TASMANIAN RACING APPEAL BOARD

Appeal No 4 of 2015/16

Panel:	**Mr Tom Cox (Chair)** **Kate Cuthbertson** **Rod Lester**	**Appellant:**	**Mr Nathan Ford**
Appearances:	**Mr Greg Barns and Ms Caroline Graves on behalf of the appellant** **Mr Paul Turner on behalf of stewards**	**Rule:**	**Australian Harness Rule 243 x 2**
Heard at:	**Hobart**	**Penalty:**	**Disqualified:** **(1) 16 months** **(2) 2 ½ years** **To be served cumulatively**
Date heard: **Date decision handed down:**	**17 December 2015** **14 January 2016**	**Result:**	**Dismissed**

REASONS FOR DECISION

Background

1. The appellant is a licensed harness driver. On 24 May 2015, he drove in a number of races at the Tasmanian Pacing Club meeting. During the course of the meeting, the appellant was required to provide a urine sample. A sample of urine was provided to the stewards by the appellant, but he was requested to provide a further sample as the initial sample did not produce a temperature reading. The appellant provided a further sample of urine.

2. The two urine samples were analysed by Racing Analytical Services Ltd ("RASL"). The analysis of the first sample indicated the presence of *d*-methamphetamine. Confirmatory analysis of the reserve sample was conducted by Australian Racing Forensic Laboratory ("ARFL") and confirmed the presence of methamphetamine. Methamphetamine was not detected in the second sample provided by the appellant on the same day.

3. The appellant was required by stewards to provide a further urine sample during the Tasmanian Pacing Club meeting held on 7 June 2015. That sample was analysed by RASL and no prohibited substance was detected.

4. Each of the three urine samples provided by the appellant to stewards were then forwarded to the Victorian Institute of Forensic Medicine ("VIFM") for DNA analysis. The results of the analysis supported the proposition that the three urine samples tested originated from three separate donors.

5. Following receipt of that advice, stewards commenced an inquiry on 26 August 2015. Pursuant to AR182, stewards granted the appellant permission to have a lawyer, Ms Caroline Graves,

present during the inquiry. The appellant was required to answer questions and frame his own questions to witnesses but was permitted to seek an adjournment to confer with Ms Graves in the event that he required assistance. Stewards also allowed Dr Michael Robertson from Independent Forensic Consulting to be present and assist the appellant when evidence was given from VIFM, RASL and ARFL.

6. The inquiry was reconvened on 9 October 2015. In the meantime, the appellant provided a buccal swab for DNA analysis on 13 September 2015. Analysis of the buccal swab and other samples were conducted by VIFM. They concluded that the donor of the urine sample provided by the appellant on 7 June 2015 was the appellant. Further, analysis showed that the first sample provided by the appellant on 24 May 2015 matched the DNA profile of a sample taken from Mr Zeke Slater, another licensed harness racing participant, on another occasion.

7. During the course of the inquiry, evidence was heard from the following people:

   (a) Mr Bruce Free, the steward who took the urine sample from the appellant on 7 June 2015;

   (b) Mr Scott Quill, the steward who took the urine samples from the appellant on 24 May 2015;

   (c) Dr Dadna Hartman from VIFM who provided evidence regarding the DNA analyses conducted in relation to the inquiry;

   (d) Mr Stewart Willers from RASL who provided evidence regarding the analysis of the urine samples for the presence of prohibited substances;

   (e) Mr John Keledjian from ARFL who provided evidence regarding the confirmatory testing carried out on the first urine sample provided by the appellant on 24 May 2015;

   (f) Dr Michael Robertson; and

   (g) The appellant, Mr Nathan Ford.

8. A number of exhibits were also considered during the course of the inquiry. Those exhibits included reports from RASL, VIFM, ARFL and Dr Robertson, documents and photographs relating to obtaining, storing and transporting the relevant samples, correspondence between the Office of Racing Integrity and the appellant and a proof of evidence signed by the appellant.

9. Following consideration of the evidence at the inquiry, stewards charged the appellant with two offences under AR243 which provides:

   A person employed, engaged or participating in the harness racing industry shall not behave in a way which is prejudicial or detrimental to the industry.

