**APPEAL PANEL OF RACING NEW SOUTH WALES**

**IN THE MATTER OF THE APPEAL OF TRAINER LESLIE DAVID KELLY**

Heard at Racing NSW Offices

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| Appeal Panel: | **Mr L. Vellis - Convenor**; **Ms J. Foley**; **Mr J. Murphy** |
| Representatives: | **Appellant – Mr J.E. Murdoch KC, instructed by Mr G.R. Ryan, Solicitor** |
| | **Racing NSW - Mr O. Jones** |
| Date of Hearing: | **28 September 2023** |
| Date of Reasons and Orders: | **20 December 2023** |

**REASONS FOR DECISION**

1. At a Stewards' Inquiry conducted on 15 June 2023, Licensed Trainer Leslie David Kelly (**Appellant**) pleaded guilty to two breaches of **AR 240(2)** relating to the detection of the prohibited substance human erythropoietin (**EPO**) present in blood samples taken from *Gogol* and *Freddie Foxtrot* prior to them running in the Ramornie Handicap at Grafton Racecourse on 13 July 2022.

2. AR 240(2) is in the following terms:

   "… *if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who is in charge of the horse at any relevant time breaches these Australian Rules.*"

3. The penalty imposed by the Stewards was a disqualification of Mr Kelly's licence to train for a period of 20 months for each charge, each reduced to 15 months allowing for a guilty plea and other relevant considerations.

4. Having regard to the principles of totality, the Stewards ruled that the periods of disqualification be served with partial concurrency with 12 months of the disqualification issued for charge 2 to be served concurrently with charge 1 and the remaining 3 months disqualification to be served cumulatively. The total period of disqualification therefore imposed upon Mr Kelly to be 18 months.

5. In accordance with the provisions of AR 285(7) & (8), the commencement of the disqualification was deferred for a period of seven days to commence on 22 June 2023 and to expire on 22 December 2024.

6. We understand that Mr Kelly is subject to a stay of proceedings and has not commenced serving any part of his penalty.

7. The Appellant has appealed the severity of penalty imposed upon him. He was represented at the appeal by Mr J.E. Murdoch KC, instructed by Mr G.R. Ryan, Solicitor. The Stewards were represented by Mr O. Jones.

8. The appeal book, containing transcript of the Stewards' Inquiry, was admitted into evidence as Exhibit A. Written submissions of Mr Murdoch KC on behalf of the Appellant and of Mr Jones on behalf of Racing NSW, were also provided and admitted into evidence.

**Submissions of Mr Jones**

9. The dispute in this matter is as to penalty, with additional commentary in relation to how the EPO came to be found in Gogol and Freddie Foxtrot.

10. Mr Jones supported the penalties imposed by the Stewards after the Inquiry. He noted that a breach of AR 240(2) is an absolute liability offence, that EPO is a notorious performance enhancing prohibited substance, that the EPO detected in this case was human EPO, which is not naturally produced by horses, and Mr Jones also referred to the principles of general and specific deterrence that are necessary to protect the thoroughbred industry in cases such as this where there are List A prohibited substances detected.

11. It was also submitted by Mr Jones that in presentation cases such as that of Mr Kelly, while the reason for the positive result is not relevant to whether or not the offence is breached, it remains possible for the relevant person to establish that they are blameless, such that the penalty should be reduced as a result. However, the burden is on the person to establish the reasons for the positive result on the balance of probabilities.

