RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

WEDNESDAY 8 AUGUST 2018

APPELLANT SHANE HILLIER

AUSTRALIAN HARNESS RACING RULE 190(1) & (2)

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Disqualification of trainer's licence for 8 months from 13 June 2018**
3. **Appeal deposit refunded**

1. The appellant appeals against the decision of the stewards of Harness Racing New South Wales of 13 June 2018 to impose upon him a period of disqualification of 12 months for a breach of the prohibited substance rules. He was charged with a breach of Rule 190 in the usual terms outlined:

> "(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."

Sub rule (4) is usually quoted, but it is not necessary here.

It was particularised as follows:

> " … that you, Mr Shane Hillier, were the licensed trainer of the horse Corrinyah Conman when it was presented to race at Temora on 9 March 2018 with a prohibited substance in its system, namely meloxicam, as reported by two laboratories approved by Harness Racing New South Wales."

2. When confronted with that allegation, he immediately pleaded guilty. He has maintained an admission of that breach on appeal and at the hearing. No stay was applied for and the order has been in effect since 13 June 2018.

3. The evidence before the Tribunal has comprised the transcripts and exhibits before the stewards, together with a series of character references, to which the Tribunal will return, and a number of extracts of various reports, to which the Tribunal will also return. Dr Wainscott was called to give brief evidence and cross-examined and the appellant gave evidence.

4. The matter is one which is the subject of the penalty guidelines and the Tribunal will return to that.

5. The appellant himself had, at the relevant time, been training for some 22 years, since he was aged 16. He is currently 38 years of age. He had, at the time of the particular breach, some 15 horses in training. He has had reasonable success. He has the usual household and other bills. He has established his own training establishment. He is a sponsor of the Temora track and a regular supporter of harness racing in the Riverina district.

6. Prior to the commission of this matter he had been before the stewards in Queensland in respect of an arsenic presentation, which it appears was attributable to the subject horse chewing contaminated wood, and no

penalty was imposed. He is also subject to a prior TCO2 matter some nine years ago in which a penalty was imposed upon him.

7. He took Movalis, a prescribed medication. The evidence of Dr Wainscott establishes that that has no part to play in this matter.

8. He had, prior to this incident, obtained from the University vets at Wagga the subject drug meloxicam in an injectable form. He had used it on his horses. When it was prescribed, it was for a different horse to that which he presented. It might be noted at this stage that on Dr Wainscott's evidence the use of such a prescribed substance in a different horse is not an unusual practice for trainers.

9. He had used the drug on the basis of his belief that a detection period of 72 hours prior to presentation to race was sufficient to prevent a positive detection. He based that opinion upon the advice he received from the University vets at Wagga, from vet Dr Brian Munro and vet Dr Trevor Robson. Dr Wainscott concedes that each of these vets is well known in the harness racing industry, well respected and universally recognised as competent. Dr Wainscott was of the opinion that the appellant was entitled to rely on what they said.

10. Armed, therefore, with that information, 76 hours prior to the presentation of the subject horse in the race, he injected it with the prescribed amount, that is correctly so, of the meloxicam. In doing so, he had a subjective belief based upon the advice he had been given that it would not produce a positive. The horse raced and returned a positive.

11. The level – and it was an assessment – was acknowledged by Dr Wainscott to be a very low reading and, on an aspect of direct performance enhancement, of negligible or very little likelihood. He also conceded that of the amount injected, that which was detected was the very last bit that had not been excreted by the horse.

12. The appellant was spoken to by stewards and subject to a standard interview on presentation of a letter indicating the positive. In the course of the interview he made full and frank admissions of his conduct and reliance upon the 72-hour period. There were other discussions about other matters and a prior racing of the horse which did not produce a positive.

13. He attended the stewards' inquiry. Prior to that, he had made inquiries of Dr Robson and had been referred to Dr Robinson, who is at the manufacturer of the subject drug as its vet. No evidence is given, it might be noted, from Drs Munro, Robson or Robinson to corroborate what the appellant has said they told him, nor from the unnamed Uni vet at Wagga. Dr Robinson apparently sent him an email; its contents are not known. Dr Robinson told him the drug had only been on the market for three or four

years, that every stable is using it and it is a very common product in a lot of stables. Importantly, he also told the appellant that at 72 hours it is a very safe product. The appellant confirmed that evidence on oath to this Tribunal.