10. The particulars of the first charge were as follows:

    "...that on the 24th of May 2015 at the Tasmanian Pacing Club meeting you as a driver engaged on the night when directed to provide to (sic.) a sample have provided Stewards a human urine sample 46299 which was found upon analysis to originate not from yourself but from licensed person, Zeke Slater. An action which in the opinion of Stewards is prejudicial and detrimental to the harness racing industry in that you have sought to subvert swabbing

procedures which are at the core of the integrity, safety of participants and public confidence of the harness racing industry."

11. The particulars of the second charge were as follows:

"…that on the 24th May 2015 at the Tasmanian Pacing Club meeting you as a driver engaged on the night when directed to provide a sample have on a second occasion provided Stewards a human urine sample numbered 47425 which it was found upon analysis to originate not from yourself but from another donor. An action which in the opinion of the Stewards is prejudicial and detrimental to the harness racing industry in that you have sought to subvert swabbing procedures which are at the core of the integrity, safety of participants and public confidence of the harness racing industry."

12. The appellant pleaded not guilty to each charge. Stewards found the appellant guilty of both charges. The appellant was disqualified in respect of each charge. In respect of the first charge, stewards imposed a period of 18 months disqualification but discounted it by two months to take into account the period during which he had been stood down from driving. A further two and a half years disqualification was imposed in respect of the second charge making a total effective disqualification of three years and 10 months.

13. The appellant has appealed both his conviction and the penalty imposed.

Conviction appeal

14. The appellant sought to have further evidence admitted for the purposes of the conviction appeal. That evidence consisted of an updated proof of evidence signed by the appellant and further report authored by Dr Michael Robertson concerning the possible explanations for why the DNA analysis showed that the three samples of urine allegedly provided by the appellant were from different donors.

15. Counsel for the stewards objected to the admission of Dr Robertson's report on two bases, namely that the report had been provided at a late stage and that it was speculative as opposed to recording an opinion based on his expertise.

16. The Board determined that the evidence ought to be admitted, and permitted counsel for the stewards to cross-examine Dr Robertson regarding his report. It was noted, however, that the Board would only give consideration to those part of the report which were based on Dr Robertson's expertise in drug testing and analysis.

Appellant's submissions

17. The appellant's notice of appeal cited the following particulars in respect of the conviction appeal:

"The Stewards erred in finding me guilty of two breaches of AR243

Particulars of Ground

The evidence led before the Stewards did not enable them to find on the balance of probabilities that Mr Ford was guilty of 2 breaches of AR 243

The laboratory used to analyse a buccal swab taken from Mr Ford was not an "official racing laboratory" for the purposes of the AR."

18. During the course of the appeal, the appellant did not present any argument regarding the appropriateness of the laboratory used to analyse the appellant's buccal swab. The appellant's submissions were entirely confined to the first limb, namely whether there was sufficient evidence for stewards to conclude that the appellant had breached AR243 when he provided the two urine samples on 24 May 2015. In order to find the charges proved, stewards were required to conclude that the appellant had substituted another person's urine for his own when he provided both of those samples.

19. The appellant denied during the course of the inquiry that he had substituted urine when providing those samples. He told stewards that he had personally provided the samples and that he could not explain why the DNA analysis of those samples did not match the DNA of the sample taken from him on 7 June 2015 or the buccal swab taken on 13 September 2015.

20. It was argued on behalf of the appellant that there was no evidence that he had substituted urine on either the first or second occasion on 24 May 2015. In particular, there was no evidence that a wizzinator or other form of technology was used to substitute the sample. Further, it was argued that in respect of the second sample, there was no evidence or observations made that would lead to a conclusion that the sample was provided otherwise than in accordance with regular practice. Reference was made to evidence suggesting that the appellant did not take specific notice of the labelling of the first sample taken on 24 May 2015, that he had co-operated when Mr Quill asked him to lift up his top and pull down his trousers after providing that sample and that no apparatus was found that could have been used to substitute the samples. On this basis, it was submitted that stewards, and in turn, this Board could not be satisfied to the requisite degree that the samples had been substituted.

