RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

25 NOVEMBER 2020

APPELLANT RAYMOND TURNER

RESPONDENT HARNESS RACING NSW

AHRR 190

SEVERITY APPEAL

DECISION:

1. **Appeal dismissed**
2. **Penalty of disqualification of 2 years and 9 months from 20 June 2019 subject to stay granted to 10 July 2019**
3. **Orders made in respect of appeal deposit**

INTRODUCTION

1. The appellant, licensed trainer Raymond Turner, appeals against the decision of the stewards of 20 June 2019 to disqualify him for a period of two years and nine months to commence on that date for a breach of AHRR 190.

2. The notice of appeal also invited an appeal be determined in respect of the disqualification of the subject horse under AHRR 195 and 195A. That part of the appeal has not been pressed at any stage and is taken as abandoned.

3. The relevant parts of AHRR 190 relied upon are as follows: –

> "(1) A horse shall be presented for a race free of prohibited substances.
>
> (2) 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."

The stewards particularised the charge as follows:

> "That you, Mr Raymond Turner, being the licensed trainer of the horse Park Run, did present that horse to race at Junee on 19 January 2019 with a prohibited substance in its system, namely cobalt at a concentration in excess of 100 micrograms per litre in urine as reported by the Australian Government National Measurement Institute, a laboratory approved by Harness Racing New South Wales."

4. When confronted with that charge, the appellant immediately pleaded guilty at the inquiry on 20 June 2019. By his notice of appeal of 26 June 2019, the appellant pleaded not guilty. He lodged grounds of appeal on 10 July 2019, maintaining that he was not guilty of the offence by reason of a material flaw in the testing procedures, and the penalty is too severe. On 29 October 2019, the appellant abandoned the plea of not guilty, entered a plea of guilty and advanced the matter on the basis of severity only. This is therefore a severity appeal only.

5. The evidence has comprised a bundle of 844 pages (key reports noted below), together with a preliminary proposal for a research project by Dr Major and others, Dr Cawleys report of 6 November 2020, and the study by Cohen and others 2002 J Vet Diagn Invest 14:231-235 [2002] under the title Brief Communications and entitled "Values of urine specific gravity for Thoroughbred horses treated with furosemide prior to racing compared with untreated horses", the form guide for the subject race, together with weather reports for Wagga Wagga and Junee. Oral evidence was given by the

appellant, Drs Wainscott, Major, Cawley and Wenzel, and Prof Hibbert. A hot-tub of those witnesses, except Dr Wainscott, took place.

6. Dr Wainscott is the Regulatory Vet for HRNSW. Dr Cawley is the Science Manager of the Australian Racing Forensic Laboratory. Prof Hibbert is Emeritus Professor of Analytical Chemistry at UNSW. Dr Major is a veterinarian. Dr Wenzel is Senior Scientist, Trace Elements at Royal North Shore Hospital and also undertook testing of the urine of the subject horse.

7. For the respondent: Dr Wainscott gave evidence before the stewards' inquiry and a report of 30 December 2019, Dr Cawley provided reports of 3 July 2020 and 6 November 2020: Professor Hibbert provided a report of 17 January 2020.

8. For the appellant; Dr Major provided reports of 26 June 2019 (not pressed), 1 August 2019, 11 October 2019 and 8 September 2020; Dr Wenzell provided reports of 12 May 2020, 18 May 2020 and one undated.

9. Having regard to the numerous reports, an agreed witness topics list was produced and it provided for five topics being: feeding regime; environmental exposure; accumulation; dehydration/urine concentration; B12.

10. The expert reports ranged over a number of topics, some of which are no longer pressed. Issues which the Tribunal is no longer required to consider include the impact of vitamin B12, any contribution to the reading caused by mouldy feed and bioaccumulation.

11. The key points identified on behalf of the appellant require consideration in respect of the threshold for the subject drug of the impact of dehydration, dehydration on urine concentration, and need for adjustment of the threshold for the impact of dehydration caused by creatinine and for allowances for urine specific gravity and, finally, consideration of deficiencies in the population studies in respect of cobalt carried out by and on behalf of the regulator.

