

RACING APPEAL PANEL OF NEW SOUTH WALES

APPELLANT: MR KENT FLEMING

Appeal Panel: Mr R. Beasley SC, Principal Member
Mr J. Murphy
Mr K. Langby

Date of Appeal hearing: 20 JUNE 2017

Date of decision: 13 JULY 2017

Appearances: Appellant: Mr Tim Ryan, Counsel, instructed by
Matthew Tutt, solicitor
Stewards: Mr M. Van Gestel, Chairman of Stewards

REASONS FOR DECISION

Principal Member

Introduction

1. On 26 December 2016, the racehorse “Pitbull” (“the horse”) was taken to the Ballina Racecourse for the purpose of engaging in race 1 on the card that day. Prior to the race, a urine sample was taken from the horse, which afterwards ran in and won the race.
2. The horse’s urine sample was analysed by the National Measurement Institute (“NMI”), which reported that the sample contained the substance cobalt, which is a prohibited substance under the Australian Rules of Racing (“the Rules”). The amount of cobalt detected was 135 micrograms per litre (see Exhibit 2) which is in excess of the legal limit of 100 mg/L: AR 178C(1)(l). A second laboratory (Racing Analytical) detected an amount of 126 mg/L of cobalt in the horse’s urine: Exhibit 5. A blood analysis of the horse detected an amount of 2.4mg/L of cobalt in the horse’s plasma, which is within the legal limit of 25mg: AR 178C(1)(l).
3. A Stewards’ Inquiry was conducted into the cobalt findings on 17 March 2017. During the course of that inquiry, the horse’s trainer, Mr Kent Fleming (the

Appellant), denied treating the horse with anything that could explain the elevated cobalt level in its urine, or to giving the horse a race day administration that could explain the reading: Stewards' Inquiry transcript, T19.947-20.961. A prior stable inspection conducted on 10 February 2017 by Mr Mark Holloway, the Chief Steward of the Northern Rivers Racing Association, failed to find any products at the Appellant's stable which could explain the elevated cobalt levels in the horse's urine. The only explanation ultimately volunteered by the Appellant at the Stewards' Inquiry was that an unknown person may have put something in the horse's feed: Stewards' Inquiry transcript, T23.1143-.1144.

4. At the conclusion of the Stewards' Inquiry, the Appellant was found guilty of a breach of AR 178, which is in the following terms:

“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 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.”

5. The charge, and its particulars, are Annexure A to these Reasons for Decision.
6. Following the finding of guilt under AR 178, the Appellant was penalised by way of a disqualification for a period of three years. The horse was disqualified from first place in the Ballina race under AR 177.
7. The Appellant has appealed to this Panel in relation to both the finding of guilt, and the severity of the penalty imposed on him.
8. An appeal to the Panel is by way of rehearing, and fresh evidence may be given. An Appeal Book, comprising the transcript of the Stewards' Inquiry, and the exhibits tendered at the inquiry, was marked as Exhibit A on the appeal, although the exhibits retained the same exhibit number as they had at the Stewards' Inquiry.
9. By leave of the Panel, the Appellant was represented on the appeal by Mr Tim Ryan of Counsel, instructed by Mr Matthew Tutt, solicitor.

10. The Stewards were represented by Mr Mark Van Gestel, the Chairman of Stewards.
11. The oral evidence called in the appeal, discussed below, was limited to expert evidence. Helpfully, both the Appellant and the Stewards provided the Panel with an outline of written submissions, and Mr Ryan provided the Panel with a document outlining the Appellant's grounds of appeal (three of which relate to guilt, and one relating to penalty). The Panel has been greatly assisted by the oral and written submissions made by Mr Ryan and Mr Van Gestel for the resolution of this appeal.

