

TASMANIAN RACING APPEAL BOARD

Appeal No 21 of 2014/15

Panel:	Mr Tom Cox (Chair) Mrs Kate Brown Mr Rod Lester	Appellant:	Mr Karl Rhodes
Appearances:	The appellant in person Mr Tony Murray, Director of Racing, in person	Decision to which this appeal relates:	Conditions placed on thoroughbred licence
Heard at:	Launceston		
Date:	27 July 2015	Result:	Upheld

REASONS FOR DECISION

1. The appellant has appealed against a decision of the Director of Racing to impose conditions on his licence that he not nominate a horse at official trials or at race meetings pending the determination of a stewards' inquiry concerning the presentation of a stallion, *Under Milkwood*, at a race meeting on 19 April 2015 with a prohibited substance, namely cobalt, at levels exceeding 200 micrograms per litre of blood.
2. By a letter dated 2 July 2015 the Director of Racing wrote to the appellant giving notice of the reported levels and requiring the appellant to attend before the Director the following day for a "licensing hearing" at which the Director would determine whether or not any conditions would be imposed upon the appellant's licence. The letter, set out in full, provided as follows:

"I have been advised by stewards that the urine sample taken from your horse Under Milkwood on 19 April 2015 has been reported to contain Cobalt at the following levels:

- *14,400 micrograms per litre (initial screening by National Measurement Institute).*
- *15,000 micrograms per litre (as reported by ChemCentre).*
- *19,600 micrograms per litre (reserve sample, as reported by Hong Kong Jockey Club Racing Laboratory).*

I am further advised that stewards have indicated to you their intention to conduct an inquiry into this matter.

In accordance with Section 6(2)(f) of the Racing Regulation Act 2004, in my role as Director of Racing I am responsible for "granting licences under the Rules of Racing". The applicable rule under the Australian Rules of Racing - Powers of a Principal Authority is AR7(iii)(b) which states that the Principal Racing Authority (which in Tasmania is the Director of Racing for matters of licensing, amongst other things) has the power, "to license jockeys, trainers and others on such terms and conditions as it shall see fit, and at any time to suspend, vary or revoke any such licence without giving any reason therefor".

I note that the current threshold level for Cobalt (AR178(C)(1) refers) is 200 micrograms per litre and that the reported levels of your horse, as detailed above, far exceed the threshold. Therefore, having regard to the welfare of the horses under your care and

control and also the welfare of horses and jockeys against whom your horses may be competing against, I have decided to give consideration as to whether conditions should be placed on your licence which would prevent horses under your care and control competing in either trials or races until such time as the stewards' inquiry into the matter is completed.

To enable my full consideration of this matter, you are required to attend a licensing hearing on Friday, 3 July 2015 at 11.30am at the Office of Racing Integrity, Level 2, Henty House, 1 Civic Square, Launceston. You will be given the opportunity at the hearing to provide submissions as to why conditions should not be placed on your licence.

If you are unable to attend at the scheduled time, please contact Glenda Attenborrow on 6777 1904 to arrange an alternate time on the same day."

3. In accordance with the Director's request, the appellant attended the Office of Racing Integrity on 3 July and participated in the "licensing hearing". During the hearing, the appellant explained:
 - (a) that his only source of income was from training;
 - (b) in all of his 21 years of riding and training he has never been in breach of the rules as they relate to prohibited substances;
 - (c) that he could not explain why the horse presented with cobalt;
 - (d) that this horse and his other horses (seven in total) were in good condition (a fact he says is inconsistent with extreme levels of cobalt);
 - (e) he would never do anything (meaning he would never administer a prohibited substance) which would jeopardise the welfare of his horses or any rider;
 - (f) that his partner was not working in the result that his income was the sole source of the family's income; and
 - (g) that if any conditions were imposed he would lose his horses and his position at the stables.
4. Having heard the appellant's submissions, the Director made the following determination:

"You are entitled to a presumption of innocence in this matter and the stewards' inquiry will occur in the very near future and you'll be given every opportunity to state your case. Normally I wouldn't intervene in a stewards' inquiry and I wouldn't take any action until such time as the stewards have come to a conclusion. However, such is the severity of the levels that have been reported by three individual laboratories that I would be derelict in my responsibility not to consider taking action and that is why I've called you here today. I have taken into account your personal circumstances and the impact that a decision to place conditions on your licence would have and I accept what you've put to me and I have taken that into account. Above that, however, is the integrity, safety and welfare of the industry and at all times I have to be mindful that those three areas are paramount to the well-being of the industry. Having considered all of the above I have decided to place conditions on your licence in terms of the following - You are not permitted to nominate or to race any horses in trials or races and any consideration from you to transfer your horses to another trainer must have prior approval from the stewards."
5. Before this Board the appellant reiterated the matters he had raised before the Director and added:
 - (a) at present he was not aware of any dates set for the inquiry;

