TASMANIAN RACING APPEAL BOARD

Appeal No 9 of 2015/16 – ZEKE SLATER

Panel:	**Mr Tom Cox (Chair)** **Ms Kate Cuthbertson** **Mr Rod Lester**	**Appellant:**	**Mr Zeke Slater**
Appearances:	**The appellant in person** **Mr Paul Turner on behalf of stewards**	**Rule:**	**Australian Harness Rules** **(1) 243** **(2) 252E(1)**
Heard at:	**Hobart**	**Penalties:**	**(1) Disqualified 18 months** **(2) Suspended 6 months** **To be served concurrently**
Date heard: **Date decision handed down:**	**4 February 2016** **15 February 2016**	**Result:**	**(1) Dismissed** **(2) Upheld**

REASONS FOR DECISION

Introduction

1. This appeal is intimately connected with a recent decision of this Board in *Ford* Appeal No. 4 of 2015/16 in which this Board upheld a decision of the stewards to disqualify Mr Nathan Ford, a harness driver, for a period of three years and 10 months for substituting another person's urine for his own during a routine drug testing procedure on 24 May 2015 at a Tasmanian Pacing Club meeting at Elwick.

2. This appeal concerns the identity of that other person and whether that person knowingly provided their urine to Mr Ford to aid him in his attempted deception.

3. Following a stewards' inquiry, convened over two days in late November and early December last year, the appellant was found to be that other person and, more importantly, that he knowingly provided his own urine to Mr Ford.

4. Ironically, the urine that was substituted by Mr Ford was subsequently analysed and found to contain a prohibited substance, namely, *d*-methamphetamine. As a result of that analysis the stewards also found that the appellant had a drug of abuse in his body while carrying on a licensed activity at a race meeting; that is during the meeting on 24 May at Elwick.

5. The appellant accepts that it was his urine that was provided by Mr Ford during the routine testing, but denies that he knowingly provided it to Mr Ford and that any sample of his urine would contain the prohibited substance detected.

6. For the reasons that follow this Board, relying solely on the evidence before the stewards at the appellant's inquiry and the evidence before the Board, is comfortably satisfied that the appellant knowingly provided his urine to Mr Ford on a date unknown. We have not reached the same degree of satisfaction to enable us to find that the appellant had a drug of abuse in his body during the race meeting.

Background

7. The appellant is a licensed harness trainer/driver. On 24 May 2015 he attended the Tasmanian Pacing Club meeting as a trainer. He had horses racing in the meet. The appellant engaged Mr Ford to drive one of those horses. As noted above, during the course of the meeting, a sample of urine was provided to the stewards by Mr Nathan Ford. The sample did not produce a satisfactory temperature reading. The sample was considered invalid and Mr Ford was requested to provide a further sample later in the night, which he did.

8. 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.

9. Mr Ford was required by stewards to provide a further urine sample during the Tasmanian Pacing Club meeting held on 7 June 2015.

10. On 19 July 2015 a urine sample was provided to the stewards by the appellant.

11. Each of the three urine samples provided by Mr Ford to stewards and the appellant's urine sample 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 provided by Mr Ford originated from three separate donors.

12. The DNA analysis identified that the DNA profile for the urine sample provided by the appellant matched the DNA profile of the first sample provided by Mr Nathan Ford on 24 May 2015. Further, the DNA analysis confirmed that the DNA profile for the second sample provided by Mr Ford on 24 May did not match either Mr Ford or the appellant's DNA profile and, finally, that the DNA profile for the third sample provided by Mr Ford on 7 June matched Mr Ford's DNA profile.

13. Put another way, the DNA analysis indicated that the first sample provided by Mr Ford belonged to the appellant; the second sample belonged to a person unknown and the third sample belonged to Mr Ford.

14. As a result of the stewards' investigations, the inference was clearly open that the appellant provided Mr Ford with a sample of his own urine to be substituted by Mr Ford at the routine testing on 24 May.

15. The stewards commenced their inquiry into the appellant's involvement in this state of affairs on 27 November 2015. Pursuant to AR182, stewards granted the appellant permission to have a lawyer, Todd Kovacic, 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 Mr Kovacic in the event that he required assistance. We observe that the requirement to have the appellant frame his own questions, rather than allow his lawyer ask questions of the witnesses, was unnecessary and made the inquiry disjointed.

