NEW SOUTH WALES HARNESS RACING APPEAL PANEL

APPEAL PANEL MEMBERS
Hon. W Haylen KC
B Skinner
D Kane

WEDNESDAY 2 AUGUST 2023

APPELLANT LEIGH DAVIS

RESPONDENT HRNSW

AUSTRALIAN HARNESS RACING RULES 190(1)

DECISION

1. **Mr Davis is disqualified for a period of 2 years and 5 months, commencing from 21 April 2023. Mr Davis' appeal is otherwise dismissed.**

1. On 22 June 2021, the horse Rainbow Titan, trained by Mr Davis, won race 6 at the meeting conducted at Young NSW. Post-race urine samples taken from the horse were certified as containing a cobalt level of 110 ug/L from one test and 115 ug/L from the other. It is not disputed that AHRR 190 requires that a horse shall be presented for a race free of a prohibited substance and where a horse is presented for a race otherwise than in accordance with this rule, the trainer of the horse is guilty of an offence. AHRR 188A(1) lists prohibited substances and in para(2) (k) the threshold for cobalt has been fixed at a concentration of 100 micrograms per litre in urine or 25 micrograms per litre in plasma. On 22 July 2022 Stewards commenced an Inquiry in relation to these results.
2. In the course of the Inquiry cobalt returns from Mr Davis's racing results from 2014 in NSW and Queensland were considered. Prior to Mr Davis travelling to Queensland to race his horses in April 2019, there were no concerns regarding the cobalt levels recorded by his horses and this was also the situation with the horses that later raced in Queensland. On returning from Queensland, 6 of 7 urines samples taken from his horses between mid July 2020 and early December 2021 were found to have elevated levels of cobalt, including the samples taken from Rainbow Titan. Three samples from that horse showed that on 22 June 2021 a level of 110 ug/L(being the race here under consideration), on 7 July 2021 a level of 24 ug/L and on 13 July a level of 53 ug/L.
3. The July 2022 hearing was adjourned on the application of Mr Davis to allow soil and water tests to be conducted on his property and also to obtain an expert report from Dr Derek Major. It was not until some 9 months later, in April 2023, that the hearing was resumed. The Stewards were then informed that the soil testing had not revealed anything of significance to this case and that water testing was in the same category.
4. At the July 2022 hearing, Dr Martin Wainscott, the HRNSW Regulatory Veterinarian, gave evidence in relation to the feeding and treatment regime adopted by Mr Davis and documented for the purposes of the Inquiry. In his opinion, "…the feeding regime is what I would call standard for what might be expected from any trainer to provide. There doesn't seem to be anything, certainly, unusual in that feeding regime." He did observe that there was certainly a little bit of variation between stated amounts and tested amounts of feed. When asked if this feeding and supplement regime or treatment was capable of returning the level of cobalt found in this case, Dr Wainscott replied: "No. As far as the treatment and the feeding regime, no, in my opinion, it doesn't explain those levels." He was then asked how these levels of 110 and 115 ug/L could be obtained. Dr Wainscott stated:" again, I'd just like to say that the feeding and the treatment regime don't account for that. Certainly with the results that we've got to hand,..it could indicate a treatment…we've had cases before where treatment with therapeutic substances at recommended doses can go over. Mr Davis has said today that he doesn't use such things. So, where that leaves us, I don't know. But, no, I can't really offer much of an explanation apart from that."
5. In Mr Davis' case, a report authored by Dr Derek Major, a veterinary consultant, was tendered. In that report Dr Major took issue with Harness Racing regarding the scheme in place under the Rules. He believed that there were deficiencies in the scheme adopted under the Rules and recommended that further testing of the samples should be undertaken to determine if the total cobalt was from inorganic ions or a false positive to Vitamin B12. He also suggested further testing for concentrations he specified.
6. Dr Major also suggested that a contributing cause for this cobalt result included the Hygain Release feed used by Mr Davis. Hygain and other leading feed brans had been found to have 20-40 times the stated cobalt in the feed. In oral evidence Dr Major noted that he was aware of Hygain having "at least six times" and other feeds having yielded 20 to 40