- (b) that he cooperated with the Director, despite the short notice;
 - (c) that he had no explanation whatsoever for the levels of cobalt;
 - (d) that *Under Milkwood* had raced twice since 19 April without any incident;
 - (e) that, to his knowledge, none of the other horses had tested positive for cobalt or any other prohibited substance;
 - (f) that his horses had been subjected to approximately 12 swabs this year; and
 - (g) that the stables were open stables and there were other trainers at the stables, thereby implying that there were some security issues surrounding access to his horses.
6. Having regard to these matters, the appellant says that this Board should exercise its own discretion to set aside the Director's decision and, in its place, eschew the need to impose any conditions on his licence.
 7. In response, the Director of Racing submitted that a key consideration in imposing conditions, pending the decision of the inquiry, was the fact that the levels of cobalt for *Under Milkwood* exceeded the threshold and did so by significant amounts. As a result, he says, the integrity, safety and welfare of the industry (including the safety and welfare of animals within the industry) were of paramount importance and required him, in the circumstances of this case, to impose the conditions he did.
 8. It is important to note that there was no expert evidence before this Board or at the "licensing hearing" from which any findings could be made concerning:
 - (a) the impact such levels of cobalt would have had on *Under Milkwood*;
 - (b) how or when the substance could have been administered to *Under Milkwood*; and
 - (c) the health or otherwise of *Under Milkwood* or the other horses trained by the appellant either as at 19 April or subsequently.
 9. It is also worth noting that the Director of Racing elected not to present any evidence which would assist in these regards, stating that he would not "prosecute" the effects of cobalt before this Board.

Discussion

10. We accept that the Director of Racing is empowered pursuant to s.6(2)(f) of the *Racing Regulation Act 2004* to exercise his discretion to impose conditions on the appellant's licence. We also accept that in exercising that discretion it is relevant to consider the integrity, welfare and image of the industry and that the existence of the testing results would have "*left hanging the cloud over the industry that the tests had engendered*" (*Day v Harness Racing New South Wales* (2014) NSWSC 1402 at 201 per Adamson J). However, the mere existence of the testing, even coupled with evidentiary presumptions under the rules of racing, do not automatically warrant the imposition of what was in effect an interim suspension of the appellant's licence. The tests and the likelihood that they would amount to compelling evidence that the appellant presented the horse not free from a prohibited substance, along with the health and safety of horses and riders and the integrity, welfare and image of the industry, all combine to weigh in favour of the exercise of the discretion.

11. Against those considerations, and relevant for present purposes, are the following matters:
 - (a) the appellant has no relevant prior offending history and, in particular, no prior offending relating to the administration of prohibited substances or the presentation of a horse not free of prohibited substances;
 - (b) the appellant was cooperative;
 - (c) there has been no evidence, at least before this Board, which would establish that he administered or was in possession of any substances containing cobalt;
 - (d) the appellant has, at present, no explanation for why the horse presented with cobalt and, assuming this to be so, his potential culpability for any breach of the rules should be viewed in this context;
 - (e) only one horse trained by the appellant had reported levels of cobalt in excess of the threshold provided by the Rules. There are seven other horses trained by the appellant and, according to him, approximately a dozen swabs have been taken from those horses from the beginning of this year, being the time at which the Rules of Racing were amended to include cobalt as a prohibited substance; and
 - (f) almost a month has passed since the “licensing hearing” and to date no inquiry has been listed for hearing. There is some explanation for this, which includes the appellant’s recent overseas travels and a determination by the stewards to await his return before conducting the inquiry. Nevertheless, it is safe to assume that any hearing will not be conducted within at least the next few weeks and may not be concluded for a few more.
12. It is finely balanced, but having regard to the matters weighing against the imposition of conditions on an interim basis this Board has determined not to exercise its discretion to impose conditions pending the determination of any inquiry.
13. We order that the appellant have his deposit returned to him pursuant to Section 34(2) of the *Racing Regulation Act 2004*. The appeal having been successful we make no order as to transcription costs.