12. The expert evidence adduced on behalf of the appellant essentially goes to establish that the true reading of the prohibited substance in his horse on presentation was less than the threshold reading of 100. The various matters listed on the witness topics list and in the just-mentioned list all go to that issue.

13. The threshold has been fixed for cobalt in the AHRR. AHRR relevantly states in 188A the following:

> "188A(1) The following are prohibited substances:

(a) Substances capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, within one or more of the following mammalian body systems:-". (A number of matters are listed).

"(2) The following substances when present at or below the levels set out are excepted from the provisions of subrule (1) and Rule 190AA:

(k) Cobalt at a concentration of 100 micrograms per litre in urine or 25 micrograms per litre in plasma."

14. That rule has been fixed by the harness racing authorities and was applicable at the time of the subject breach and it is not for the Tribunal to make a determination as to the adequacy or inadequacy of that rule or the processes by which it was established. The Tribunal is solely dealing with a severity appeal by a presentation with cobalt in excess of the threshold. To the extent that in determining objective seriousness there may be a finding that a true measure of the cobalt in the urine was less than 100 will only go to the issue of severity based upon an objective seriousness finding. It is not suggested by the appellant that it should lead to any other outcome.

15. The experts have provided comprehensive reports dealing with the threshold and its background. For the appellant, challenges as outlined are made. The Tribunal will not in this decision seek to analyse all of the conflicting expert evidence, or agreed evidence, to come to some conclusion as to the adequacy or otherwise of the threshold and the means by which it was determined. To the extent that the regulator may see fit, it could take into account the various reports and evidence in this proceeding and revisit a consideration of the threshold for cobalt. That is entirely a matter for the regulator. Of course this regulator does not stand alone as this is an Australian rule, has been adopted in other codes and internationally. In particular, the Tribunal will only deal with the issues identified by the parties in the oral evidence and submissions. Any of the remaining matters in the reports are not pressed by either party and are not analysed further.

16. This is a severity appeal and it is the function of the Tribunal to determine an appropriate penalty. The Tribunal has indicated that it will give weight and consideration to the Harness Racing Penalty Guidelines, and in this matter they are those published in 2016.

17. As with all severity appeals, the Tribunal will firstly determine objective seriousness and an appropriate starting point for penalty, if any, then consider and apply, if appropriate, any discount for subjective features. 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 benefit of the public. It is essential that a level playing field for participants and the betting public is maintained as well as the integrity of the industry generally. To the extent it is relevant to any case, welfare of the industry and of its participants, both human and animal, is paramount. It is essential that the protective order maintain 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 decisions applied.

FACTS

18.The key facts remaining for consideration are the following matters.

19. The appellant has been training for some 47 years. At relevant times, he maintained the same feeding regime for each of the horses in training. He continually used the same combination of feeds.

20. The only one of the feeds requiring consideration in the appeal is Micrspeed, which was fed to the horse on a daily basis. The horse was presented to race in January. In late December or early January, the appellant noticed that some of that feed was mouldy. It is his evidence that he immediately ceased feeding the subject horse with mouldy Micrspeed and did his best to ensure that it could not get at it.

21. The issue of mouldy feed and its likely contribution to the cobalt level was examined in various reports. That issue is no longer pressed by the appellant. The appellant's evidence is that he had stopped feeding the mouldy Micrspeed prior to the relevant presentation. He continued to use the product but not the mouldy product. In any event, the expert evidence is that mould in the feed could have made no contribution to the cobalt level.

22. The appellant's evidence is that on the morning of the race he would have fed two kilograms of Micrspeed to the horse. A sample of Micrspeed was taken by the stewards from the appellant's stables on 11 April 2019 and analysed. It produced a reading of 0.57 micrograms per kilogram. Testing of some remaining mouldy feed collected from the property had readings between 0.57 and 0.68 micrograms per kilogram. The batch number for the feed at the property was used to enable a sample from that batch to be collected from the manufacturer and tested to show 0.39 micrograms per kilogram.