Appeal Ground 1

12. This appeal ground relates in part to the proper construction of AR 178D(3). It raises the issue as to whether Exhibit 2, which is the "Report of Analysis" of the horse's urine sample by NMI, is a "certified sample" within the meaning of that sub-rule.
13. Before considering that, it is convenient to set out the relevant parts of AR 178D which are as follows:

"178D(1) Samples taken from horses in pursuance to the powers of the Principal Racing Authority pursuant to AR 7(u) or AR 7(v) or conferred on the Stewards by AR 8(j) and/or AR 178H shall be analysed only by an official racing laboratory.

(2) Upon the detection by any official racing laboratory of a prohibited substance in a sample taken from a horse, such laboratory shall-

- (a) notify its findings to the Stewards, who shall thereupon notify the trainer of the horse of such finding; and
- (b) nominate another official racing laboratory and refer to it the reserve portion of the sample and, except in the case of a blood sample, the control of the sample, together with advice as to the identity of the prohibited substance detected.

(3) In the event of the other official racing laboratory detecting the same prohibited substance, or metabolites, isomers or artefacts of the same prohibited substance, in the referred reserve portion of the sample and not in the referred portion of the control, the certified findings of both official racing laboratories shall be *prima facie* evidence that a prohibited substance has been detected in that sample for the purposes of these rules.

(4) Where an official racing laboratory is unable, for any reason, to analyse a sample to detect and/or certify as to the presence of a prohibited substance in that sample, that official racing laboratory or the Stewards may refer the sample, or any portion of the sample, to another official racing laboratory for analysis.”

14. In essence, the Appellant’s argument is that the “Report of Analysis” (Exhibit 2) of NMI is not a “certified finding” as required by AR 178D(3). Mr Ryan contrasted Exhibit 2 with Exhibit 5, which is the “Certificate of Analysis” of Racing Analytical. As Exhibit 2 is not a “certified finding”, Mr Ryan’s submission was that it should not have been admitted at the Stewards’ Inquiry, and is not properly admissible before the Panel as evidence that the urine sample contained cobalt above the legal threshold amount. As such, Mr Ryan submitted that the finding of guilt made against the Appellant cannot be sustained.

15. There is authority that the Rules, and in particular AR 178D, must be strictly complied with: see *Kavanagh and Ors v Racing Victoria Limited* [2017] VCAT 386 at [599] to [633]. While accepting that proposition for the time being, I do not accept the submission that Exhibit 2 is not a “certified finding” within the meaning of that term in AR 178D(3).

16. The term “certified finding” is not defined in the Rules. The key issue is the meaning of “certified”. While dictionary definitions are by no means necessarily decisive of the meaning of a word in a contract or statute, or in the Rules (which are contractual in nature), I note however that in the Macquarie Dictionary “certified” is relevantly defined to mean:

“1. Having, or proved by, a certificate. 2. Guaranteed; reliably endorsed”.

17. Exhibit 2 is a document that sets out the findings of the horse’s urine analysis. It bears the following features:

- (a) it is on the letterhead of the NMI laboratory;
- (b) it is headed “Report of Analysis”;

- (c) the urine sample has been identified by a sample reference number;
 - (d) the amount of cobalt has been stated;
 - (e) the uncertainty for the reading has been outlined; and
 - (f) the report has been signed by Andrew Evans, the analyst.
18. The only difference that I can see between Exhibit 2 and Exhibit 5 (the “Certificate of Analysis” by Racing Analytical) that could possibly bear on the matter is that Exhibit 2 is titled “Report of Analysis” and Exhibit 5 is titled “Certificate of Analysis”.
19. That difference, in my view, is not a difference of substance. I regard the NMI “Report of Analysis” to be a “certified finding” within the meaning of that term in AR 178D(3). A certified finding, in my view, under the rule means no more than one that has been properly verified – or, to quote the dictionary definition, “reliably endorsed” - by an official racing laboratory. That is clear from both Exhibit 2 and Exhibit 5.
20. In the circumstances, the first appeal ground cannot be maintained.