Nature of appeal and role of the Board

21. In *Hillier* Appeal No. 1 of 2013/14, the Board set out the nature of an appeal brought pursuant to the provisions of the *Racing Regulation Act 2004.* It determined as follows:

    (a) An appeal from the stewards to this Board is not an appeal in the strict sense, nor is it an appeal de novo;

    (b) The appeal is in the nature of a re-hearing with this Board exercising its own discretion.

    (c) The appeal is decided upon the materials before the stewards, together with any further evidence the Board may see fit to receive.

    (d) The Board has full power to receive further evidence and, in deciding whether or not to do so, will be guided by what it considers to be the interests of justice in the particular circumstances.

    (e) The power or discretion to receive further evidence, whatever its form, is unfettered.

    (f) No error on the part of stewards need be demonstrated before an appeal can succeed.

    (g) It will remain for the Board to be comfortably satisfied, having regard to the evidence before it, that the appellant was in breach of any particular rule or rules (See Briginshaw v Briginshaw *(1938) 60 CLR 336.*

22. The particular allegations the subject of the two charges are clearly very serious. As a consequence, the Board has approached its task from the position that it must feel an actual

persuasion that the appellant substituted the samples on each of the occasions the subject of the charge before dismissing the appeal. For the reasons that follow, the Board is comfortably satisfied that the appellant substituted urine that was not his own when providing the samples to Mr Quill on 24 May 2015.

Evidence

23. Although it was argued on behalf of the appellant that there was no evidence that he had substituted urine on either occasion, this is not the case. It is perhaps more accurate to say that there was no direct evidence of substitution. There was, however, an abundance of circumstantial evidence that supported the inference that the appellant had substituted urine on both occasions he was called upon to provide a sample on 24 May 2015.

24. The evidence given by Mr Quill regarding obtaining the samples was clearly crucial in this respect and was to the following effect:

    (a) The appellant had been requested to provide a sample at around race 1, 2 or 3. The appellant eventually presented to provide a sample between races 7 and 8.

    (b) During the course of taking the sample, Mr Quill was present but did not have a clear view of the appellant actually urinating into the collection cup. He explained that this was due to the confined space and that the appellant was wearing a lot of clothing. A small volume of urine was provided in the collection cup.

    (c) The collection cups contain an inbuilt temperature gauge that registers temperatures between 32 and 36 or 38 degrees. If a valid temperature is not reported, the sample is not considered valid. In this case, Mr Quill observed that the urine sample provided felt cold to the touch. Further the temperature gauge did not register a temperature. He made the particular point that the sample felt different from the other samples he took that night.

    (d) He asked the appellant directly whether the urine was his urine. The appellant said it was. Mr Quill then asked if he could explain why the temperature did not register. The appellant said something similar had happened to him before and that it was a cold night. Mr Quill asked him if he had anything in his trousers that he shouldn't have. The appellant said he didn't have anything to hide, so Mr Quill asked him to show him if he had anything in his trousers without taking off his underpants. After expressing initial reluctance, which Mr Quill accepted was not unusual given that such requests are not a regular occurrence, the appellant co-operated and rolled down both pairs of trousers he was wearing and the top of his underpants down revealing the top of his pubic hair. His top was also lifted up. Mr Quill did not see anything abnormal.

    (e) The appellant was told that the sample was non-compliant and that he would have to provide a further sample.

    (f) Mr Quill says that the appellant signed the tamper proof seals, and said he wanted to leave and that it was alright for Mr Quill to seal the samples himself. Mr Quill says he asked the appellant to remain while he put the seals on, but he continued to walk away. He says that the appellant did however remain in sight and gave him a quick verbal confirmation that he had seen the bottles sealed up and that it was okay to package them.

(g) There were no other samples or drivers providing samples in the drivers' room at that stage. The samples were sealed in a bag and brought straight down to the stewards' room.