23. Dr Wainscott opined that even the upper levels were within normal limits for pre-mixed feeds.

24. The appellant kept detailed log book entries which noted that for the subject horse on 15 January 2019 he administered 10 mls Pre-Ferrin, and on 17 January 2019, 15 mls of Folic-B12 (race sample 19 January). On 10

February 2019 he administered 10 mls of Pre-Ferrin and on 20 February 2019, 15 mls of Folic-B12 (race sample 22 February).

25. Dr Wainscott opined that that treatment regime was unremarkable in terms of cobalt supplementation.

26. The subject horse was tested, both on 19 January 2019 and 22 February 2019, and produced readings of 120 µg/L, and on 22 February 2019, 4.2 µg/L. That 22 February 2019 reading was also from a race day sample.

27. In addition, on 25 February 2019, another horse of the appellant, Malicious Fella, was race day tested and returned a reading of 19 µg/L and it had been provided with the same feeding regime and treatment regime as Park Run.

28. In summary, therefore, the appellant's feeding and treatment regime, which remained constant for both horses in the relevant period 15 January 2019 to 22 February 2019, did not change, and it was only on the presentation on 19 January 2019 that an increased reading, in excess of the threshold, of 120 was produced.

29. The testing of the race-day urine from 19 January was carried out by the Australian Government National Measurement Institute and that produced a reading of 120. With an allowance for measurement of uncertainty, a reading between 109 and 131 was considered possible.

30. A confirmatory analysis was sought from ChemCentre and it produced a reading of 110 which, with allowance for measurement of uncertainty, may have fallen below the threshold and accordingly that measurement was disregarded by the stewards and is not relied upon here.

31. As outlined earlier, Dr Wenzel on 4 October 2019 provided a test report in respect of his assessment of the same urine tested by those laboratories. His assessment produced a reading of 112. At this stage, it might also be noted that his assessment produced a creatinine level of 3.8, and a creatinine adjusted cobalt reading of 30, and a specific gravity adjusted cobalt reading of 44. He did not measure specific gravity.

32. The appellant in his interview by the investigators, in evidence before the stewards and in evidence before the Tribunal maintains a consistent version that he simply cannot 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.

33. One of the concerns of the appellant, supported by his experts, is that the horse was dehydrated. The appellant assessed the day as extremely hot and he thought it might have been above 45 degrees. Evidence in the proceedings establishes it was more around the 38 degree mark but nevertheless still hot. Travelling to the course, the appellant's vehicle broke down. Evidence establishes that fact. The appellant has stated that the horse remained in the float with no shade and no water for over one hour before a passer-by was able to take the horse to the course. The appellant's evidence is the horse only drank moderately upon arrival at the course.

34. The appellant stated before the stewards that perhaps the horse had eaten something by the side of the road. Dr Wainscott opined that he was not aware of anything that could have been eaten that would have been on the side of the road that might have contributed to the cobalt level. This matter has not been pressed before the Tribunal.

35. Accordingly, this appeal has focused upon feed, dehydration and urine concentration as a matter of relevance to the appellant.

EXPERTS OTHER ISSUES

36. To simplify the arguments for the appellant, it is that reliance is placed upon Dr Major's opinions that dehydration must be taken into account in respect of the cobalt reading. That is, that the actual reading should be adjusted to make allowance for the dehydration on urine concentration and the relevance of creatinine and urine specific gravity to that.

37. As set out above, the resolution of those arguments will not be undertaken in this appeal.

38. The critical reason why that determination is made is the evidence for the respondent by Dr Cawley and Prof Hibbert and agreed upon by the witness for the appellant, Dr Wenzel, is that, as stated by Prof Hibbert in his report of 17 January 2020:

> "If the mass concentration were to be adjusted by some function of the measured specific gravity, then … the threshold would need to be re-established by measuring adjusted concentration of racing horses and performing a similar statistical analysis to that done with total cobalt concentrations."

