RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

FRIDAY 22 FEBRUARY 2019

APPELLANT JOHN MCCARTHY

AUSTRALIAN HARNESS RACING RULE 183

Appeal against interim suspension

DECISION:

1. **Appeal upheld**
2. **Appeal deposit refunded**

1. Licensed trainer and driver Mr John McCarthy appeals against a decision of the stewards of 13 February 2019 to suspend his licences. That suspension arose as a result of the exercise of Australian Harness Racing Rule 183. Relevantly, it provides:

> "183 Pending the outcome of an inquiry the Stewards may direct that a licence or any other type of authority be suspended."

2. The appeal was lodged on 14 February; a stay was granted on 15 February and the matter was capable of being heard on 18 February – that is, this appeal – but the Tribunal did not have time on that day to do so and this was the next available date, 22 February, suitable to the parties.

3. Discussions at the commencement of this hearing indicated that the stewards might anticipate that they will commence the actual hearing of an inquiry in about three weeks. One issue remains for consideration before that inquiry can commence, and that is testing of some of the feed that was used by the appellant, and that is progressing.

4. The test that is to be considered on this appeal was referred to in the RAT NSW matter of Nathan Turnbull, 24 April 2017, harness racing, a cocaine presentation. The facts need not be canvassed. The Tribunal said, to paraphrase paragraph 19: two key factors, integrity of the industry, which comprises a level playing field and the welfare of the horse, as against hardship in relation to personal circumstances.

5. This is an appeal on an issue pending an inquiry. The evidence that the stewards will no doubt consider is not complete. The Tribunal notes that the appellant has, from the moment the stewards visited him, in the preparation of the matter, retained an expert, got references and provided assistance to the stewards in respect of their gathering of evidence. The stewards visited him at 12:22 on 21 December, after they received that first positive of 20 December, with an interview and stable inspection.

6. Whilst the appellant has available to him some evidence, the Tribunal does not accept, as submitted, that this appeal should be successful because the respondent has not produced evidence. It is, in the Tribunal's opinion, premature to consider that they have to produce all their evidence at this 183 appeal.

7. The key facts are these: that the appellant is a trainer of 44 years' experience with no prior prohibited substance matters. He has been a successful trainer and driver. Critically, in respect of his training he has had some 12,000 presentations without prior prohibited substance matters. He was – and these are brief facts only – treating all of his horses with a same feeding regime. That comprised two particular types of feed. They do not need to be analysed here. Each of them contained cobalt.

8. The subject horse had been unwell. It was being treated with a therapeutic drug, Hemoplex, in accordance with manufacturer's recommendations, but given a greater withholding period than was recommended. The horse was presented to race and produced positives to cobalt in both the A and B samples at readings of 250 and 230 respectively. No charges have yet been preferred against the appellant but it is a fact that it would not be surprising that there was a presentation allegation of a horse with a prohibited substance. Should that be the case, the rule in respect of the breach is absolute. It has two ingredients: the appellant presented and the horse contained a prohibited substance. In that sense, the inevitability of a finding of a breach of the rule is very high.

9. This essentially becomes an assessment of a penalty outcome rather than an exculpation from liability consideration that will drive the stewards.

10. The appellant has a report of Dr Major, a veterinary scientist, who has stated that on the information then available to him when he did his report on 31 January 2019, and simply turning to its conclusions, as this is not an inquiry, it is that having regard to the use of the therapeutically permissible drug Hemoplex in combination with the feeding regime and in consideration of cumulation of cobalt, a naturally occurring substance in the horse, that it may provide a reason why this particular horse was over the permissible threshold. There is a difficulty for the appellant, because other horses that were subject to the same regime have all produced negative results. There is a time gap there but that can be dealt with by the stewards. It is an issue that will no doubt be the subject of consideration at the inquiry.

11. Other things have occurred since: that the feed which was said to be given to the horses has returned readings that are consistent with the manufacturer's stated levels. It is suggested the wrong feed was tested. That does not have to be determined here. It is noted that feed from a sample more proximate to that presentation is to be tested.

12. The other key matters are that the appellant has obtained character references from leading licensed persons who speak highly of him. There are two points to those references – and they need not be read into this decision – firstly, with knowledge that this cobalt reading has occurred in the horse presented to race, they maintain their support of him. And, secondly, they speak highly of him in relation to issues of welfare and expertise. That the United Harness Racing Association, through its secretary, Mr Mann, in an undated "to whom it may concern" document, says that that Association is looking at certain matters does not take the matter any further.

13. In relation to the issue of possible penalty, some parity cases have been put up. They do not need to be analysed in this decision, suffice it to

say that on contamination cases an outcome of no penalty is possible. This Tribunal is not determining a likely penalty or outcome.

14. The drug cobalt has been the subject of some changing considerations by the regulator and the industry, by experts and, as a result of recent analysis by the Tribunal in the case of Hughes, seen as perhaps in relation to a standardbred horse of possibly less gravamen than was earlier perceived when cobalt first came to light. The Tribunal has said in other cases, the decision of Hughes was based upon the facts presented in that case. The science with which the Tribunal made its decision may yet be found to have been misplaced, or the Tribunal may well have not come to incorrect conclusions. But it is based on the evidence that it determined in that case that it came to decide that cobalt was not performance-enhancing and that in respect of its impact upon the standardbred horse there are other matters that need consideration. That is not to give a close analysis of Hughes, merely to indicate that the science in cobalt is being questioned.