16. The inquiry was reconvened on 4 December 2015.

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

    (a) Mr David Batty, Laboratory Director, Racing Analytical Services Pty Ltd;

    (b) Dr Adam Cawley, Science Manager, Racing New South Wales;

    (c) Ms Michelle Spiden, Scientist, Victorian Institue of Forensic Medicine;

    (d) Mr Bruce Free, the steward who took the urine sample from the appellant on 19 July 2015;

    (e) Mr Scott Quill, the steward who took the urine sample from Mr Nathan Ford on 24 May 2015;

    (f) The appellant, Mr Zeke Slater.

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

19. Following consideration of the evidence at the inquiry, stewards charged the appellant with two offences. The first under AHRR243 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.

    The second under AHRR 252E(1) which provides:

    Subject to sub-rule (2) a person shall not have any alcohol or drug of abuse in his or her body when carrying on or purporting to carry on a licensed activity or official duties at a meeting.

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

    "...that at the Tasmanian Pacing Club race meeting on the 24th of May 2015 you have provided urine to licensed driver Nathan Ford which has allowed him to subvert swabbing procedures. In providing Mr Ford the means to subvert swabbing procedures we state that you have acted in a manner detrimental to harness racing in that swabbing procedures are at the core of the integrity of harness racing and act to ensure the safety and welfare of drivers and horses."

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

    "……that a urine sample numbered 46299, which was taken on 24th of May 2015, which has been analysed and found to exactly match the DNA profile of your urine was tested for the presence of drugs of abuse and found to contain d-methamphetamine above the permitted threshold and that on the date this sample was obtained you were carrying out the activities of a licensed trainer with runners engaged at that race meeting."

22. The appellant pleaded not guilty to each charge. Stewards found the appellant guilty of both charges. In respect of the first charge, stewards imposed a period of 18 months' disqualification.

In respect of the second charge, stewards imposed a period of six month's suspension of the appellant's trainer and driver licence. The penalties imposed were to be served concurrently.

Conviction appeal

23. The appellant's notice of appeal cited the following grounds of appeal:

"The applicant/appellant strongly disputes the prosecution and finding of guilt by the Office of Racing Integrity. The applicant/appellant contends that he has a strong and meritorious (sic) defence to the charges. The dispute is based on legal, factual and scientific grounds. The applicant/appellant's livelihood is in the racing industry and has been for 12 years. He has no other source of income."

24. Although it is not expressly stated in the appeal grounds, it was apparent that the appellant contended that this Board could not be satisfied to the requisite degree that he provided his urine to Mr Ford, or that the prohibited substance detected in his sample was not as a result of contamination.

25. He observed, quite rightly, that there was no direct evidence, be it from any witness or other source (for instance CCTV footage) to establish when and where he had provided his urine to Mr Ford. Further, he stated that he had nothing to gain in doing so and that he has been compliant with drug testing procedures, both personally and for his horses, in the past.

26. He also raised an interesting point that the evidence relating to the taking of Mr Ford's urine samples and the evidence relating to his urine being sent for DNA analysis was not admissible because:

(a) In the case of Mr Ford's samples, the first sample must have been procured by Mr Ford contrary to the *Forensic Procedures Act 2000*; that is, the urine was procured without the appellant's consent and not in compliance with the procedures prescribed under that Act; and

(b) In the case of his sample being forwarded for DNA analysis, the stewards did not have his consent to do so and, in the alternative, the stewards did not have the power to do so.

27. No challenge was made to any testing procedures carried by any of the laboratories, nor was there any challenge to the authority of laboratories to conduct such testing on behalf of the stewards. As noted above, the appellant accepted that the first sample provided by Mr Ford was his urine.

28. Before considering these matters, it is worth setting out the nature of an appeal to this Board and manner in which we should approach our review of the stewards' findings.

Nature of appeal and role of the Board

29. 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.*

30. 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 sense of persuasion that the appellant did provide the urine sample to Mr Ford and that the sample contained a prohibited substance at a time when the appellant was engaged in a licensed activity at a race meeting.