12. Mr Jones further submitted that the principles applicable in these circumstances were established in *McDonough v Harness Racing Victoria* [2002] VRAT 6 per Judge Williams and *Kavanagh v Racing Victoria Limited* [2018] VCAT 291 per Garde J, and were summarised by the Racing Appeals Tribunal in *Turnbull v Harness Racing NSW*, 30 September 2022, as follows:

"*In very broad summary, McDonough has provided three categories for consideration on penalty.*

*The first of those is where a positive culpability on the part of the person responsible is established, for example, by administration of the drug, or at the direction or otherwise instrumental, and possibly involving deliberate wrongdoing, or through ignorance or carelessness. This was assessed as the worst category and high penalties were appropriate.*

*The second category is where the decision-maker cannot determine where the prohibited substance came from or the decision-maker does not accept the explanation given by the trainer. This was said to attract a penalty similar to the first category.*

*The third category is where the person is not responsible for the administration of the drug or for administration by others, and whilst technically guilty of the offence because it is absolute, has no true moral culpabilities. The case establishes that it is necessary for the trainer to demonstrate, because the onus is on the trainer, that culpability does not exist. That is, the blameless test. If this explanation is accepted and there is no culpability, then it may not be appropriate to impose deterrence and it may be possible to impose no penalty at all.*"

13. With respect to proposition that there may have been contamination arising from blood left on both horses by Mr Aouad, one of the horses' owners, Mr Jones contended that this was so remote as to be fanciful. Mr Aouad suffers from various medical conditions, one of which involves being treated by dialysis with Aranesp. This drug contains EPO. Mr Aouad was in contact with the horses on 12 July 2022, the day before the positive test on 13 July 2022. It was noted by Mr Jones that none of the other substances contained within Aranesp or otherwise taken by Mr Aouad for his various ailments were detected in the positive results returned by the two horses.

14. With respect to the possibility that the process by which Foxtrot and Gogol were swabbed was contaminated and could cause the positive results, Mr Jones dismissed this as an extremely unlikely possibility and noted that:

    a. the Stewards inquiry received evidence from Dr Chelsea Kramer who conducted the blood tests on Freddie Foxtrot and Gogol at Grafton on 13 July 2022, with Dr Kramer providing evidence that she had swabbed the area from which the blood had been taken with an alcohol swab, that her general practice was to check the swab to see if it contained any contamination, that if there was any dirt on the swab her general practice was to swab the area again, that if blood was on the swab it would have appeared as a red stain, and that her general practice was that if she saw any blood on the swab she would have notified the Stewards.

    b. None of Dr Kramer, Mr Kelly, Ms Kelly (Mr Kelly's daughter-in-law) or Ms Paisley, who had contact with the horses on 12 and 13 July 2022, noticed any blood on the horses.

    c. Ms Paisley's evidence was that, in relation to Gogol, she brushed the horse with a damp brush prior to it being tested, and Ms Kelly accepted that she brushed the mane of Freddie Foxtrot prior to the test.

d. The evidence of Professor Sillence was that it was virtually impossible to see how a sufficient amount of blood could have entered the eye of the needle used to perform the test to produce the level of EPO ultimately recorded. It was submitted that Professor Colin Chapman agreed.

e. The evidence of Mr Keledjian and Professor Sillence was that the level of EPO in each of the samples tested was relatively constant. If there had been contamination through the needle, Professor Sillence explained that one would have expected to see a far higher EPO concentration in the first sample than in the subsequent samples. Again, It was submitted that Professor Chapman agreed.

15. With respect to penalty, Mr Jones submitted that a period of disqualification was the only appropriate penalty in this case and referred to the following cases:

a. *McCarthy v Harness Racing NSW,* 30 August 2023, where the Racing Appeals Tribunal determined that a disqualification period of 9 months was appropriate for a race day presentation of a horse with cobalt above the threshold, in circumstances where it was unknown how the prohibited substance came to be in the horse's system;

b. *Russo v Harness Racing NSW,* 16 August 2023, where the Racing Appeals Tribunal determined that a disqualification period of 3 years and 9 months (45 months) was appropriate for a race day presentation of a horse with cobalt above the threshold, in circumstances where it was unknown how the prohibited substance came to be in the horse's system;

c. *Kavanagh v Racing NSW*, 13 August 2018, where the Racing Appeals Tribunal determined that a disqualification period of 10 months was appropriate for a race day presentation of a horse with caffeine, in circumstances where it was not known how the substance came to be present in the horse; and

d. *Laming v Laming*, 11 November 2010, where the Victorian Racing Appeals and Disciplinary Board determined that a disqualification period of 3 years (36 months) was appropriate for a presentation offence for EPO and/or the related material darbepoetin alfa (DPO), in circumstances where there was no explanation for the presence of the prohibited substance in the horses' system.