And later:

> "It is metrologically wrong to compare adjusted concentrations with unadjusted concentrations because these are different quantities, and therefore an adjusted cobalt concentration cannot be compared with the current unadjusted, threshold cobalt concentration."

And later in respect of creatinine, he stated:

> "I repeat my observation that it is metrologically wrong to compare adjusted concentrations with unadjusted concentrations because these are different quantities, and therefore a creatinine-adjusted cobalt concentration cannot be compared with the current, unadjusted, threshold cobalt concentration."

39. Prof Hibbert said in his oral evidence that if you adjusted for specific gravity you would need to re-establish the threshold. A number of factors would have to be taken into account and these may not be capable of analysis. Rescaling would be required. He was also concerned that rescaling would be required when unknown creatinine and urine specific gravity readings were to be used, or they may be unreliable.

40. Drs Cawley and Wenzel agreed. Dr Wenzel's stated that it would lead to a lower threshold.

41. It was Dr Major's theory that there needed to be a fundamental change in the processes of analysis to account for the dehydration factors listed above, but that it must not be done using urine. In essence, he said urine was the wrong test.

42. The Tribunal does not consider it is its function to determine whether testing for cobalt by urine analysis is correct or not. That is a matter for the regulators.

43. Accordingly, the determination is made that based upon some of the witnesses for both parties being in agreement, that taking into account these dehydration issues will mean a recalculation of the threshold and the Tribunal's determination it is not its function to redetermine the threshold. Virtually all the arguments for consideration fall away. Accordingly, there will not be a detailed analysis of all of the above arguments.

44. To the extent that it is necessary to determine whether the objective seriousness of the conduct of the appellant is lessened by reason of the impact of dehydration, there must be some consideration of the issues identified.

46. In respect of dehydration, the following brief remarks are noted.

47. The appellant's experts establish that if a horse is dehydrated, its kidney function will be different to that of a hydrated horse and horses given the same volume of a drug will produce different results by reason of that. It is submitted that that will mean a lower reading if it was differently calculated.

48. Dr Cawley was of the opinion that there is no reliable measurement for density and dehydration in equine urine. Accordingly, he could not agree that dehydration would cause less dense urine. Accordingly, he would not agree that a denser urine would give higher readings of substances. Prof Hibbert is of the opinion that density did not matter. Prof Hibbert was also of the opinion that volume became irrelevant because you are measuring cobalt to volume tested. Some only of the sample is tested.

49. Dehydration alone is not found to be an issue to reduce objective seriousness.

50. In respect of creatinine, the experts differ.

51. Dr Major was of the opinion, supported by Dr Wenzel, that creatinine is a reliable measurement for hydration. Its measurement would take into account differences between horses. Both doctors are of the opinion that it is a normal method of measurement worldwide.

52. On the other hand, Dr Cawley was not supportive of it as a measurement at all. He referred to conjecture in the literature about excretion rates not being established and numerous other factors which affect it. For example, muscle mass, gender, age, activity and kidney function are but some of the many factors that can cause different creatinine measurements. Dr Cawley also expressed the opinion that any measurement of creatinine would likely lead to doping practices because it would undermine the integrity of the testing process. That is the administration of creatine, which is a widely available nutritional supplement, which is metabolised to creatinine, would therefore have the ability to give increased levels of creatinine. Therefore the unscrupulous could administer creatine in conjunction with prohibited substances to circumvent an exceedance of a threshold.

53. On the facts here, Dr Major noted that Dr Wenzel's calculations showed a creatinine level of 33.3 mmol per litre and he assessed it as an abnormally concentrated urine sample. Dr Major also noted that creatinine is a well-correlated substance with urine specific gravity.

54. Creatinine on the facts here is not found to be an issue to reduce objective seriousness.

55. The issue of urine specific gravity is also related to the dehydration issue.

56. It is the appellant's experts' case that the use of USG gives a good estimate of urine concentration. It is then said, for the reasons expressed above, why urine concentration is important.

57. It takes less of an emphasis here because the actual sample tested did not lead to a measurement of creatinine but purely academic assessments of what it might have been.