Appeal Ground 2

21. This ground of appeal relates to both Exhibit 5 and to the words “*and not in the referred portion of the control*” in AR 178D(3).
22. While Exhibit 2 stated that “no cobalt was detected in the laboratory blank control solution”, Exhibit 5 recorded cobalt in the control sample in an amount of less than 1mg/L of urine. While this is obviously a very small amount, as some cobalt was detected in the sample analysed by Racing Analytical, Mr Ryan submitted that AR 178D(3) had not been strictly complied with, and hence Exhibit 5 should not have been admitted into evidence at the Stewards’ Inquiry or on this appeal, and the finding of guilt accordingly cannot be sustained.
23. To provide some background in relation to the finding of less than 1mg of cobalt per litre of urine in Exhibit 5, Mr Van Gestel called Mr David Batty to give evidence. Mr

Batty is the Director of the Racing Analytical laboratory. His evidence was that 1 mg/L was the limit of detection for the analysis equipment. Some cobalt was detected in the control sample (which is water), but in an amount of less than 1mg/L, and hence in an amount so minute that it currently cannot be precisely quantified. Mr Batty further explained the reason the control, when analysed, was “positive” for cobalt, albeit in what could be described as a trace amount, is that cobalt is in the environment; it is in drinking water in trace amounts, and no control sample of water will ever give a negative result. The relevant evidence given to the Panel, which commences at T6.287, was as follows:

“M. F. Van Gestel: Could you just please explain to the Panel what you mean by “limit of detection” for that particular substance?

D. Batty: Well, it means basically that the cobalt is in the environment. It’s in water, soil. It’s really trace levels in the environment generally, so you’re never going to get a completely negative result and one microgram per litre is our limit of detection for the method. We run our calibration from zero to 600, but we cannot accurately quantitate anything below one microgram per litre.

M. F. Van Gestel: You used the word there “trace”. Would you describe the finding of less than one microgram per litre as a trace finding?

D. Batty: Absolutely. I mean essentially for all intents and purposes it’s a negative result because you will get levels of less than one or sometimes between one and ten in water, depending whether it’s drinking water, groundwater, seawater. There’s very minor levels of cobalt in all water samples, so you’re never going to get a truly negative result. In this particular case, the control solution is made up of water, so there will be some response and we detected a very small response, by our method – that response is so small that we were unable to accurately quantitate it. Therefore, we reported as less than our limit of detection ... Because cobalt is an environmental contaminant you’re going to get some response and so this has been consistent. The result we reported is consistent with what you would normally in water samples. So for all intents and purposes the sample was negative...”

24. Mr Ryan did not challenge Mr Batty’s evidence, but reaffirmed his submission that AR 178D(3) had not been strictly complied with. He submitted that If racing authorities wanted to accommodate the fact that no control sample will have absolutely no traces of cobalt, they should amend the text of the rule accordingly.

25. While I accept that AR 178D(3) must be complied with, to interpret the words “and not in the referred control sample” as meaning the control sample cannot even have a miniscule or trace amount of a prohibited substance in it (or an amount so miniscule that the analysing equipment cannot quantify it with precision) would be to take compliance to an absurd level. The Rules must be given a common-sense interpretation. For all practical and relevant purposes, there was no cobalt in the referred portion of the control, and AR 178D(3) has been complied with. In my opinion, the rule was not drafted with the intent that if miniscule amounts of the prohibited substance (which will exist naturally in any control sample) are detected in a control sample, the rule should be found to have not been complied with. The fact that the analysis of the urine sample by Racing Analytical detected a miniscule or environmental background amount of cobalt in water does not establish that cobalt was “not in the referred portion of the control”. Those words should be interpreted to mean an amount of prohibited substance above a trace amount that is incapable of being precisely quantified or that will exist in all control samples in a trace amount.
26. Accordingly, appeal ground 2 cannot be maintained.

