

TASMANIAN RACING APPEAL BOARD

Appeal No 17 of 2016/2017

Panel:	Kate Brown (Chair) Rod Lester Sue Martin	Appellant:	Marion Dalco
Appearances:	Andrew Nicholl on behalf of the Appellant Robin Thompson on behalf of the Stewards	Rules:	Australian Thoroughbred Rule 178
Heard at:	Launceston	Penalty:	Horse Disqualified/Fine \$1,500.00
Date:	3 May 2017	Result:	Varied – Conviction Affirmed/ Penalty of Fine Quashed

REASONS FOR DECISION

1. On the 3rd of May 2017 the Tasmanian Racing Appeals Board heard an appeal against conviction and penalty by the appellant pertaining to her presenting *Speckie* to race at Mowbray on the 20th January 2016, with a prohibited substance present in its system. The prohibited substance detected was Oripavine. Pursuant to AR 177 *Speckie* was disqualified and the appellant was convicted of a breach of AR178 and fined \$1500.
2. The Appellant's Grounds of appeal were:
 - a) *Appealing the need for a conviction to be registered, as it is within the Stewards control to use their discretion to decide a guilty/take no further action decision, which both satisfy the Rules of Racing. Instruct no conviction be recorded against the trainer and no penalty be placed on the horse.*
 - b) *Any financial penalty is excessive in the context that trainers have virtually no control over Oripavine, given it operates as an unchecked stock feed contaminant across Tasmania.*
3. The mandatory operation of AR177 was raised with the appellant and her advocate at the commencement of the appeal hearing and that aspect of the appeal was conceded. While the first ground of appeal also alleged that the Stewards could have determined not to charge the appellant this was not really addressed during the appeal, nor was the issue of whether, when dealing with an appeal from Stewards, the decision to charge can be appealed or only the outcome of the charging process. However it is noted that the right to appeal in this case must be found in s28(1)(b) of the *Racing Regulation Act 2004* which limits the right of appeal to the decision of Stewards to impose a fine, suspension or disqualification on the person aggrieved. The decision of Stewards to proceed to lay a charge contrary to AR178 is on the face of it administrative in character and would appear to be outside the jurisdiction of the

Board. The Board therefore can only deal with that ground on the basis that is a blanket appeal against the conviction for a breach of AR178 and the penalty imposed as a consequence.

4. The Board heard evidence from the Appellant and submissions from her advocate. The Director of Racing represented the Stewards and made submissions on their behalf. As well as the significant amount of material provided to all parties prior to the hearing there were some further documents tendered during the hearing and reference made to cases relied as providing guidance to the Board. The Board took all the material provided into account in considering the matter.
5. It is important to note that there was no assertion at any point or evidence that the substance detected in the sample from *Speckie* was due to anything other than contaminated feed, most probably from poppy regrowth rather than an actively managed poppy crop.
6. The key issue for the hearing in terms of both culpability and penalty was the extent to which the Appellant was able to address the risk of such contamination. Regrettably much of the evidence and submissions as to this issue was unhelpful or of very limited weight, and the Stewards did not particularise the steps the Appellant ought to have taken in order to address the risk, or conversely what she had failed to do to address the risk. The Director tendered a document headed Morphine and the "Opium Poppy" (undated but referring to a racing calendar of February 2001) which was said to have been published by Racing Australia. That document suggested that trainers examine and inspect their feed supply and ask suppliers/growers of feed if the feed was grown in a paddock in which poppies had previously been grown; if poppies had been grown in that paddock, what steps had been taken to prevent regrowth; and if the supplier grower would be prepared to supply a written guarantee that all precautions were taken to ensure that the feed supply is free of poppy contamination.
7. It is noted that while Ms Dalco gave evidence of the inquiries she had made around obtaining feed that was certified poppy free, that there was no evidence in rebuttal of that, just submissions from the Director that it is possible to purchase uncontaminated feed. The document tendered by the Director, referred to above, was of limited weight given the context of the massive growth of the poppy industry in Tasmania since it was published in or about 2001. The evidence from Mrs Dalco was that she had made inquiries and was aware of fruitless efforts by other trainers to obtain certified uncontaminated feed. There was some argument around whether there are areas of farmland in Tasmania at this time where poppies have never been grown or been grown nearby. For the purposes of the hearing, and in the context of the evidence, the Board accepted that was unlikely.
8. In view of the uncontradicted evidence of Mrs Dalco, the Board accepts that it is not possible to buy feed in Tasmania that is guaranteed to be free of poppy contaminant. It also accepts that the appellant made appropriate inquiries and purchased her feed from a source which supplies a great deal of feed to the Tasmanian racing industry. There being no challenge to the evidence or the finding that Oripavine was found in the sample taken from *Speckie* on the 20th of January 2016, the Board must uphold the conviction for the breach of AR178.
9. In terms of penalty the Board was referred to a number of cases which were submitted to be relevant, and considered those, however the most persuasive of those were the

matter of *Hill* (reference #5 TRAB Jan 28 2016) and the case of *Moody* in Victoria, both involving Oripavine.

10. In the case of *Hill*, this Board found that the source of contamination was probably contaminated feed but it was not possible to be certain. There were present, in the case of *Hill*, circumstances of aggravation which did not exist in this matter; most particularly that Mr Hill had taken over the training of the horse only days prior to the race, that it had until then been in the care of stable employees while the previous trainer was overseas and Mr Hill had contemplated getting a voluntary swab taken, but because the time frames were insufficient, decided to assume the risk of racing the horse. The matter of *Moody* was factually indistinguishable to this case. It was accepted in that case that the source of contamination was feed and that there was no negligence on the part of the trainer. In the case of *Hill* a fine of \$2500 was imposed, while in *Moody* a conviction was recorded but no financial penalty imposed.
11. In imposing penalty the Board must have regard for the need for both specific and general deterrence, the level of culpability apparent in the offence and the particular circumstances of the offender. The evidence was that although Mrs Dalco had long experience with horses, she was only freshly licensed as a trainer. She had been aware of other trainers being penalised for feeding contaminated feed and had made proper enquiries as to how to avoid doing so in her own stables. There was also evidence indicating the significant, and outside the ordinary, impact the process had had on Mrs Dalco, the distress she felt at having been found to have offended against the Rules, and the impact that would have on her reputation as a new trainer. It was clear there was no need to have undue regard to specific deterrence for this appellant.
12. In all the circumstances the Board determined to affirm the conviction but vary the penalty by quashing the decision to impose a fine.
13. Pursuant to s.34 of the Racing Regulation Act 2004 the Board orders that 50% of the deposit paid be forfeited to the Secretary and that the appellant pay 50% of the cost of preparation of the transcript for the appeal.