58. The respondent's witnesses state it to be an unreliable measurement.

59. Dr Cawley commented upon some calculations by Dr Major to come to his conclusions that it was abnormally concentrated in the subject sample. Dr Major agrees that there were some fundamental assumptions and mathematical errors in his report, but nevertheless maintains that the calculations he did perform provide useful figures. Dr Cawley challenges those on the basis that adjustments were made to various base figures on more than one occasion. Dr Cawley takes challenge with various formulae which were adopted by Dr Major.

60. There is a considerable amount of evidence about the capacity to measure urine specific gravity by instruments in equine urine. Drs Major and Wenzel were of the opinion that it could be done and was done regularly. Dr Cawley was of the opinion that it could not be done due to the viscosity and the like of equine urine. The Tribunal has determined that it does not have to resolve this issue by reason of the fact that USG was not measured for the subject sample, and for the other reasons expressed. The Tribunal declines to make a determination on the theory.

61. The Tribunal does not consider it necessary to reflect upon the numerous calculations advanced to make findings on the hydration, creatinine level and USG to determine the issues here. There were challenges to laboratory and witness accreditation, the base figures, the formulae, the assumptions made, expertise and the relevance of human tests to equine readings. At the end on the day they were not analysed by the parties in detail. The Tribunal however concludes that it prefers the arguments and facts in favour of the respondent on these matters but again those findings are not detailed.

62. USG on the facts here is not found to be an issue to reduce objective seriousness.

63. Dehydration, creatinine and USG on the facts here are not found to be issues to reduce objective seriousness when considered alone or in conjunction.

64. The next issue was a challenge by the appellant's witnesses to the population studies carried out by and on behalf of the regulators in New South Wales, Australia and worldwide to provide figures upon which a threshold could be determined.

65. Dr Major took issue with the studies on the basis that they took no account for dehydration or hydration or creatinine and the like. That is, the threshold as fixed did not account for appropriate variables. Dr Wenzel was of the opinion that various other matters should always be measured for the purposes of determination.

66. Dr Cawley and Prof Hibbert set out in their reports considerable detail on the population studies used and the calculations based upon those studies.

67. Dr Cawley stated in his report that horses having a wide range of hydration status would be included such that the potential variation caused by hydration effects is included in the statistical data used to derive a specific threshold. In summary terms he referred to reports from around the world on the number of horses incorporated in each study and the mean level obtained.

68. The Hong Kong Jockey Club analysed 7462 race day samples to produce a mean of 5.5. An Australian test of 5816 urine samples produced a mean of 8.3. A review of racing tests by Racing Australia of 42,477 samples produced a mean of 5.1. In 2019, Dr Cawley performed an analysis of 1363 samples of which only five (0.4 percent) contained greater than 100. Those five had readings of 1590, 250, 168 and lower. The mean was eight. This sample at 120 was included.

69. In summary, he noted there were 57,118 urine equine cobalt samples analysed to produce a mean of 6.7. He opined, therefore, that the level at which cobalt concentrations can be considered to be abnormal is greater than or equal to 22. He opined that there does not appear to be a problem with the threshold or how it was derived.

70. Prof Hibbert's report, with all of his studies appended, dealt with studies of statistical distribution of mass concentration of cobalt in standardbred racing horses. There are seven such studies. He did not fix or recommend a threshold. He modelled the distribution of the mass concentration of urinary cobalt in a typical racing population and calculated probabilities that a horse would present at any given concentration. He referred in detail to the numerous studies upon which he based his calculations and in particular noting each of the low readings of a mean nature that were established in each of those studies. He acknowledged that the present threshold did not take into account specific gravity. It was in this report he opined that if there was to be some adjustment for specific gravity, then the all of the threshold calculations would need to be remade. The reasons were set out earlier.

71. Importantly the respondent's experts establish that the threshold was fixed with all inherent variables covered. For example: climate; feeding regimes; hydration; Australia wide differences (if any); racing condition; supplements by vitamins and the like. This is sufficient to satisfy the

Tribunal that racing on very hot days and consequent dehydration is logically part of the very extensive sampling and testing that has taken place over a number of years.