**Mr Murdoch's Submissions**

16. Mr Murdoch recognised that the provisions of AR 240(2) ("the presentation rule") impose an absolute (i.e. strict) liability on the trainer of the horse so presented to race, but Mr Kelly also

emphasised that Mr Kelly is at pains to emphasise that he did not administer, or cause to be administered, any EPO or peptide product likely to have caused the presentation of either Gogol or Freddie Foxtrot with the prohibited substance in its system.

17. It was submitted by Mr Murdoch that the appropriate penalty is a fine and Mr Kelly's early plea of guilty should attract a discount of 25%. It was also submitted that the ongoing ban on Mr Kelly's starters in NSW is in the nature of a suspension and justifies a further discounting of any fine.

18. Mr Murdoch also noted that the determination of penalty should be directed at deterrence (personal and general), it is not about punishment.. It was also submitted that although EPO is a List A drug under the Australian Rules of Racing, there is no requirement that List A drugs attract a disqualification.

19. Mr Kelly's personal situation was also discussed by Murdoch, noting that:

    a. Mr Kelly has been a licensed thoroughbred trainer in New South Wales and Queensland for approximately 45 years.

    b. He has, at different times, been based in each of those States but, in more recent years, while based in Queensland, he has regularly raced horses in the Northern Rivers from his stables on the Gold Coast.

    c. He is a salaried trainer. In addition to salary, he receives a share of the trainer's prizemoney percentage. He has no other source of income. Mr Kelly is 65 years of age.

    d. Mr Kelly been in poor health in recent years. His wife Christine is recovering from breast cancer and is unable to obtain employment for that reason, despite being a trained nurse. She too is 65 years of age. Her only paid employment is occasional casual work at the stables.

    e. Mr and Mrs Kelly own their own home and motor cars, but have no other significant assets.

20. Mr Murdoch submitted that based on the evidence the Mr Kelly had a very low level of culpability for the infringements. Relevant items mentioned by Murdoch were as follows:

    a. The stables at Bundall are securely fenced with a staff member living on site as a night watchman;

    b. The established practice for the particular owner visitors (the Mansours and the Aouads) was for the owners to be seated at a table outside Mr Kelly's office and the horses led over to enable the owners to inspect and pat the horses in the presence of Mr Kelly and/or a staff member;

    c. On the occasion of the visits on Ramornie eve, Mr Kelly, who had been, and was still unwell, arrived at the stables after Mr Mansour and Mr Aouad had entered and had contact with the horses. He was unaware that they had had direct contact with Gogol;

    d. In particular, Mr Kelly was unaware of the incident involving quantities of blood flowing out of Mr Aouad's cannula and being smeared onto the necks of each of those horses;

e. The stables were attended when the visit took place. Ms Kelly, the stable foreperson was there, but occupied on work at the other end of the yard.

f. Mr Kelly was unaware that Mr Aouad's regular dialysis treatment necessitated his taking EPO. Mr Aouad was taking the drug as a prescribed drug necessary for him, as a kidney dialysis patient, to lift his red blood cell count.

g. Ms Kelly, a trusted senior member of the staff, accompanied the horses to Grafton on the day of the race in the absence of Mr Kelly, who was unwell.

21. Mr Murdoch also referred to several written reports from Professor Chapman, who is qualified in both veterinary science and pharmacy. Mr Murdoch submitted that Professor Chapman supports Mr Kelly's submission, that Mr Aouad's contact with Gogol and Freddie Foxtrot resulted in contamination of the samples.