times the stated amount of cobalt. That caused him to look first at feed contamination because of the number of racing cases that had shown beyond doubt that this was the cause of elevation in urinary cobalt levels. Dr Major then stated: “I’ve also looked at some of the other-well, all the other products that came up in Mr Davis’s treatment records and in the original investigation and looked for possible cobalt salts in those ones and also for vitamin B12. And I can’t really convince myself that any of them in the way that the inquiry has found them to be used would have a significant effect. But Hygain, of course, is being fed twice a day, or at least every day, and I would think would be the number one candidate.” Later in his evidence he was asked how he had reached his conclusion that Hygain feed was the cause of the elevated level of cobalt in the horse. Dr Major responded: “I can’t say I believe it’s the Hygain, but among the list of candidates there, the Hygain is, in my observation in this matter, overwhelmingly the most likely candidate based on previous cases. And, in fact, unless you actually analyse the, or are able to get retention samples from the feed which the horse was actually feeding at the time, the results don’t help us very much.” Later in his evidence, Dr Major agreed that “we have no idea what was the cobalt level in the feed of the horse on the day- of Rainbow Titan on the day that he was tested.”
7. Dr Wainscott was recalled to deal with some of the matters raised by Dr Major and rejected the comments made about certain testing registering a false positive for Vitamin B12. The issues brought up by Dr Major regarding urine concentrations and his recommendations had been covered in previous decisions by both the Racing Appeals tribunal in NSW as well as in other jurisdictions around the country.
8. The Stewards then proceeded to the process of laying charges against Mr Davis. Reference was made to the provisions of AHRR 90A(2.10)(a),” A trainer is at all times responsible for the administration and conduct of his stables. (b) A trainer is at all times responsible for the care, control and supervisions of the horses in his stables.”
AHRR 188A (2)(k) stated: “The following substances when present at or below the levels set out are excepted from the provisions of sub rule (1) and Rule 190AA: (k) Cobalt at a concentration of 100 micrograms per litre in urine or 25 micrograms per litre in plasma.”
AHRR 190(1) stated: “A horse shall be presented for a race free of prohibited substances.” Sub Rule (2) stated: If a horse is presented for a race otherwise than in accordance with sub-rule (1) the trainer of the horse is guilty of an offence.” Sub Rule 4 stated: “An offence under sub-rule (2)…is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.”
9. Relying on these provisions, the Stewards gave particulars of the charge, namely, that Mr Leigh Davis, being the licensed trainer of the horse Rainbow Titan, did present that horse to race at Young on Tuesday, 22 June 2021, with a prohibited substance in its system, namely cobalt at a concentration in excess of the allowable threshold of 100 micrograms per litre in urine as reported by two laboratories approved by Harness Racing New South Wales. Mr Davis acknowledged that he understood the charge as particularised and entered a guilty plea.
10. At this point, Mr Morrris, appearing for Mr Davis, asked for time to consider a few matters that had been raised with Dr.Wainscott and to prepare submissions on penalty. While it was acknowledged that there was a guilty plea he submitted that there were “extremely relevant circumstances for sentence because it goes to his moral culpability and blameworthiness under the McDonough principles.” After deliberation the Stewards allowed for further submissions to be filed but, in light of the finding of guilt, and the possible prospect of disqualification, it was decided to immediately invoke the provisions of AHRR 183 (a),(b),(c),and (d). These provisions allowed the Stewards, pending the outcome of an inquiry, to direct (a) that a horse shall not be nominated for or compete in a race; (b)