Evidence

31. The following circumstantial evidence is relevant in this case:

(a) The scientific evidence demonstrated that:

i. The appellant's DNA profile matched the first urine sample provided by Mr Ford.

ii. The first sample tested positive for a prohibited substance, namely *d*-methamphetamine.

iii. Each of the three samples provided by Mr Ford originated from separate human donors.

iv. No other contributor was identified; that is no other DNA profile was identified in the first urine sample, and the probability that the sample originated from another donor to the appellant was in excess of 100 billion to one.

v. The first urine sample was not diluted.

vi. None of the samples, once taken by the stewards and forwarded for testing, failed any integrity test.

vii. Provided the stewards complied with the normal practice for obtaining urine samples, there is no possibility that the equipment used by the stewards could result in sample contamination.

viii. The testing procedure cannot determine if the sample was contaminated prior to it being taken.

(b) The other evidence demonstrated that:

i. A urine sample was not taken from the appellant on the night Mr Ford provided the first two samples.

ii. The container containing the first sample "didn't register a temperature" to Mr Quill, the steward who took the sample. He said "it just didn't feel warm like a normal urine sample would feel."

iii. During the course of taking the first sample, Mr Quill was present but did not have a clear view of Mr Ford actually urinating into the collection cup. He explained that he was standing behind Mr Ford to his left and Mr Ford was wearing a lot of clothing.

iv. He asked Mr Ford directly whether the urine was his urine. Mr Ford said it was. Mr Ford said something similar had happened to him before. Mr Quill asked him if he had anything in his trousers and to show him if he had anything in his trousers, which he did. Mr Quill couldn't see anything abnormal so he asked Mr Ford to present himself later in the night for another sample.

v. The appellant had no explanation for how his urine was provided by Mr Ford.

vi. Before this Board the appellant suggested that Mr Ford may have used a syringe and taken a sample from a urinal.

vii. He also said that he had confronted Mr Ford about it and not received a satisfactory explanation.

Consideration

32. It is necessary to first deal with the appellant's submissions concerning the admissibility of the evidence of the testing procedures. We do not accept that that evidence is inadmissible. Neither this Board, nor the stewards, is amenable to the *Forensic Procedures Act 2000*. That Act concerns forensic procedures for suspects or charged persons in connection with offences, including serious offences. The provisions of the Act relating to consent concern, in the main, the procedures which must be complied with by police officers in obtaining consent. Those provisions have no application in this case.

33. In any event, this Board is not bound by the rules of evidence and, as counsel for the stewards submitted, this Board does not have a discretion to exclude relevant material even if it is unlawfully obtained. (See *Martin v Medical Complaints Tribunal* [2006] TASSC 73 at [15]).

34. We also note that the stewards, pursuant to AHRR15(1)(k), have broad powers to submit any "substance", in this case the urine samples, for whatever testing they consider appropriate. The stewards were entitled to refer the urine samples to VIFM for DNA testing and the appellant's consent was not a pre-condition to that occurring.

35. The contentions raised by the appellant at paragraph 26 above are rejected. All that remains to be determined is whether we are satisfied to the requisite degree that the appellant provided the urine to Mr Ford and that he had a drug of abuse in his body whilst engaging in a licensed activity during a race meeting.

36. We are comfortably satisfied that the appellant provided Mr Ford with his urine. The forensic evidence is unequivocal and compelling. That DNA analysis evidence was that the first urine sample came from a single donor and was not a mixed sample. The forensic evidence did not support a finding that it had been diluted in any way. It follows that Mr Ford procured a single undiluted specimen of the appellant's urine and did so in circumstances where no other contributor was found in the specimen. In this event, the inference that this occurred by the appellant knowingly providing his urine to Mr Ford in that form is almost irresistible. The possibility of some of event occurring, for instance that Mr Ford procured the specimen from a urinal or other receptacle, is not open on the evidence. One would expect a person would notice the urine being collected in such circumstances or evidence of contamination of the sample with another person's DNA. The appellant was unable to point to any occasion where this might have occurred. The Board considered the possibility that some other unknown event occurred which resulted in Mr Ford obtaining a sample of the appellant's urine without his knowledge. No evidence was put before this Board to raise any such possibility beyond mere speculation.

37. We are, therefore, comfortably satisfied that the appellant provided a specimen of his urine to Mr Ford. There is no evidence to support any alternative scenario.