15. The other factor is that in recent times the Tribunal has considered, as have the appeal bodies in both Victoria and Queensland, a more compassionate approach to prohibited substance matters in putting them into three categories. It would be fair to say that the approach up until that movement in the disciplinary approach was more firm when a prohibited substance matter was available; regardless of explanations, disqualifications were inevitable.

16. But as a result of those recent decisions, there are three categories. A category that has been pressed here is the third and most favourable category, that the appellant here, at the inquiry, will be able to establish to the satisfaction of the stewards that he was blameless in respect of his conduct. It is possible, therefore, that that, coupled with other factors, may lead to a no penalty outcome. That is not to prejudge the matter in any way but to reflect upon a possible outcome.

17. On the other hand, there are many facts that the stewards no doubt will need to consider which may lead them to conclude that there were husbandry failures and that it would fall therefore into a first category where a substantial disqualification may be the outcome. As to whether it may be that the second category, where the explanations are not accepted etc might arise and lesser penalties are available again could be an outcome. Those are matters for the future.

18. The effect of those matters is that in respect of integrity, when considered on a level playing field so far as the image and the industry is concerned, the stewards have formed the opinion that 183 should be applied. Principally because prohibited substance matters strike at the heart of the integrity of the sport, they are the most serious types of breaches, they go directly to confidence in relation to racing, wagering and

the public interest, and the public are taking a great interest, because of the frequency with which it has been ventilated in the press, in relation to issues of drugs in sport. It could be the stewards could in fact determine that the appellant's explanations to them at their inquiry will be found to be implausible.

19. The integrity issue may well be that it is imperative that having undertaken the exercise they have here of the most extreme fairness to this licensed trainer in respect of their use of 183 that at the inquiry they determine that the integrity that must be maintained is paramount. Just to touch upon the fairness to this appellant: 183 could have been exercised under the rules on a first certificate. Procedurally, they gave him every opportunity, consistent with Day's case, to make submissions on that possibility, and they did. In considerable fairness, they then deferred that decision. They came up with other factual matters and they gave him every opportunity to make further submissions. He made his submissions. Their decision clearly indicates they gave fair and proper consideration. Then they came to the determination, for the integrity reasons just read out, that despite the appellant's personal circumstances and the other factual matters of this case, integrity outweighed all of those other considerations. That is a possible outcome here.

20. In relation to integrity and the issue of level playing field, the Tribunal notes the steps taken to completely eliminate from this stable the practices which may have led to this positive presentation: the removal and ceasing of the use of the Hemoplex, the cessation of the use of the two feeds and therefore the possibility that the problem has gone. Of course, it could be the outcome the stewards decide that none of those matters were relevant to it and may say removal of those makes no difference to what actually took place. That is a matter for the stewards at their inquiry.

21. At the moment, there is evidence that gives comfort to the appellant – that is, the evidence of Dr Major – that there is a possibility that was the cause.

22. In relation to welfare, a number of matters have been put. There are essentially no welfare issues here that need any detailed analysis in any event to the extent that they may have arisen as a result of the existence of the cobalt in the subject horse. Those issues have, so far as the appellant is concerned, been remedied.

23. There is then the issue of his personal circumstances, and the key one is that he is 44 years, 12,000 presentations and nothing prior. This reading here, by the way, is not out of the box, as it were; it is not a reading of 94,000 and it's not a reading of 6000 or 7000, all of which would clearly indicate that that well-known drench that was doing the rounds has been administered, and probably immediately prior to racing. That is not the issue.

24. There will be hardship. It is acknowledged that any suspension will have an impact upon his personal circumstances and that of his family. It will have an impact upon his business, the horses that he trains, the employee – his son – that he has; that it will have an impact upon his reputation and that it will have an aspect of penalty about it.

25. There is some explanation advanced. There will be a consideration of the issue of penalty on the facts currently known to this Tribunal. But the likely outcome is not such that there is certainty that should this 183 suspension not be maintained pending a relatively proximate hearing, that there will be such an outcry amongst fellow industry members – and, to the contrary, there was an indication that that would not be the case – nor would it appear to the Tribunal that if the facts were known that a person of 44 years' training with 12,000 prior starters and no positives, a person of good reputation in the industry, was to be allowed to train pending an outcome and possible penalty, that the community would consider, notwithstanding the recent issues, that this industry's integrity would fall away dramatically or in any way at all.

26. The personal factors, therefore, have, in the Tribunal's opinion, with all of those other matters taken into account, a strong balancing exercise against that integrity issue.

27. The appellant persuades the Tribunal that it should uphold his appeal and set aside the decision to suspend him made on 13 February. It is not for the Tribunal – it is not a stay matter – to impose conditions; it is merely an upholding of the appeal.

28. The appeal is upheld.

29. The suspension of 13 February 2019 is set aside.

30. There being no submission to the contrary, the appeal has been successful, the Tribunal orders the appeal deposit refunded.