that a driver shall not drive or otherwise take part in a race; (c) that the horses of certain connections shall not be nominated for or start in a race; and,(d) that a licence or any other type of authority or permission be suspended.
11. Ultimately, in arriving at an appropriate penalty, the Stewards noted that the Penalty Guidelines provided for no less than 5 years disqualification for a breach involving a class I prohibited substance as a first offence. A second offence of this nature warranted no less than 10 years disqualification. It was noted that at the date of decision Mr Davis had trained 1693 starters across 36 seasons since the 1983/84 season for 185 winners and 391 placings. The Stewards were of the view that disqualification was the only appropriate penalty for prohibited substances of the nature found in this case.
12. In relation to parity, 4 cases were relied upon on behalf of Mr Davis for matters said to be of this nature, three of them being imposed by other State Tribunals. One case involved a 9 month suspension that was wholly suspended for 12 months and a $3,000 fine imposed. Two other cases involved a 12 months suspension and a 12 month penalty. An inadvertently injected horse case decided by HRNSW Stewards seemed to involve no penalty. However, the Stewards regarded the 2020 case of Turner, heard by the Racing Appeals Tribunal NSW, as being the most comparable to Mr Davis' matter. Both trainers had similarly long histories in harness racing and comparable levels of cobalt. Mr Turner had 3 previous prohibited substance cases, occurring in 1993, 1994 and 2017 where only a caution was issued. Mr Davis had 2 previous prohibited substance cases, in 1984 and 2009. Mr Turner was disqualified for a period of 2 years and 9 months.
13. The Stewards then explained their approach to Mr Davis' case by noting the available evidence and the absence of any evidence to the contrary, as leading to being unable to be comfortably satisfied that the feeding/treatment regime undertaken by Mr Davis as being responsible for the cobalt levels recorded in the urine samples obtained from Rainbow Titan on 22 June 2021. The Stewards stated that the cobalt levels recorded in this case had not been appropriately explained. His record showed that the 1984 presentation offence resulted in 6 months disqualification while the 2009 offence attracted a fine of $3000. These matters were taken into account in fixing the current penalty.
14. Despite the 2 previous offences and the Guidelines suggesting a penalty starting point of 10 years, the Stewards regarded this case as warranting an "offset" having regard to subjective matters and leading to a starting point of 5 years. A 25% reduction was allowed having regard to his guilty plea and a further 15% was allowed having regard to subjective matters as referred to above. Mr Davis was disqualified for 3 years commencing from 21 April 2023.
15. Mr Davis has appealed to this Panel on the grounds of severity of the penalty imposed by the Stewards. In this Appeal HRNSW has again turned to the decision of the Racing Appeals Tribunal NSW in the Turner case as providing the relevant principles. It is of some significance for the present case to recall aspects of that decision. The Tribunal addressed the scope and purpose of hearings of this nature, stating: "This is a civil disciplinary hearing in which the function of the Tribunal is to determine a protective order on the Appellant for the industry. That protective order will require consideration of whether a message is required to be given to this individual trainer and to the industry at large and for the public benefit…It is essential that the protective order maintains community trust and public confidence in the industry. Each case must be determined on its own facts and circumstances and where possible, parity from prior cases."
16. Some of the facts of that case should be stated in this context. Mr Turner had been a trainer for 47 years and had 3 prior presentation convictions. The evidence showed that his feeding regime was unchanged. The Tribunal observed: "Turner could not explain how the

cobalt reading above the threshold came to be present in the horse. He has been consistent, clear and unequivocal in that evidence… The Tribunal accepts his evidence. No other source has been identified for the excess reading in evidence." The Tribunal then noted that the high reading remained unexplained and took into account the long standing decision of the Victorian Racing Appeals Tribunal in the case of Mr Allen McDonough (chaired by Judge R.G.Williams- 24 June 2008). It is useful to consider at this point, some of the observations of the Victorian Tribunal. In that case the Tribunal noted that the finding of a prohibited substance in a horse constituted a strict liability offence, designed no doubt to preserve the integrity of and public confidence in the industry. His Honour stated: "Accordingly, even in a case where the trainer is able to show that he did not himself administer the prohibited substance or that he took reasonable precautions to prevent it, such material does not provide a defence-there is still a breach of the strict liability obligation.

17. The Turner case then turned to the three categories of wrong conduct analysed in McDonough: (1) where the conduct of the trainer can clearly be established as wrong;(2) where the Tribunal was unable to determine what really occurred; and (3) where the trainer was found to be blameless. In Mr Turner's case, it was noted that he had no explanation, and no other explanation was available on the evidence. Here, there was a reading of 120 mg/L in breach of the threshold, although that was considered a "low level". The Tribunal agreed to deal with the case without taking into account an earlier breach and to start from the basis of a 5 year disqualification as set out in the Guidelines. It was noted that under the category 2 principle in McDonough, an appropriate penalty was still required but not as severe as it might have been under a category 1 case.