22. It was also submitted that Mr Kelly, his staff and his owners, Mr Mansour and Mr Aouad, have fully co-operated with Stewards and made themselves available for interview by Racing NSW Stewards and investigators whenever required.

23. Mr Murdoch noted that by the time Mr Kelly was advised on 3 August, 2022, of the discrepancies in the pre-race blood tests, some weeks had elapsed since the Grafton races. This meant that it was not possible to conduct any contemporary investigations into what had occurred. Nevertheless Mr Kelly, through his solicitor, Mr Ryan, engaged an investigator in a quest to find an explanation for the discrepancies. They also sought and obtained the assistance of Professor Chapman.

24. It was submitted that Mr Professor Chapman's view was that the exposure of each horse to blood from Mr Aouad, was a possible means of contamination of the pre-race blood samples taken at Grafton from the jugular vein in the neck of each horse.

25. Mr Murdoch submitted that in this case the most likely explanation for the l contamination of the samples was the presence of congealed blood on the hair of the horses' necks in the area of the jugular vein from which the blood samples were taken pre-race.

26. It was also submitted by Mr Murdoch that in presentation cases rather than following the principles from *McDonough v Harness Racing Victoria* [2002] VRAT 6, that the approach in *Wallace –v- Queensland Racing* [2007] QDC168 (14 August 2007) should be preferred, whereby DCJ McGill said among other things:

*"In my opinion, however, there is a difference between a case where there is evidence to show a specific mitigating circumstance, and simply an absence of evidence of an explanation, either mitigating or aggravating depending on the extent to which it shows an absence or presence of blameworthiness on the part of the trainer. Cases where the trainer was able to show a specific explanation which did not involve any blameworthiness on his part are really examples of the situation where the trainer has for the purpose of penalty been able to show a mitigating circumstance. It may well be appropriate for such cases to be treated more leniently than what might be described as the ordinary case, where there is no explanation for the elevated reading, and therefore no indication as to whether or not there is any personal blameworthiness on the part of the trainer. Obviously the third category of case would be one where there was some explanation which did show moral blameworthiness on the part of the*

*trainer, which I would expect would justify a more severe penalty. But I do not think that there was an error of law in failing to equate the present case with one where there was a specific exculpatory explanation for the elevated reading demonstrated either before the stewards or before the tribunal. Accordingly, I would reject the specific criticisms of the tribunal made on behalf of the appellant, but, for the reasons given earlier, I consider that the tribunal made an error of law in applying the wrong test to the appeal in respect of penalty": cf R v Morrison [1999] 1 Qd R 397 at 422."*

27. It was submitted that there is ample precedent for a trainer guilty of presenting a horse to race where a Prohibited List A substance is detected, to have a penalty in the form of a fine only imposed. For example, the following cases were mentioned:

    a. The RNSW Appeal Panel matter Re: Chris Waller (Decision of Mr R Beasley SC – Principal Member, Mr T Carlton, Mr J Fletcher (10 February 2017), which was an appeal against a penalty of $30,000 imposed by Stewards after Mr Waller entered a guilty plea to a charge under AR 178 (now AR 240) arising out of the detection of a level of 4 to 5 micrograms per litre of methylamphetamine in a horse's urine sample. The reasons for decision said, among other things "*Mr Waller runs a stable of high standards generally. The breach here involved no intent…In the Panel's majority view (Beasley and Fletcher), the appropriate penalty is a fine of $5,000."*

    b. *Darrel Graham –v- QRIC,* in which in the opinion of the Senior Member a penalty of 10 weeks suspension of licence was an appropriate penalty in Mr Graham's case. This was on the basis that he had been to a degree careless in his administration of supplements. *Graham v Queensland Racing Integrity Commission* [2021] QCATA 125 (1 November 2021) at [221].

    c. *Ahrens v Queensland Racing Integrity Commission* [2020] QCAT 347 (8 September 2020), in which the penalty imposed was a $3000 fine with a 9 month suspension, wholly suspended for 12 months on a "good behaviour" condition. The case concerned a positive test to cobalt above the threshold, which was the consequence of an inadvertent mix up of horses.

