

## **RACING APPEAL PANEL OF NEW SOUTH WALES**

### **APPEAL OF MR PAUL MURRAY**

Appeal Panel: **Mr R. Beasley SC – Principal Member; Mr R Clugston; Mr J Murphy; Mrs J Foley**

Date of hearing: **26 February 2018**

Date of decision: **26 February 2018**

Appearances **Appellant – Mr D O’Neil, Barrister**  
**Racing New South Wales – Mr P Sweney, General Counsel, RNSW**

### **REASONS FOR DECISION**

**Mr R Beasley SC (Mr R Clugston, Mr J Murphy and Mrs J Foley agreeing)**

#### **Introduction**

1. On 28 January 2016, the Racing NSW Stewards commenced an Inquiry into the findings made by the National Measurement Institute and ChemCentre following their analysis of blood and urine samples taken from the racehorse Alma’s Fury, a horse trained by the appellant.
2. The blood sample was taken from the horse following its win in the Apollo Stakes on 23 February 2013, and the urine sample following it running in the Doncaster Prelude on 13 April 2013. Both samples revealed a high level of the prohibited substance cobalt in the horse’s system.
3. As a result of the findings in the urine and blood samples, the appellant was charged under the following Rules of the Australian Rules of Racing:

**AR 80E.** (1) Any person commits an offence if he has in his possession or on his premises any substance or preparation that has not been registered or labelled, or prescribed, dispensed or obtained, in compliance with the relevant State and Commonwealth legislation.

(2) The Stewards may take possession of any substance or preparation mentioned in sub rule (1), and may use it as evidence in any relevant proceedings.

**AR 175.** The Committee of any Club or the Stewards may penalise;

(h) Any person who administers, or causes to be administered, to a horse any prohibited substance -

(i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race; or

(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

**AR 177B.** (5) If any substance or preparation that could give rise to an offence under this rule if administered to a horse at any time is found at any time at any premises used in relation to the training or racing of horses then any owner, trainer or person who owns, trains or races or is in charge of horses at those premises is deemed to have the substance or preparation in their possession and such person shall be guilty of an offence and liable to penalty.

**AR 178.** Subject to AR 178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.

4. The particulars of the charges were as follows:

**Breach (4)** The details of the charge under AR175(h)(i) being that you, licensed trainer, Mr Paul Murray, did administer or cause to be administered, a prohibited substance to the gelding, Alma's Fury for the purpose of affecting the performance of that horse in race 6, the Doncaster Prelude, at Royal Randwick racecourse on the 13<sup>th</sup> April 2013 as;

- a. cobalt was detected in a sample taken from Alma's Fury following that gelding running in race 6, the Doncaster Prelude, conducted at Royal Randwick racecourse on the 13<sup>th</sup> April 2013;
- b. cobalt is a prohibited substance pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system;
- c. further or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is an haematopoietic agent.

**Breach (5)** The details of the charge under AR175(h)(ii) being that you, licensed trainer Mr Paul Murray, did administer or cause to be administered, a prohibited substance which was detected in a sample taken from Alma's Fury following that gelding running in race 6, the Doncaster Prelude, conducted at Royal Randwick racecourse on the 13<sup>th</sup> April 2013, as:

- a. cobalt was detected in a sample taken from Alma's Fury following that gelding running in race 6, the Doncaster Prelude, conducted at Royal Randwick racecourse on the 13<sup>th</sup> April 2013;
- b. cobalt is a prohibited substance pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system;

- c. further or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is an haematopoietic agent.

**Breach (6)** The details of the charge under AR178 being that you, licensed trainer Mr Paul Murray, did bring Alma's Fury to Royal Randwick racecourse for the purpose of engaging in race 6, the Doncaster Prelude, on the 13<sup>th</sup> April 2013 and a prohibited substance was detected in a sample taken from Alma's Fury following it running in that race as:

- a. cobalt was detected in a sample taken from Alma's Fury following that gelding running in race 6, the Doncaster Prelude, conducted at Royal Randwick racecourse on the 13<sup>th</sup> April 2013;
- b. cobalt is a prohibited substance pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system;
- c. further or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is an haematopoietic agent.

**Breach (7)** The details of the charge under AR80E being that you, licensed trainer, Mr Paul Murray did have in your possession on your Kembla Grange stable premises, when visited by RNSW Officials on the 17<sup>th</sup> June 2014, the following substances and/or preparations that had not been registered and/or labelled and/or prescribed and/or dispensed and/or obtained in compliance with relevant State and Commonwealth legislation, namely the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) (Agvet Code), *Poisons and Therapeutic Goods Act 1966* (NSW) and the *Poisons and Therapeutic Goods Regulation 2008* (NSW).

- (I) Concentrated Trace Mineral, containing concentrated cobalt (1 x 100ml bottle) and/or;
- (II) Sytokine EQ (1 x 5ml vial) containing lignocaine.

**Breach (8)** The details of the charge under AR177B(5) against you, licensed trainer, Mr Paul Murray, being that a substance that could give rise to an offence under

AR177B if administered to a horse at any time, namely cobalt, was at your Kembla Grange stable premises on the 17<sup>th</sup> June 2014 and was therefore in your possession as:

- a. Cobalt is a prohibited substance pursuant to AR177B(2)(a) as it is an erythropoiesis simulating agent;
- b. Cobalt is a prohibited substance pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser.

Cobalt in concentrations approximately 385 times the concentration of cobalt found in registered veterinary injectable products for horses containing cobalt and vitamin B12, was detected in an unregistered injectable bottle for veterinary use labelled 'Concentrated Trace Mineral' found on your premises.