72. The Tribunal concludes that the expert evidence for the respondent must be accepted on the basis that it establishes that there was a strong evidential foundation for the establishment of the threshold and that at the present level of 100 it can be put in the context of Dr Cawley's estimate that, there being a mean of 6.7, anything greater than 22 is abnormal.

73. There is nothing advanced in the appellant's case that satisfies the Tribunal that in considering objective seriousness when there is a reading of 120, as compared to anything above 22 as being abnormal, that that reading of 120, with measurements of uncertainty considered, can be in any way diminished on seriousness by the fact that there may or may not have been an impact of dehydration which may or may not be considered appropriate from looking at creatinine or urine specific gravity impact. The Tribunal is particularly reinforced in that conclusion by the fact that there is no evidence that would indicate anything approximating a reading of 22 that is established by clear and unambiguous mathematical calculations.

74. Dr Major carried out some calculations, which have been the subject of some criticism, and parts which he accepts, designed not to advocate a case, the Tribunal accepts, but to try and put forward a scientific theory to justify the propositions advanced on behalf of the appellant. To the extent some of those may have been around 44, the Tribunal does not find comfort that for the totality of the evidence that that would approximate to that level of 22, so it is not further analysed.

75. The appellant being unable to provide an explanation, it is necessary to examine what remains. The first is the feeding regime.

76. Dr Wainscott's evidence to the stewards, his report of 30 December 2019 and his oral evidence, essentially unchallenged, means that there can be no satisfaction that feed was the cause of the elevated reading. There are several reasons.

77. The Tribunal does accept the evidence of Dr Major that there can be mislabelling of the quantity of cobalt in labelled products. That was amply demonstrated in the case of Quinton. Dr Major's research establishes that fact.

78. The appellant has sought to advance a possibility that by reason of the manner in which cobalt is added to a mix before it is a bag mix, it could lead to, as it were, a clump of cobalt being present in the mix and then consumed. Whilst that seems to be a possibility, there is no evidence of any manufacturer or compiler of the mix which would give any comfort that such

a thing could happen. Postulation by witnesses in this case does not advance that theory any further.

79. The various items of feed that were analysed here all produced very low levels. None of those readings could account for a high cobalt level for the subject horse.

80. In addition, the evidence establishes that on a subsequent presentation this same horse, and on another date another horse, all under the same treatment and feeding regime, produced readings below the abnormal range. The subject horse in particular produced a very low reading of 4.2.

81. The Tribunal accepts from previous determinations that accumulation of cobalt in a horse does take place. Bioaccumulation is not pressed by the appellant in this case as being a factor.

82. The totality of the evidence adduced on behalf the respondent is such that on balance of probabilities the respondent satisfies the Tribunal that feed, when ingested by a single meal, or feed when it is considered for accumulation, has not caused the subject reading.

83. Accordingly, the high reading remains unexplained.

84. The Tribunal notes the opinion of Dr Wainscott in his report of 30 December 2019 that:

> "The urinary cobalt concentration is inconsistent with all administration studies involving cobalt-containing products given at therapeutic levels."

85. In oral evidence, Dr Wainscott maintained that with an agreement as to divergencies between products tested, that he nevertheless remained unable to explain this reading.

OBJECTIVE SERIOUSNESS

86. When considering objective seriousness, therefore, the Tribunal takes into account the determinations in McDonough v HRV 2018 where the three categories of wrong conduct were analysed which, in very summary terms, involved Category 1 where the conduct of the trainer can clearly be established is wrong, Category 2 where the Tribunal is unable to determine why the reading occurred or does not accept the explanation of the trainer and Category 3 where the trainer can be found blameless. On that assessment, this trainer cannot be found blameless. This trainer has no explanation. No other explanation is available on the evidence.