    d. A penalty of a $4000 fine with a 12 month suspension of licence (wholly suspended) for a period of 2 years subject to no repeat infringement of the rules of racing in respect of cobalt, was the penalty imposed by thoroughbred Stewards Messrs Chadwick, Aurisch and Zimmerman on trainer Tina Cotsiopoulos on 13 April 2022. The trainer in that matter had presented a horse to race and after a urine sample from the horse was tested, the cobalt level exceeded the threshold. She too had no previous infringements of the presentation rule.

    e. *Bennett –v- QRIC*, a Queensland harness racing code case, which also involved cobalt. It was noted that in Bennett's case the penalty was a suspended 12 months suspension and a $6000 fine. However, the licensee in that case had a previous presentation breach on his record.

28. Mr Murdoch reiterated that the penalty should be structured in the nature of a fine only. In the alternative, Mr Murdoch submitted that, if because EPO is an List A substance, a "time out" was considered by the Panel, t it should be a suspension wholly suspended on the condition that there be no further infringements of the presentation rule in relation to EPO for a stipulated period.

**Resolution**

29. Appeals in relation to AR 240(2) are difficult when there is no definitive evidence as to how a prohibited substance has come to be in a horse's system.

30. Based on the expert evidence and other evidence presented, however, the Panel is of the view that it is extremely unlikely that the explanations provided by Mr Murdoch (blood from Mr Aouad or a contaminated swab process) were the cause of the prohibited substance finding its way into Gogol and Freddie Foxtrot.

31. The Panel does not see any reason to deviate from the principles elucidated in *McDonough v Harness Racing Victoria* [2002] VRAT 6 per Judge Williams and *Kavanagh v Racing Victoria Limited* [2018] VCAT 291 per Garde J, as summarised by the Racing Appeals Tribunal in *Turnbull v Harness Racing NSW*, 30 September 2022. The three categories espoused in McDonough reflect the absolute liability attaching to a breach of AR 240(2).

32. The Panel is not satisfied that the Appellant has established on the balance of probabilities what the cause was of the two breaches of AR 240(2) relating to the detection of the prohibited substance human EPO present in blood samples taken from *Gogol* and *Freddie Foxtrot*. Based on the evidence presented, the Panel does not know one way or the other what the cause was and in this case, the decision falls within category 2 of *McDonagh* such that it is treated as a category 1 matter.

33. There is insufficient evidence before the Panel that supports the contention that there may have been contamination arising from blood left on both horses by Mr Aouad, one of the horses' owners. Mr Aouad was unsupervised by the Appellant and his staff when he visited with the two horses and the Panel does not accept on the balance of probabilities that there may have been contamination arising from blood left on both horses by Mr Aouad,

34. The Panel notes that Professor Sillence's evidence was that if there had been contamination as a result of Mr Aouad's blood, one would have expected to have also seen the presence of other prohibited substances that were present in medication he was taking. There was also no clear evidence that Mr Aouad had received anything near the amount of Aranesp immediately prior to visiting the stables that would be required to produce the positive results for EPO returned.

35. The Panel also does not accept that there is compelling evidence to suggest that the process by which Foxtrot and Gogol were swabbed was contaminated and could be said with any degree of confidence to cause the positive results, particularly given that of the 18 horses that

Dr Kramer swabbed that day, the Panel understands that only two horses had the prohibited substance human EPO present in blood samples taken, and they were the horses trained by the Appellant, Gogol and Freddie Foxtrot.