14. He raised an issue of possible dehydration. That will not be analysed further, as the scientific evidence available to the Tribunal in this matter does not indicate that dehydration has in fact played any part in the presence of the prohibited substance at the estimated level detected or any impact it would otherwise have had. In other cases, threshold levels and detection levels have been, on Dr Wainscott's earlier case evidence, set on the basis that a range of factors that vary in individual horses, such as weight, dehydration, training, condition, etc, are all taken into account in fixing levels. As said, it need not be analysed further.

15. Importantly, armed with that information and engaging in the conduct in which he did, the appellant was not worried and thought he was doing nothing wrong.

16. The drug itself was described in some detail by Dr Wainscott. It is, as he said, widely used as an anti-inflammatory and is a legitimate therapeutic medication, and there are some 54 veterinary products registered for use that contain it. As a prescription medicine, an S4, it is required to be prescribed by a vet. In this case it was, although for a different horse, as earlier referred to.

17. Dr Wainscott gave evidence about the difference between a withholding period and a detection period. The appellant's evidence is based upon a detection period. It is the regulatory vet's opinion that a safety margin should be allowed and that should provide for a withholding period. That is, whilst this particular drug and, of course, others on detection of levels, are capable of being detected in a horse's system at 72 hours, a safety margin should be allowed to cover a range of different factors, not all of which have been referred to in the evidence, before a horse is presented to race. That safety margin, when added to the detection period, provides a withholding period.

18. That has been the subject, in respect of this particular drug, of analysis and reports have been placed in evidence.

19. The first of those is the FEI announced detection times for the drug of 11 May 2011. That is, to paraphrase it, on proper administration, 72 hours. But it went on to say: a detection time is not the same as a withdrawal time. The withdrawal time must be decided by the treating veterinarian and is likely to be based on the detection time and an appropriate safety margin to allow for individual variation, confirming the evidence of Dr Wainscott.

20. The European Horserace Scientific Liaison Committee has published a lengthy table setting out a detection time for the subject drug of 72 hours.
21. Racing Australia has published a notice to racing calendars of a screening limit for the subject drug at 10 nanograms per millilitre in urine and that has been adopted, for international screening limit purposes, by signatories in the Asian region.

22. Equine Veterinarians Australia undertook a study of some 44 different veterinary practices to ascertain what the recommended withdrawal times were for the subject drug. The Tribunal accepts the correction given in cross-examination to the evidence given by Dr Wainscott to the stewards. Importantly, he acknowledges that there is no material available to indicate that any vets were of the opinion that a five-day withholding period or greater could be appropriate.

23. The table shows that 25 percent of surveyed veterinarians considered a withholding period of three days. The median considered four days, as did the 75th percentile. That is, on administration of the subject drug intravenously, although slightly with a higher dose of 15 millilitres to 3 grams compared to the 10 which was administered here, but the Tribunal is not aware what any difference that would make on the evidence it has.

24. It is acknowledged that the subject drug does not accumulate. Dr Wainscott gave evidence, which is not contested, that it is, when detected as it was, a prohibited substance. And he gave evidence, as has been referred to, of the estimate of the screening limits that were detected at 2.2 on a limit of 1.

25. In fairness, it must be said that Dr Wainscott, in the inquiry, described the 72-hour period as a close call. He also referred to the fact that by 96 hours the drug had gone completely. And later he said:

> "If you were using 72 hours as your cut-off, you're really close to the wind, to start off with, and if there's no safety margin as well to account for all these other factors like just dehydration levels in the horse, even just – like, there's things such as age and sex of the horse and various – with orally administered substances it's – you know, the amount of food in the gut can affect the times."

And later:

> "So that's where that safety margin becomes important."

26. He was asked by the appellant whether there should be a recommendation;

> "instead of a three-day clear, they should be advised to sort of go to a four-day clear"

and he said;

> "I would agree with you."

27. It is the evidence of Dr Wainscott that the regulator, aware as it is of that evidence just outlined, has not published to trainers or to the industry at large, or apparently notified to veterinarians about the advice they give, that a safety margin should be added to a detection time and a withholding period of greater than 72 hours is appropriate.

28. The Tribunal notes that this is not the first case in which the issue of notification by this regulator to the industry has been raised with the regulatory vets who have appeared before it. It did so in the matter of Frisby (1 April 2016) and Amanda Turnbull (12 March 2018). Dr Wainscott said that as a result of the Tribunal's remarks in each of those cases no notice of the type canvassed has been given to the industry.