(h) The appellant presented to provide a further sample about 20 to 30 minutes later. He had more difficulty providing a sample. Another driver was providing a sample to another steward when he initially commenced the testing procedure, but he had left the room before the sample was eventually produced. The appellant took several drinks of water between attempts and left a tap on to aid provision of the sample.

(i) Again, Mr Quill says he did not have a direct view of the appellant's penis passing urine into the cup. He says he stood closely behind the appellant who was facing into the corner of the urinal. This second sample produced a valid temperature. The tamper proof seals and paperwork were signed by the appellant, and the sample sealed and packaged up in his presence.

25. The appellant disputed that Mr Quill did not have a clear view of him passing urine into the collection cup on both occasions. He cross-examined Mr Quill to that effect, but he was not shaken. The appellant also disputed that he was not present during the sealing and packaging of the first sample but accepted during the inquiry that he was present during the entirety of that process in respect of the second sample. The appellant raised the following questions in the course of the conduct of the inquiry:

(a) Why would he substitute urine for a sample that was found to contain drugs; and

(b) Why would Mr Quill have allowed him to provide the second sample in circumstances where he did not have direct observation of his penis passing the urine into the cup given the suspicions that he had in relation to the first sample provided.

26. Evidence before the inquiry included evidence showing the samples taken on the night were transported to RASL, that they arrived with their tamper proof seals intact and were duly tested. The first sample which tested positive for methamphetamine was sent to ARFL for confirmatory testing. Each of the samples taken on 24 May 2015 together with the sample taken from the appellant on 7 June 2015 were forwarded to VIFM for DNA testing.

27. Mr Bruce Free took the sample from the appellant on 7 September 2015. He stated that he had a clear observation of the urine passing from the appellant's penis into the collection cup.

Dr Michael Robertson

28. The appellant relied on a report from Dr Michael Robertson, a pharmacologist and forensic toxicologist with qualifications in the collection and testing of urine and oral fluid samples. He offered the opinion that the scenario described above, where the DNA analysis of the three samples provided by the appellant were shown to the have come from three different males, could be explained by one of three possibilities:

(a) Samples 1 and 2 (taken on 24 May 2015) but not sample 3 (taken on 7 June 2015) were substituted by the appellant at the time of sample provision;

(b) Samples 1 and 2 were misidentified, mislabelled or otherwise mixed–up following the provision of the sample and during subsequent labelling, storage and transporting to the laboratory;

(c) Samples 1 and 2 were misidentified, mislabelled or otherwise mixed-up following the arrival of the samples at the laboratory and during subsequent processing, storage and analysis.

29. On the facts known to Dr Robertson, he could not exclude sample substitution but noted the absence of evidence of observable physical manipulation or unusual behaviour consistent with the substitution of samples or direct evidence of apparatus used to substitute samples. He also regarded the substitution of a sample with another sample containing methamphetamine as unusual.

30. With respect to the scenarios concerning the misidentification or sample mix up, on review of the chain of custody documentation and analytical data he noted no anomalies suggesting a labelling mistake or other issues. In his view, such scenarios could not be ruled out.

31. In conclusion, he stated he was unable to conclude which of the three possibilities was more or less likely than any other.

32. Although Dr Robertson noted that DNA analysis of the first sample was found to match the DNA of a urine sample taken from a trainer who was present at the racetrack on the day or evening of 24 May 2015, his report did not refer to the fact that stewards did not take a sample from that particular individual at all on 24 May 2015. Further, the urine sample used to make the DNA comparison with sample one was not obtained until 19 July 2015. The initial DNA analysis of sample one occurred some time between 9 July 2015 when the samples were received by VIFM and 20 July 2015 when the report was generated. The urine sample from the trainer used to make the comparison was not received by VIFM until 23 July 2015. This chronology contradicts any suggestion of sample mislabelling or mix-up at least in respect of the first sample provided by the appellant on 24 May 2015.

33. As noted above, another driver was present in the drivers' room during the initial stages of the appellant providing the second sample to Mr Quill on 24 May 2015. DNA analysis of a later sample provided by that driver did not provide a match with the second sample provided by the appellant on 24 May 2015.