87. On the other hand, the need for a specific message being given to this appellant diminishes because there is no specific act of wrong conduct identified against which the appellant would be required to change his ways. Likewise, the general message to be given to others in the industry, and as seen by the public at large, must be lessened by the fact that the same considerations must be found.

88. No change in husbandry practices which the Tribunal would expect to have been demonstrated by the appellant, if they were identifiable, are able to be determined.

89. No welfare issues have been identified.

90. There is no evidence of performance enhancement and therefore a loss of a level playing field. The public perception about a presentation with a prohibited substance cannot be discounted. Uninformed as it may be, it nevertheless is an important consideration in determining a protective order. That is essential to ensure, having regard to all the facts and circumstances, that the protective order is designed to ensure the integrity of the industry.

91. On objective seriousness, whilst the level of 100 has been exceeded, and it is relevant to the fact that at 120 it is well above a normal range of 22, there is a breach of a threshold but at a low level. The other outliers in the 0.4 percent of matters analysed by Dr Cawley are much higher.

92. The Tribunal is guided in determining an appropriate protective order by reason of consideration of the NSW Harness Racing Penalty Guidelines, although it is common ground that the Tribunal is not bound to follow them and they are guidelines and not tramlines, and also consideration of the application of the principles of parity.

93. Under the Penalty Guideline, cobalt is a Class 1 substance, the most serious level, and carries with it for a first breach a disqualification of not less than five years as a starting point.

94. The Tribunal is not asked to determine that a greater starting point should be considered on the facts, nor on the basis that this is not the appellant's first breach of the prohibited substance rules. The case has been run on that basis. The parties ask the Tribunal not to do otherwise. Accordingly, the Tribunal will not do otherwise.

95. The Tribunal must look to the future. In looking to the future, regard must be had to the facts as they are at the day of the imposition of this order but take into account past conduct. Past conduct cannot lead to a higher penalty because that would be to punish the appellant again for past conduct. Past conduct is relevant to the "not less than" issue.

96. On the other hand, where there is past conduct and the present conduct remains unexplained, there is a need to exercise caution in extending undue leniency to an offender. To do otherwise would lead others with clean records to exclaim that they were unfairly dealt with. Past conduct does not lead to increased penalty. But if the facts and circumstances of the particular case warrant it, then treating a person with priors as a first offender in looking to a starting point has with it an obligation to consider that starting point to be appropriate.

97. Under the McDonough Category 2 principle, the appropriate penalty is still required but not as severe as it might be under a Category 1 and, of course, as already determined, a Category 3 on blamelessness is not appropriate. There is no discount from the starting point based on the McDonough principles.

98. Parity needs to be considered.

99. The appellant relies upon Hughes to submit that a two-year starting point is appropriate. The respondent says for various reasons Hughes can be disregarded. The Tribunal agrees.

100. Hughes can be disregarded as that two-year starting point was effected on the basis that Hughes had no priors, made ready admissions which would otherwise not have been found in respect of the more serious charge travelling with the presentation of an admission, had established facts that the substance administered was a regularly used and prescribed medication which, when administered in accordance with prescription, is beneficial to the horse. It is noted in Hughes also that the particular substance was administered in accordance with manufacturer's recommendations and proper method of administration. On the other hand, in Hughes, and similar to here, there was no performance-enhancing benefit nor welfare issue. In Hughes, the reading was 180 and here, 120. That is in favour of this appellant. However, the key distinguisher between Hughes and this appellant is the self-reporting nature which played such a critical factor in the Tribunal's determination in Hughes.

101. The Tribunal does not consider itself bound by Hughes to impose a starting point of two years having regard to the facts and circumstances of this case.

102. Mifsud can be distinguished as it dealt with the guideline as at 2013 and cobalt was accordingly assessed there as a class 3.

103. The appellant does not satisfy the Tribunal that the starting point should otherwise be reduced by reason of any of the other factors in issue in these proceedings.

104. In particular the approach adopted by the stewards and the Tribunal to prohibited substance breaches has been to analyse the facts and circumstances in this way and the respondent satisfies the Tribunal this is not a case to divert from that approach on the guidelines, the substance found and the threshold.