29. It is to be acknowledged that, for example, there are 54 different drugs as referred to that contain meloxicam. It is acknowledged that the exhibit from European Horserace Scientific Liaison Committee extends over some pages of drugs with detection times. It is apparent that there are many, many other drugs that are put into horses for which the same issues might arise. It cannot be expected that the regulator would set out to, nor be required to, notify trainers in respect of particular detection safety margin or withholding times in respect of all of those drugs. As to why it was not done in respect of this drug, with the knowledge gained since at least 2011 because of the FEI announcement and in the Equine Veterinarians Australia research of 2017, that publication might be appropriate is not known.

30. The case requires, firstly, a consideration of objective seriousness.

31. In Frisby and Turnbull just referred to, the Tribunal, as it has in numerous cases, set out the issues of integrity and welfare and level playing fields and the like. Those matters are not repeated; they are adopted. So far as a level playing field is concerned, it is submitted for the appellant in this matter that, having regard to Dr Wainscott's evidence on the performance-enhancing effect, the level playing field for others in the race was not breached.

32. But that of course would ignore another part of the level playing field – and it was referred to in Neagoe v Harness Racing Victoria [2017] VCAT 535 at 32 where Senior Member Butcher said:

> "However, the perspective of the betting public that a horse may have performed better because of drugs is central. The betting public does not have the benefit of extensive expert evidence as the

Tribunal has. The public perception is that drugs alter the outcomes of races."

33. As to whether the public perception is correct or not – and scientifically here it would be wrong – there is nevertheless that perception in respect of a level playing field and therefore issues of integrity.

34. The failures of the appellant here which enable a distinction from the decisions in both Frisby and Amanda Turnbull are that here he – and not a veterinarian – administered to the horse a drug which was prescribed for another horse, that he had not directly in respect of the subject horse obtained any veterinary advice as to whether the withholding period was appropriate for it.

35. It is also said that he failed to record these matters in his log book. The Tribunal is satisfied that his explanation of the log book being full – or to him apparently full even if it was not – and his understanding at the time that someone may have sent him a replacement and the fact that he did not make notes of it elsewhere does not lead to a conclusion that his conduct was nefarious in the sense that it is relevant to objective seriousness. It was a mere failure for which he was otherwise dealt with on the matter for which there is no appeal. The Tribunal accepts that he was acting in good faith on his belief otherwise.

36. Therefore, he cannot be said to be in the same position as Frisby and Amanda Turnbull. And the Tribunal will return to those cases.

37. Objectively viewed, and having failed to meet a level playing field on a prohibited substance matter, a period of disqualification is mandated by precedent, by the penalty guidelines – again which will be addressed further – and by an acknowledgement on the appellant's behalf that a disqualification is appropriate. The need for that will not be further analysed.

38. The appellant loses the benefit of other leniency that would be available to him by reason of the fact that this is a third presentation matter. The stewards very fairly disregarded the arsenic matter and the Tribunal will do likewise. However, there is the prior matter, slightly aged as it is, in relation to TCO2. This appellant cannot ask to be dealt with on the same basis as others who are dealt with by the stewards or the Tribunal who have had long and satisfactory association with the industry and have had no prior matters. The Tribunal addressed that at some length in 2006 in Moses v Racing NSW, 2 December 2015, and has addressed it for harness racing in a number of like cases.

39. Therefore, when the penalty guidelines are turned to, it is apparent that it is the regulator's opinion that in looking to the guidelines – and not tramlines – it considers that a starting point for a second presentation is

greater than that for a first presentation. Whether the approach is done on the basis of a lack of leniency or it is more serious objectively does not have to be determined in this appeal. The penalty guidelines here provide for a two-year starting point before various deductions.

40. The subjective circumstances of the appellant have been summarised to some extent. The Tribunal is satisfied on the individual message to be given that it is much reduced. Despite the fact that it is his third or, for penalty purposes, his second presentation reinforces the Tribunal in that, particularly having regard to the material given about the financial impact upon him, and the Tribunal accepts, as is so often the case with licensed trainers with the number of horses he had in the setup that he had, that the impact upon him financially and personally has been devastating. As was said as long ago as Thomas in 2011 or 2012, hardship can be the inevitable consequence of a failure to comply with the rules.