Conclusion

34. The Board is satisfied that the DNA analysis results which show that the samples of urine provided by the appellant on 24 May 2015 did not belong to him is not explained by mis-identification, mislabelling or sample mix-up. There is nothing in the evidence to suggest that any such issues occurred in this case. Regarding the evidence as a whole, and particularly the chronology relating to the timing of the provision of the comparison sample of urine by the trainer identified as the donor of the first sample of urine, the Board is satisfied that such scenarios can be positively excluded.

35. The Board is comfortably satisfied that the explanation for the urine samples purported to have been provided by the appellant on 24 May 2015 not matching his DNA was because he substituted samples of urine from two separate donors, one of whom has been identified as a trainer who was not otherwise tested by stewards on that date. It is the Board's view that, contrary to what was put by the appellant and Dr Robertson, the appellant did engage in behaviour during the course of testing that was consistent with sample substitution. There was time and opportunity between the request to provide a sample and the provision of the first sample for substitution to be arranged. The trainer identified as the donor of the sample was present at the racetrack and was also the trainer of one of the horses driven by the appellant that

evening. The temperature of the first sample was consistent with being a substituted sample that had not been kept at an adequate temperature. The appellant had significant difficulty in providing the second sample, which is also consistent with having difficulties effecting sample substitution. Although no apparatus was detected, particularly when the appellant was asked to lower his trousers, this does not rule out the use of equipment that was otherwise concealed. On any version, the examination of the appellant's person for signs of sample substitution was not particularly thorough.

36. The appeal against conviction in respect of both charges is dismissed.

Appeal against penalty – manifestly excessive

37. The appellant also contends that the penalties imposed by the stewards were, in combination, manifestly excessive. On the first charge, relating to the first sample provided by the appellant, the stewards imposed a period of 18 months disqualification, discounted by two months to take into account the period the appellant was stood down pending the stewards' inquiry. On the second charge, relating to the second sample provided by the appellant, the stewards imposed a period of 2½ years' disqualification to be served cumulatively to the first penalty. Combined the period of disqualification was 3 years and 10 months.

38. Regrettably, the appellant did not elaborate on the grounds of his appeal before this Board, suffice to note that:

    (a) the length of the period of disqualification will be "career ending";

    (b) as a consequence, the appellant will suffer an extended period of financial hardship;

    (c) to the extent that the stewards relied on the decision of Clint Harvey (A30/08/773 Racing Penalties Appeal Tribunal of Western Australia), the appellant was not afforded a like period of disqualification, namely 12 months, for a like offence.

39. In response, counsel for the stewards endorsed the reasons provided by the stewards in handing down penalty and further noted two aggravating aspects:

    (a) that the substitution of the second sample, so shortly after the substitution of the first sample, was wilful;

    (b) the appellant showed no recognition or remorse for his wrongful conduct.

40. It is necessary to set out in full the stewards' reasons for determining the penalties as noted above:

    We consider these to be very serious charges. We don't accept that the swabbing procedures employed during the collection and analysis of samples 46299 and 47425 contributed to contamination or substitution. We accept the results of the scientific testing from the Victorian Institute of Forensic Medicine which showed that two Buccal swabs in sample 46327 contained your DNA. We also accept that sample numbers 46299 and 47739 are the DNA of Zeke Slater and we also accept that sample number 47425 is not your DNA but that of another as yet unidentified person. We are comfortably satisfied that the urine in samples 46299 and 47425 is the urine which was subjected to analysis for prohibited substances and then for DNA analysis.

    Driving in races is a dangerous profession which involves a significant level of skill and a high level of risk for drivers when performing their duties. The testing of drivers is conducted

to ensure that they compete free of prohibited substances and as a result of what is, in the opinion of Stewards, deceitful behaviour we will never know what was in your system which had the capacity to compromise the safety of other drivers on that night. We are aware that you were penalised on the 24th of March 2013 when you were fined for trying to interfere with or prevent a sample being taken from a horse otherwise your disciplinary record, whilst lengthy, does not reflect any similar offences. We've taken into account the following:

1. *That you have pleaded not guilty to both charges.*
2. *That you offered no meaningful explanation other than your assertion of possible contamination.*
3. *We've taken into consideration your personal, financial and subjective circumstances and what effect any penalty would have on your personal life.*

However as stated these are very serious matters which the Stewards strongly believe are prejudicial and detrimental to the harness racing industry. Any penalties must reflect the serious nature of the offences and act as both as a punishment to you and act as a specific and general deterrent to other industry participants.