Appeal Ground 3

Expert reports

27. Appeal Ground 3 is founded upon the expert evidence of Professor Chapman. Professor Chapman has qualifications in both veterinary science and pharmacy. He is an Emeritus Professor of Pharmacy at Monash University, and Professor of Pharmacy at the University of New England. For the purposes of the appeal, he produced a report dated 24 April 2017 concerning the findings of cobalt in the horse’s urine sample (Exhibit A1 – Professor Chapman’s “first report”).
28. In his first report, Professor Chapman expressed the opinion that “*the horse’s urine could have been highly concentrated following exposure to severely dehydrating conditions which included a hot day, two hours of travel, travel in a non-air-conditioned truck, and no access to a drink on arrival at the trace track*”. This opinion was based on the following assumptions:

- it was a pre-race sample obtained from the horse on 26 December 2016 which returned a urine cobalt concentration of 116mg/L;
 - the sample was taken soon after the horse arrived at the race track;
 - the horse arrived at the race track on a very hot day after being transported for two hours in a truck/transporter which was not air-conditioned;
 - the horse was not allowed any time to cool off, walk around, be hosed down or drink before being taken to the swab box;
 - the horse urinated immediately (within seconds) of entering the swab box;
 - a post-race blood sample from the horse later that day recorded a cobalt concentration below the declared threshold of 25mg/L and blood plasma.
29. In relation to the last bullet point above, Professor Chapman’s view as expressed in his first report was that *“the fact that a post-race blood sample from Kent Fleming’s horse was negative for cobalt ... on the same day as it returned a positive urine test greatly increases the possibility that dehydration has substantially increased the urinary cobalt concentration, resulting in a false positive result.”* In his oral evidence, Professor Chapman firmed up his view concerning “possibility” to “probability”.
30. In his first report, Professor Chapman expressed the view that the main measure used to determine concentration in urine is the specific gravity of urine (USG). Professor Chapman explained that USG is a means of adjusting the detected amount of a substance in urine to reflect its true amount. Professor Chapman referred to a study on human urine by *Cone et al* (2009) concerning how excessive fluid intake could substantially dilute urine such as to result in false negative reports for certain drugs. He extrapolated from this that dehydration could result in false positives. He referred to a similar human study by *Hasse et al* (2016) showing how the adjustment of urine sample for the drug salbutamol to a particular USG was shown to be a way of

correcting for hydration status, and to change the outcomes of false negatives to true positives, and of false positives to true negatives.

31. He also referred to a study by *Cohen et al* (2002) regarding the USG of thoroughbred horses which he indicated showed that the medium and mean USG for untreated horses was a reading of 1.028. In Professor Chapman's view, the measurement of USG on the urine sample provided by Kent Fleming's horse is essential in order to rule out the possibility that a false positive result has been obtained."
32. In response to Professor Chapman's first report, two reports were tendered by Mr Van Gestel. The first was a report of Dr Adam Cawley, the Science Manager of the Australian Racing Forensic Laboratory. His report, dated 27 April 2017, became Exhibit R1.
33. In his report, Dr Cawley first noted that Professor Chapman's assumption of a cobalt reading of 116mg/L of urine from the NMI analysis was not necessarily accurate. The measurement accuracy was +/- 19mg/L of urine. The certified result of 135mg/L of cobalt in the urine was as likely, therefore, to be 154mg/L in the urine as it was 116mg/L in the urine.
34. Dr Cawley also expressed the view that there was no evidence that the urine of the horse was "highly concentrated". Dr Cawley's evidence was that urine samples of 10ml in volume or less may be evidence of the urine being highly concentrated. The horse's sample was 50ml. This was very close to the mean of 54ml for the 24 samples received from the Northern Rivers Racing Association for the race meet held on 26 December 2016.
35. Dr Cawley expressed some strong doubts about the appropriateness of relying on the various studies that Professor Chapman had, which I will discuss when considering Dr Cawley's oral evidence. However, at [13] of his 27 April 2017 report, Dr Cawley stated as follows:

"There is no requirement in the Australian Rules of Racing for USG to be measured. It is generally agreed that thresholds derived from population studies include data from horses having a wide range of

hydration status such that the potential variation caused by hydration effects is already included in the statistical data used to derive a specific threshold. To this end, the current urinary cobalt threshold of 100mg/L is supported by the analysis of 5,816 race day samples collected in Australia. This reference population shows the mean and median urinary cobalt concentration is to be 8.3mg/L and 3.4mg/L, respectively. A normal equine urinary cobalt value is considered to be less than 22mg/L, based on a log normal statistical transformation of data. Equine urinary cobalt values greater than 22mg/L are considered to be the result of administering cobalt-containing products.”