41. The subjective facts require he receive a full 25 percent discount for his cooperation with the stewards, the ready admissions he made at the kennel inspection and his consistent cooperation and assistance to the stewards at their inquiry with a ready admission of his breach. A further reflection of that is to be found in the steps he took to inform himself, after the notification to him and prior to the stewards' inquiry. It is a reflection of the genuineness with which he has approached his duties as a trainer and his diligence, despite the failures identified, to carry it out properly, and is a reflection of his desire to comply, which is why the subjective message is diminished. The other factor, of course, is that he has admitted the matter and cooperated fully and narrowed the issues to be determined on this appeal.

42. His personal subjective factors are such that he is also entitled to a discount in respect of his association with the industry and in particular his support for Temora and the Riverina racing generally. The stewards recognised that as well.

43. The further subjective factor is that his failure here is to be properly informed in respect of a withholding period. There are two things about that.

44. Firstly, no one raised with him, it appears, in any of the discussions he had, either before or after, the fact that there is a withholding period as distinct from a detection period.

45. Secondly, the regulator has not chosen, despite its knowledge in respect of this particular drug, to give guidance and information to the industry that they should consider, by informing them, of the need to apply a safety margin and a withholding period and not a detection period. Having regard to the fact that the Tribunal has said this on more than one occasion, and as recently as Frisby and Amanda Turnbull, it considers that

the culpability of this appellant in this matter is reduced by that failure. The Tribunal is reinforced in that conclusion by the matters it put to Dr Wainscott about the publications put out, for example, by Racing New South Wales on a regular and repeated monthly basis of a list of matters about which trainers should be informed. The continued determination – deliberate, it appears – not to do that is a matter which this Tribunal is extremely uncomfortable about. It has, when a person is asked to be punished for a transgression, an element of unfairness that, knowing a trainer might fall into a transgression in circumstances where this regulator could have published information and does not, the substantial consequences that should otherwise flow should not flow.

46. He has put in evidence 4 character references.

47. Alana Pitt has known him for five years and employed by him for two years until his disqualification. She has been forced to leave the area and find work elsewhere. She says he was a role model for her. She reflects upon the affectation of his disqualification upon her life and upon others.

48. Ms Jane Walker secretary of Temora Trotting Club refers to his major sponsorship of that club for three years and that he is one of the main trainers supporting their race meetings.

49. Debra Smith has known him for eight years and they have become friends. He assists their daughter in mini trotting. They are now harness racing people because of his support and help. Their daughter would like to do school work experience with him.

50. John Tapp OAM, a licensed person, employed him in 2003 and he was a reliable and extremely punctual employee, an expert horseman and an immense help to Mr Tapp with the management and training of his horses

51. Dealing with the Amanda Turnbull case, the Tribunal imposed what might be said to be a nominal penalty of 16 days. The facts there were quite different. There was no prior. The veterinary aspects and other matters were well documented in that case. She even reported her conduct to the stewards and no alarm bells rang for her, and presented well outside the withholding period. Accordingly, what was originally a three-month disqualification was reduced to 16 days.

52. In relation to Frisby, not dissimilar: veterinary treatment way outside the detection period recommended and similar prior good history with nothing prior. He had an original starting point of six months which the Tribunal reduced to 3 months.

53. Neither of those trainers could say that if this appellant was to receive a similar penalty they had been fairly dealt with because they did not have a prior matter. There is a prior matter and it must mean that less leniency

is given to him or, alternatively, in considering the applicability of the penalty guidelines, a higher starting point is necessary.

54. Having regard to those criticisms, the Tribunal has determined that from a starting point of 2 years there will be a 25 percent discount for the cooperation and plea matters, there will be a further discount in respect of the subjective matters and there will be a further discount in respect of the basis upon which he acted and the lack of information available to him. In those circumstances, the Tribunal, for the reasons expressed, is not of the opinion that he can ask to be treated on an equivalent basis to the other two stated cases and especially in respect of a second matter.

55. The Tribunal has determined in the circumstances that a period of disqualification of 8 months is appropriate.

56. The formal order made is that the severity appeal is upheld.

57. The Tribunal imposes a period of disqualification of 8 months to commence on 13 June 2018.

SUBMISSIONS ON APPEAL DEPOSIT

58. In the circumstances, the application for a refund not being opposed, the appeal deposit is ordered refunded.