18. The Tribunal allowed a 25% discount for the guilty plea and took into account one reference regarding Mr Turner's standing and his volunteer work in the industry. No further discounts were available considering Mr Turner's history although it was noted that some of the cases were old and one considered to be mild. The Tribunal then allowed a discount of 20% for personal factors agreed to by the Stewards, although considering it to be exceedingly generous.

19. In this case, the Appeal Panel will take some guidance from the Turner case, and in particular, will determine this case on its own facts and circumstances. In submissions to the Panel it was argued for Mr Davis that the 6 month failure of HRNSW to notify him of the test results finding high levels of cobalt in his horse, left him at a forensic disadvantage. It was said that he was unable to promptly test his feed on hand to establish that it was contaminated by excess levels of cobalt. The evidence of Dr Major was relied upon as identifying the Hygain feed used by Mr Davis, as the probable source of the high cobalt readings found in Rainbow Titan. The six month delay was criticised at length. At the hearing of the Appeal HRNSW informed the Panel that the 6 month delay was the result of covid restrictions regarding movements in the regions. Two notifications from HRNSW to industry participants supported that approach. While those restrictions were accepted on behalf of Mr Davis, it was then argued that he could have been informed of these results by telephone as soon as they were known and that would have put Mr Davis in a much better position to have his feed tested. This somewhat simple suggestion failed to acknowledge the well known practice of HRNSW to conduct an on site inspection following a positive swab, where the trainer is informed of the test results for the first time and the property searched for illegal substances.

20. Another argument put forward for Mr Davis was that the six month delay in notification prevented him from obtaining early access to the feed and in obtaining actual readings of the feed taken by the horse because his feed receipts did not have batch numbers. In submissions, HRNSW took issue with that assertion. It was submitted that all Mr Davis had

to do was provide Hygain with the feed receipt details and the provider would be able to supply samples. The Panel also inquired whether Mr Davis had asked other trainers in the area if they had received high level cobalt in their Hygain feed at that time. That course was not taken.

21. In relation to Dr Major's evidence that the Hygain feed was the likely source of cobalt in the horse, that view was based on "previous cases" where the feed was found to very high in cobalt. Later in his evidence Dr Major accepted that if the actual feed at the time was not available then "the results don't help us very much". It appears that Dr Major's evidence on this point was not scientific in nature but represented a mere possibility. As referred to earlier, Dr Wainscott's evidence was that Mr Davis' feeding and supplement treatment was not capable of returning this level of cobalt and did not explain the levels tested. There was nothing unusual about this feeding regime and it was not a matter of concern. The high level of cobalt tested could indicate treatments, but not in this case as Mr Davis had not used treatments. Dr Wainscott therefore could not explain the level of cobalt found. He did accept that, over time, high levels of cobalt had been found in Hygain feed. That fact alone does not allow the Panel to conclude that Hygain feed was responsible for the high level of cobalt found in Rainbow Titan.

22. It was next submitted that the issues of blameworthiness and moral culpability raised the presumption of some form of mens rea as an element in these types of offences. It is not necessary to examine this assertion due to the nature of the offence created by the rules of Harness Racing. Indeed, if the Appellant's approach regarding these matters was followed the likely result would be to reduce the provisions from creating an absolute liability offence.

23. The McDonough principles have already been set out earlier in this decision: Mr Davis has not been charged or found guilty of causing the level of cobalt found in the horse, nor has he been found to be blameless. His case clearly falls within category 2 of those principles- no one knows how these high levels have been obtained. However, for a period of approximately 17 months he should have been aware of the fluctuating cobalt levels found in his horses, albeit below the 100ug/L level. He would then have put himself in a position to track down the cause of these elevated levels.

23. In determining an appropriate penalty in this case, the Panel considers that the starting point should be disqualification for four years having regard to the relatively low level of cobalt detected. The Panel is also comfortable in adopting the approach of Stewards, thereby allowing a 25% discount for the early plea and a further 15% for subjective matters. No other discounts are warranted. Mr Davis is therefore disqualified for 2 years and five months, commencing from 21 April 2023. His appeal is otherwise dismissed.

2 August 2023

Hon Wayne Haylen KC-Principal Member
Mr B Skinner-Panel Member
Mr D Kane-Panel Member