On the first charge we have taken into account a precedent in another racing jurisdiction which has been of assistance to us. It is our decision that the appropriate penalty is a disqualification of 18 months, of which we will discount two months to take into account the period of which you have stood down from driving pending this inquiry. That disqualification will commence immediately and expire at midnight on the 8th of February 2017.

On the second charge we have formed the view that is more serious than the first due to it being committed in the knowledge that you had committed the same offence only a short time earlier. It is our decision that the appropriate penalty is a disqualification for two and a half years which will be served cumulatively to the first penalty and then commence on the 9th of February 2017 and expire at midnight on the 8th of August 2019.

Against these decisions you do have the right of appeal.

41. In our view, all of the reasons articulated by the stewards are apposite in the circumstances of this case.

42. It is also important to note the appellant has a relevant prior offence, as recently as March 2013, for interfering with a sample being taken from a horse. The circumstances of that case, briefly stated, were that the appellant removed the horse from the swab box whilst the Veterinary Surgeon was taking blood. The needle was still in the horse's neck at the time and the appellant was expressly directed by the steward-in-charge not to remove the horse from the swab box. The appellant's motivation for acting as he did was to "wash down" the horse as it had travelled for over five hours to race, competed in a 2700m race, and then been placed in the confines of the "swab box" where it was hot. The appellant was fined $1000 to reflect his disregard for the swabbing procedure, albeit in circumstances where his motivation for doing so was the welfare of his horse.

43. Whilst we accept that the period of disqualification will remove the appellant from the industry from a considerable period, we do not accept that it will necessarily end his career. He is not of an age that would prevent him from physically competing in the future and to predict what may or may not occur after the expiry of the period of disqualification would be to speculate. In any event, the question for this Board is whether the period of disqualification is reasonable and just having regard to all the circumstances of this case.

44. As far as Mr Harvey's case is concerned the stewards imposed a period of disqualification of 18 months which was discounted by six months to take into account a period of 12 months for which Mr Harvey was stood down pending the inquiry. Having regard to the approach taken by the stewards in Mr Harvey's matter, it can be seen that the effective period of disqualification in his case was two years.

45. As has been mentioned by this Board on many occasions, no two cases are alike and no two persons' circumstances are the same. No tariff exists for offences of this type. Nevertheless, the penalty imposed in Mr Harvey's case, undisturbed on appeal, provides some guidance as to the gravity of offences of this type. Clearly, any industry participant who seeks to deceive the stewards and in so doing place themselves and other participants at risk of injury, while at the same time grossly undermining the integrity of the industry, ought to expect a considerable period of disqualification from any involvement in the industry.

46. The appellant's conduct, on two separate occasions, was very serious. The fact that he chose to repeat his conduct so soon after his first deception of the stewards is of grave concern, and a matter which calls on this Board to mark its strong disapproval. There are also the aggravating factors referred to by counsel for the stewards, of which we have not lost sight. There is also his prior breach of a rule relating to the integrity of swabbing procedures, which should be given some, but not significant, weight.

47. Having regard to all of the above matters we are not minded to disturb the combined penalties imposed by the stewards. The total period of disqualification will see the appellant out of the industry for a considerable time and adversely impact him financially. However, the stewards were required to impose a period of disqualification to mark the gravity of the offences and guard the industry from the appellant and conduct this type.

48. The total period of disqualification was severe, but not, in our view, unjustly harsh.

49. In the circumstances, the appeal will be dismissed.

50. In accordance with s.34(1A) of the *Racing Regulation Act 2004*, 50% of the appellant's prescribed deposit is to be forfeited to the Secretary of the Department. The appellant is also ordered to pay 50% of the cost incurred in the preparation of the transcript in accordance with s.34(4A).