38. By contrast, we are not comfortably satisfied that the appellant had a drug of abuse in his body whilst engaging in a licensed activity during a race meeting. The forensic evidence is equivocal as it relates to this charge. The Forensic testing cannot determine whether the sample, prior to being provided to stewards, could have been contaminated with *d*-methamphetamine. If it is accepted that Mr Ford procured the specimen from the appellant and had it in a container and then transferred it, for example by syringe, into the steward's collection cup and he did so to subvert the prospect that a prohibited drug would be detected in his body, it is not at all fanciful to suppose that his involvement may have been a factor contributing to the prohibited substance being detected in the sample. There is also the fact that the sample failed to record a sufficient temperature to be validated for testing. This fact suggests that the sample the appellant provided to Mr Ford was not provided immediately before Mr Ford was tested. Although we are satisfied the appellant provided the sample, when he did so is a matter of pure speculation. The possibility that Mr Ford contaminated the specimen with *d*-methamphetamine and the uncertainty as to when the appellant provided the specimen, in combination, mean the Board does not feel a sense of actual persuasion that the appellant had a drug of abuse in his body when carrying out activities as a licensed person at the meeting on 25 May 2015.

39. The appeal against the second charge is upheld and the period of suspension quashed.

40. For completeness, we note that the first charge contained a particular that the appellant provided his urine to Mr Ford at the race meeting on 24 May 2015. Pursuant to s34(5) of the *Racing Regulation Act 2004* that part (the date) of the charge will be excised for the purpose of considering Mr Ford's appeal against the penalty imposed by the stewards.

Appeal against penalty – manifestly excessive

41. The appellant contended that the penalties imposed by the stewards were, in combination, manifestly excessive. The question now is whether the period of 18 months' disqualification on the first charge was reasonable and just.

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

(a) First offences for having a prohibited substance in the body normally attract a disqualification of three to four months;

(b) The length of the period of disqualification will put the appellant's livelihood in jeopardy; he is currently employed at stables on the mainland and a period of disqualification will preclude him from attending those stables; he has rented a property in Victoria which are licensed premises;

(c) A disqualification will affect the appellant's ability to obtain future work in the industry.

43. We also note that the appellant is 28 years of age.

44. In response, counsel for the stewards endorsed the reasons provided by the stewards in handing down penalty and noted the seriousness of offences of this type.

45. It is convenient to set out the stewards' reasons for determining the penalty on the first charge:

"*….at the Tasmanian Pacing Club race meeting on the 24th of May 2015 you have provided urine to licensed driver Nathan Ford which has allowed him to subvert swabbing procedures. In providing Mr Ford the means to subvert swabbing procedures we state that you have acted in a manner detrimental to harness racing in that swabbing procedures are at the core of the integrity of harness racing and act to ensure the safety and welfare of drivers and horses. In determining penalty we have considered the following factors:*

1. *That the taking of human samples is essential in ensuring a drug free workplace.*

2. *That harness racing has inherent risks which further underline the necessity of participants being free of prohibited substances to ensure the safety of participants and horses.*

3. *That we cannot conceive of any reason for you to provide urine to Mr Ford for any purpose other than for him to use it to subvert swabbing procedures thus making you complicit in his commission of an offence.*

4. *That this is an offence which impacts adversely on the integrity of the public image of harness racing.*

We have also considered that you pleaded not guilty to the charge and provided no meaningful explanation to the panel as to how Mr Ford provided a urine sample which, on DNA analysis, is an exact match to yours.

We also considered that you have previously served a term of disqualification under the same rule, Australian Harness Racing Rule 243 which is in essence an integrity offence.

It is our decision that the appropriate penalty is a disqualification for a period of 18 months.

46. All of these matters are apposite in the circumstance of this case.

47. The prior period of disqualification related to giving false and misleading evidence at a stewards' inquiry and related to offences of dishonesty in 2009.

48. Whilst we accept that a period of disqualification will most likely result in the appellant losing his employment, any other penalty would not be sufficient to mark the gravity of his conduct.

He, in concert with Mr Ford, conducted himself in a manner that was designed to deceive the stewards in the performance of their functions. It was conduct quite different from being found with a prohibited substance in a person's body. It was conduct that, as the stewards' described, subverted the drug testing procedures and their purpose.

49. Having regard to all of the above matters we are not minded to disturb the penalty imposed by the stewards. 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 of this type.

50. The appellant has been partly successful in the appeal. In accordance with s.34(1A) of the *Racing Regulation Act 2004*, 25% of the appellant's prescribed deposit is to be forfeited to the Secretary of the Department. The appellant is also ordered to pay 25% of the cost incurred in the preparation of the transcript in accordance with s.34(4A).