36. In his report of 2 May 2017, Dr Craig Suann, the Chief Veterinarian of Racing New South Wales, expressed similar views to those outlined by Dr Cawley in [13] of his report. Dr Suann also expressed the following opinion regarding the horse’s blood analysis for cobalt:

“The relationship between plasma and urine concentrations of cobalt at a particular point in time is quite complex, and it cannot be assumed that if a urine sample has a cobalt concentration in excess of the threshold that a blood sample collected at the same time should also have a plasma cobalt concentration in excess of the threshold in plasma. Urinary and plasma cobalt concentrations will vary due to the nature of the cobalt administration, whether by injection or orally, the size of the dose given and the chronicity of dosing.”

37. In response to the reports of Dr Cawley and Dr Suann, Professor Chapman prepared a second report dated 14 May 2017 (Exhibit A2 – Professor Chapman’s second report).
38. The key opinions expressed by Professor Chapman in his second report are as follows (adopting Professor Chapman’s paragraph numbering):

[13] It is not possible to say that well designed and broad population studies have taken into account variations in USG unless “variables” such as USG, hydration status of the horses, and use of bona fide cobalt-containing supplements given in the days, weeks or months prior to collection of the urine samples have been specifically recorded and taken into account.

[18] It is not possible to determine whether a urine sample is diluted, concentrated or normal by merely looking at it.

[21] Contrary to Dr Cawley's assertion, adjustment of USG and human sports anti-doping is performed to account for normal variations in hydration.

[31] Dehydration and other factors which can substantially increase urinary drug concentrations can result in false positive results.

[38] If the relationship between urinary cobalt concentrations and blood concentration is "quite complex" – and largely unknown – it means that interpretation of a situation where the blood threshold has not been reached but the urine threshold has been exceeded is also complex and the significance largely unknown. There is a strong probability that the urine result is a false positive.

39. Professor Chapman repeated his opinion from his first report that:

"In order to determine if dehydration was the cause of the above threshold concentration of cobalt in the pre-race urine sample provided by Pitbull, measurement of USG is essential in order to rule out the possibility that a false positive result has been obtained."

40. Assuming that the USG of a normally hydrated horse is 1.028, Professor Chapman in his second report prepared a table indicating what he said would be the true cobalt concentration in the horse's urine if its USG was other than 1.028. For example, he referred to what he said was a recent Victorian case (of which there was no evidence tendered before the Panel) where the true USG reading was 1.043. Professor Chapman's evidence was that applying this USG, the horse's cobalt concentration would drop from 135mg/L of urine to a true reading of 88mg/L of urine, and thus under the threshold. If the horse's true USG reading of its urine was 1.060, its cobalt concentration would drop to 63mg/L of urine. An immediate difficulty with this analysis, which is set out at [29] of Professor Chapman's second report, is that there is no evidence at all as to what the horse's USG was.

Oral Evidence

41. In his oral evidence, Professor Chapman explained that USG is a means of indicating how "thick" the urine is. He explained how he had "dug" the "normal" figure of 1.028 from work done in the United States. He explained that when urine becomes

concentrated the figure goes upwards of 1.028, hence his use of USGs of 1.060, 1.050, 1.043 and 1.035 in [29] of his second report. The following exchange took place between Mr Ryan and Mr Chapman to elaborate on all this:

“T. A. Ryan: Professor, we know that a urine sample was taken from this at about 1 o’clock on 26 December 2016 and I want you to assume, if you wouldn’t mind please, some proposition. Firstly, it’s said that it was a warm day. The temperature was about 30 degrees or so and the horse had been transported to the races in a trip that took about two hours in a non-air-conditioned vehicle and it’s as well that the horse hadn’t drunk water before the urine sample was taken. It hadn’t been hosed down. What effect, firstly would those factors have on the urine sample itself that was taken from the horse that day?