105. The Tribunal determines that the objective seriousness of this unexplained conduct requires a disqualification with a starting point of five years.

SUBJECTIVE FACTORS

106. It is then necessary to have regard to the subjectives.

107. Firstly, there has been a plea of guilty before the stewards and a hearing conducted on a severity basis before the Tribunal. The Tribunal disregards the plea of not guilty on the initial lodgement of the appeal as that was corrected before any substantial preparation was required. That approach extends some leniency to the appellant. As is the normal course, a plea of guilty, with the full co-operation that this appellant has demonstrated, warrants a discount of 25 percent, and that shall be given.

108. The Tribunal takes in to account the reference of Saul Duck, 25 June 2019, not updated, where Mr Duck describes the appellant as a friend of 20 years and who Mr Duck assesses as a gentleman, never known to cheat or do anything wrong, and always presented his horses in excellent order and demonstrates a love for them. The appellant has assisted Mr Duck on numerous occasions. He assesses him as a trustworthy person.

109. In 2019, the appellant was 63 years of age and been licensed for 47 years. He is also a qualified farrier. He regularly participates in harness racing and his horses have been swabbed on many occasions over the years.

110. Importantly, the appellant undertakes many hours of voluntary work at the Coolamon track where he assists as a handyman and as an official. It is unpaid work.

111. The appellant’s past history does not entitle him to any further discount. In 1993, he was given a 12-month disqualification, reduced to 4 months on appeal, for a presentation with heptaminol. In 1994, he was given a 20-month disqualification for a TCO2 offence, equivalent today to a Class 2. In 2017, he was subject to the penalty of a caution for an arsenic presentation.

112. The Tribunal accepts that the circumstances of the 2017 matter, where a caution only was imposed, can be viewed at the very lowest end of the scale of seriousness. In addition, the matters of 1993 and 1994 are a very

long time ago and might otherwise have been disregarded. However, as the Tribunal has said on a number of occasions, a person even of very many long years' standing, who has committed prior breaches of the prohibited substance rules, cannot be expected to be dealt with as another person with the same long history who has not transgressed.

113. Accordingly, the effect of those determinations is that there is no further reduction by reason of a good past record. In addition, that record was one of the factors which caused the stewards to treat the appellant as a first offender under the Penalty Guidelines. The Tribunal is not asked to deal with the matter differently and, as indicated, does not.

114. The stewards determined that those subjective factors should entitle him to a discount of 20 percent. The Tribunal is not asked to disturb that finding. The Tribunal considers it, on the facts and circumstances of this case, to be exceedingly generous. His past record would not assist him with any discount there. It can only be that his voluntary work at Coolamon has played a substantial part in their consideration. A long period as a trainer is in his favour.The reference in essence does not distinguish him from any other trainers who breach the subject rule.

115. As the Tribunal is not asked to disturb the finding of the stewards that in total there be a 45 percent discount for subjectives, despite the fact it considers that to be excessive, it will not disturb that determination.

116. Accordingly, from a starting point of a disqualification of five years, there will be 45 percent discount. That discount equates to 27 months.

DETERMINATION

117. The determination of the Tribunal is the same as that of the stewards. The Tribunal has made its own determination, coloured as it is by the submissions that the same penalty should be imposed as was imposed by the stewards.

118. The order of the Tribunal, therefore, is that there be a disqualification of two years and nine months to commence on 20 June 2019, but tempered by the fact that the appellant enjoyed a stay from 20 July 2019 to the date of this decision. The respondent can calculate the termination date of the disqualification.

119. The severity appeal is dismissed.

APPEAL DEPOSIT

120. The Tribunal is required to make an order in respect of the appeal deposit and having regard to the findings in this decision would ordinarily order the appeal deposit be forfeited. However, the appellant has not made a submission in respect of the appeal deposit and he is entitled to do so.

121. The Tribunal will order, seven days from today's date, that the appeal deposit be forfeited unless the appellant makes an application for its refund in whole or in part within that seven-day period.