36. Other factors that leave open other possibilities as to how the human EPO came to be in the blood samples of Gogol and Freddie Foxtrot are that:

    a. Mr Kelly was not present during the visit of Mr Aouad and Mr Mansour, and there was insufficient procedures in place to ensure that he was notified of any such visits;

    b. Mr Aouad and Mr Mansour were allowed to access the stables on the day in question and were able to feed the horses carrots completely unsupervised;

    c. No video cameras were installed at the premises at the time of the relevant visits (this has since been rectified to Mr Kelly's credit); and

    d. Ms Kelly's evidence was that she deliberately avoided Mr Aouad and Mr Mansour during their visit.

37. A breach of AR 240(2) is an objectively serious breach of the Rules. It is always a shocking look for racing when any horse races and is subsequently found to have had a prohibited substance in its system.

38. The Panel has taken into account, and is sympathetic to, all of the Appellant's subjective circumstances and the assistance provided to the Stewards. Any period of disqualification will have a significant financial impact upon him.

39. Penalties imposed are not for the purpose of punishment, but are a means of protecting the industry, and to demonstrate to the public that racing officials will take steps to ensure that the reputation of the industry, and its integrity, are protected. Deterrence is another important matter, itself related to both the protection of the sport, and the racing public. Both the racing industry, and the racing and betting public, need to be protected from circumstances where a prohibited substance is detected in a horse's system. The question to be asked is what kind of penalty is required to deter the conduct involved in a particular breach of the rules.

40. The Panel has borne these matters in mind in assessing what penalty is appropriate in this matter, together with the subjective circumstances of the appellant. We do not agree with the submission by Mr Murdoch that an appropriate penalty here is closer to a fine, or that the penalty imposed is excessive. Mr Murdoch referred to the *Waller* case by way of comparison, although

the Panel is of the view that this case is different in that in Waller the Panel found that it was "*more likely than not that the source [of the meth] was a member of Mr Waller's staff by inadvertent means*". In our current case the Panel is unable to discern with any likelihood or confidence how the human EPO came to be in the blood of the two horses. The performance enhancing nature of the prohibited substance in this case is also relevant.

41. The Panel notes that *Laming v Laming*, 11 November 2010, is a reasonable comparison in that it also includes a presentation offence for EPO. In this case it is noted that the Victorian Racing Appeals and Disciplinary Board determined that a disqualification period of 3 years (36 months) was appropriate for a presentation offence for EPO and/or the related material darbepoetin alfa (DPO), in circumstances where there was no explanation for the presence of the prohibited substance in the horses' system.

42. It may appear that a penalty like a lengthy disqualification is harsh where no dishonest conduct is involved. A trainer's honesty is only one matter to be considered though. The conduct here has resulted in the presence of human EPO in a pre-race sample of two racehorses. These horses raced with those substances in its system. EPO is a List A prohibited substance. Detection of such substances in racehorses is very damaging to the image of racing. At the very least, there has been some degree of carelessness in the operation of the stables. It is just not as simple as saying that: well, no-one tried to cheat, so it should be a lenient penalty. That is not a proper approach to the Rules of Racing.

43. Taking all relevant factors into consideration, we agree with the Stewards that the nature of the penalty to be imposed here for both charges must be a disqualification.

44. The Panel also agrees with the penalty imposed by the Stewards, of a disqualification of Mr Kelly's licence to train for a period of 20 months for each charge, each reduced to 15 months allowing for a guilty plea and other relevant considerations.

45. Where we differ from the Stewards is with respect to the periods of disqualification to be served with partial concurrency. The Panel believes that the entirety of the penalties for each charge should be served concurrently such that the total period of disqualification imposed upon Mr Kelly is 15 months.

46. Accordingly, the Panel makes the following orders:

    a. Appeal against severity of penalty allowed.

    b. A penalty of a 15 month disqualification for charge 1 is confirmed.

c. A penalty of a 15 month disqualification for charge 2 is confirmed.

d. The penalties for charge 1 and charge 2 are to be served concurrently such that the total penalty imposed is a 15 month disqualification.

e. The period of disqualification commences on 22 December 2023 and expires on 22 March 2025, on which day the Appellant may reapply for his licence.

f. Appeal deposit to be refunded.

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