undertaken on a race day, but the day before. He said he "must have got the days mixed up" and it was "intended the day before": AB 1, T-195.

66. The Appellant again points out in his submission that the evidence of Daniel Smith was unable to be tested, that he was in Melbourne on the day of the Tuncurry Races on 29 October 2017, and reiterated that he got his days mixed up.

67. One difficulty for the Appellant suggesting that he got his days mixed up is that, in his text message to Daniel Smith, he refers to the paste as a "race paste". That description seems consistent with a reference to a paste that is to be administered on a race day. Again, there was little doubt in Daniel Smith's mind that this was what it was a reference to.

68. Taking into account the totality of the evidence, the Panel is comfortably satisfied that the Appellant has breached AR 227(b). The Appeal in relation to that charge must be dismissed. The finding of breach in relation to AR 227(b) in relation to charge 8.3 is confirmed.

Charge 10 – "improper conduct" by administration of formaldehyde

69. Pursuant to charge 10, the Appellant is alleged to have engaged in "improper conduct" in breach of AR 228(b) in that, without taking veterinarian advice, he administered to three horses a substance subsequently found to contain formaldehyde.

70. The undisputed evidence in relation to this charge is as follows:

(a) A bottle of liquid was provided to the Appellant by Mr Neil Costello.

(b) Mr Costello described the bottle as containing anti-bleeder medication.

(c) Mr Costello is not a veterinarian.

(d) The bottle was not a registered product. It had no label. It gave no indication of its contents. It did not identify a manufacturer, or a place or time of manufacture.

(e) When tested, the product was found to contain formaldehyde.

(f) Dr Koenig gave evidence that formaldehyde is known quite widely as a carcinogen.

(g) There is some anecdotal evidence, Dr Koenig said, in relation to the use of formaldehyde for anti-bleeding purposes, but its use is concerning given its carcinogenic properties: see also Exhibit 106.

71. For the Appellant, it was said that he trusted Mr Costello. He did not know that the bottle contained formaldehyde, and if he had known that, he would not have used it. None of the three horses displayed any adverse effects as a result of the administration of the substance. It was submitted that as the bottle was obtained through a "trusted source", who had supplied previous medications without incident, it was not incumbent on the Appellant to make enquiries as to the legitimacy of the bottle containing formaldehyde. In all the circumstances, it was submitted, the Appellant's conduct falls short of "improper conduct".

72. The Panel disagrees. In the Panel's view, the administration to any racehorse of an unregistered product, where the person administering it (the licensed trainer) has no idea:

(a) what the substance is;

(b) whether it is harmful or not;

(c) what the effects of administration might be;

(d) whether it is a prohibited substance or not;

(e) where it was made; and

(f) who made it,

constitutes improper conduct. That it turned out to contain a substance harmful to the health of horses (namely, a carcinogen) is an aggravating factor.

73. It is not to the point that the Appellant asserts that he trusted Mr Costello. It is not to the point that he would not have administered the substance, had he known it contained formaldehyde. That the Appellant would not have administered a carcinogen to a horse if he knew it was a carcinogen is hardly an answer to a charge of "improper conduct". The fact is he did administer it, and in the circumstances outlined above. He did so when in the Panel's view alarm bells should have been ringing very loudly in his head about what it was he was giving to his horses. No trainer acting responsibly would have administered the substance in this bottle to a horse.

74. The Appeal in relation to charge 10 must be dismissed. The finding of breach of AR 228(b) is confirmed.

Conclusion

75. The Appeals in respect of charges 3, 5, 7.1, 7.3, 8.2, 8.3 and 10 are dismissed. The findings of breach of the Rules relating to each of those charges are confirmed.

76. The Panel will make final orders at a later time, when the Appeal in relation to penalty is heard.

77. In relation to the Appeal against severity of penalty, that matter should be listed for hearing at the earliest convenient time.