5. The appellant pleaded not guilty to each charge. On 8 March 2017, the appellant was found to have breached the rules, and was penalised as follows:

Charge 4 – Disqualification of 3 years

Charge 5 – Disqualification of 2 years

Charge 6 – Disqualification of 12 months

Charge 7 – A fine in the sum of \$1000

Charge 8 – Disqualification of 12 months

6. The penalties imposed for charges 4, 5 and 6 were ordered to be served concurrently, and 6 months of the penalty for charge 8 was ordered to be served concurrently, and six months cumulatively to the other penalties. The total penalty was therefore a disqualification of 3 years and 6 months, and a fine in the sum of \$1000.
7. The appellant lodged an appeal to this Panel against the finding of breach of the rules, and against the severity of penalty imposed.
8. The matter was listed for a three-day appeal commencing today. On Friday, the Panel was advised that the appellant would now be entering a plea of guilty to each charge. The Panel was also informed that the appellant, who is represented by Mr David O'Neil of Counsel, would be making submissions to the Panel concerning penalty that would be supported by the Stewards.

9. The history of this appeal was complicated by one main matter, the decision of the Victorian Court of Appeal in *Racing Victoria Limited v O'Brien and Kavanagh* [2017] VSCA 334. In this case, one of the central issues was the means of proving the presence of a prohibited substance (in this case also cobalt) in a horse's system. That issue was resolved in large part when the Court delivered judgement in November last year.
10. This appeal was originally listed for a 5-day hearing in May last year. By consent, the hearing was adjourned pending the outcome of *O'Brien and Kavanagh*.
11. This appeal was listed for a 3-day hearing on 15 December 2017. Mr Sweney has advised us today that following the outcome of *O'Brien and Kavanagh*, discussions took place between RNSW and Mr O'Neil for the appellant. This resulted in the appellant voluntarily standing down from training on 3 January 2018. The appellant's evidence today was that since this time, he has not been involved in the horse racing industry.
12. Both Mr Sweney and Mr O'Neil submitted that as a result of the appellant entering a guilty plea to the five charges today, he should receive a discounted penalty to the penalty imposed by the Stewards. This is because they both agree, for similar reasons, that the appellant is now entitled to a 25% discount for a number of penalties for pleading guilty.
13. Before dealing with the submissions made and our findings, the joint submission in relation to the penalty for each charge was as follows:
  - (a) For breach 4 (AR 175(h)(i)), this offence attracts a mandatory minimum disqualification of 3 years: see AR 196(5). The submission was that this should apply, but be discounted by 25% for "special circumstances" – that is, the entering of a plea at an early stage, and assistance in the prosecution of the charge: see LR 108(2)(a). This would result in a penalty of a disqualification of 2 years and 3 months.
  - (b) Breach 5 (AR 175(h)(ii) – 2-year disqualification, to be served concurrently with the penalty for breach 4 (see AR 196(3));

- (c) Breach 6 (AR 178), a 12-month disqualification, also to be served concurrently;
  - (d) Breach 7 (AR 80E), a fine of \$1000 discounted by 25% for early plea, resulting in a fine in the sum of \$750;
  - (e) Breach 8 (AR 177B(5)) – a penalty of a 12-month disqualification, discounted to 9 months for early plea. 6 months of this penalty to be concurrent, and 3 months cumulative.
14. The total penalty contended for by both parties then is a disqualification of 2 years 6 months (commencing on 3 January 2018), and a fine of \$750.
  15. Ordinarily, a licensed person who pleads not guilty to a breach of a rule at a Stewards' Inquiry, and is then found to have breached that rule, and who then pleads guilty on appeal before the Panel, is unlikely to receive a discount for plea, or at least the full usual discount (relevantly here 25%).
  16. In this appeal, however, we agree with Mr Sweney and Mr O'Neil that there are good reasons for applying a discount for the pleas entered today. First, it was a reasonable approach for the appellant to await the outcome of the *O'Brien and Kavanagh* appeal. Secondly, since the outcome of that matter, the appellant has cooperated with the Stewards and with Racing NSW in the sense that he has voluntarily stood down from training, and has not been involved in the industry, and has now pleaded guilty. We are satisfied that LR 108(2)(a) applies.
  17. The main purpose of the Rules of Racing, and in particular penalty provisions, is to protect the interests, image and integrity of racing. We are satisfied that the penalties that the parties submit should be imposed do that. Although not strictly relevant to that issue, we also note that this matter, and the penalties imposed, have had a devastating effect on the appellant, both emotionally and financially.
  18. The Panel makes the following orders (noting that charges 1 to 3 were not pursued):

1. Finding of guilt is made in respect to a breach of AR 175(h)(i) (charge 4).
2. A penalty of a disqualification of 2 years and 3 months is imposed for breach of AR 175(h)(i).
3. Finding of guilt is made in respect to a breach of AR 175(h)(ii) (charge 5).
4. A penalty of a disqualification of 2 years is imposed for breach of AR 175(h)(ii), such penalty to be concurrent with the penalty for breach 4.
5. Finding of guilt is made in respect to breach of AR 178 (charge 6).
6. A penalty of a disqualification of 12 months is imposed for breach of AR 178, such penalty to be concurrent with the penalty in respect to charge 4.
7. Finding of breach of AR 80E (charge 7) is made.
8. A penalty of a fine in the sum of \$750 is imposed for breach of AR80E.
9. Finding of breach of AR177B(5) (charge 8) is made.
10. A penalty of a disqualification of 9 months is made for breach of AR 177B(5), 6 months of which is to be concurrent with the penalty for breach of charge 4, and three months cumulative.
11. Total penalty imposed is a disqualification of 2 years and 6 months, and a fine in the sum of \$750.
12. Appeal deposit forfeited.