C. Chapman: Okay. So the real possibility, probability if you want, is that the urine was concentrated. Because the animal was happy to control its body temperature by perspiration, it would pump, if you like, water out through the skin and it would reduce the urinary output potentially. So just on what it says there, you would say it would be probably dehydrated or, when I say that, have a dehydration, which will manifest as concentrated urine. Now I have not been given the urine concentration, which is called the urine specific gravity, so I can’t tell you whether that would change the case or not, but certainly on face value it looks like it would have ... When urine becomes concentrated that figure [1.028] can go up to 1.060 or something between 1.028 and 1.060 and it becomes thicker and more concentrated as a consequence of that. What that means in sort of basic terms is that the amount of cobalt in it is expressed an amount per millilitre or urine or litre or urine. The more concentrated the urine, the higher apparent cobalt.” (T11.522-12.556)

42. Professor Chapman said it would have been easy to test for the USG of the horse, and that there was no difficulty in acquiring the equipment to do it which is inexpensive and “pretty basic”: T15.709-.729.
43. In cross-examination, Mr Van Gestel asked Professor Chapman whether his opinions were in any way altered if he accepted that the horse’s urine sample was taken about half an hour after it arrived at the racecourse, rather than immediately upon it leaving the float (the evidence at the Stewards’ Inquiry was that the horse had about 30 minutes to cool down after leaving the horse float prior to the urine sample being taken: see T22 of the Stewards’ Inquiry). Professor Chapman’s evidence was that this did not change his opinion as in his view, the crucial issue was whether the horse had a drink or not: T20.971.

44. The key aspects of Dr Cawley's oral evidence were the following:

- (a) As indicated in his report of 27 April 2017, the volume of the horse's urine did not give any indication of dehydration: T44.2175-45.2192.
- (b) Dr Cawley saw limited relevance in the study of *Cone et al* relied upon by Professor Chapman as it was, first, a study on human urine, and secondly, a study that looked at the issue of false negatives rather than the issue of false positives: T45.2208-.2238.
- (c) Dr Cawley saw no relevance at all in the study of *Haase et al* relied upon by Professor Chapman, as this was a study looking at the threshold of salbutamol again in human urine: T46.2245-.2272.
- (d) Fundamentally to Dr Cawley's opinions, it was his view that there is "no valid USG measurement of equine urine": T47.2305. Dr Cawley explained this opinion this way:

"The devices, the refractometers that have been used in human urine testing are calibrated in a proprietary amount [sic – manner], so the black box, if you like, to the particular manufacturer's calibration specific to human urine. The use of refractometry for equine urine, in my opinion, would not fit the purpose and be seen as such by an accreditation body such as we have here, NATA, the National Association of Testing Authorities, under ISO17025. The USG measurement of equine urine would not fit the purpose because of the variances we have in the equine urine matrix of dissolved gases, dissolved materials, the viscosity of the urine. It's a higher protein content. All these factors would contribute to the USG measurement of equine urine not being fit for purpose under ISO17025 ... You have proteins, the viscosity of the urine itself and I understand that horses – and Dr Suann can probably better speak to this than myself, but my understanding is horses absorb calcium through the intestine and then eliminate it by urine, which can give it milky, cloudy appearance and I think we discussed that before the break. That in itself is a problem for refractometry, which is an optical measurement. Urine can be bubbly due to the mucous that it contains. Now that mucous effect on urine is actually produced by the body in a horse at [inaudible] as I understand it, to prevent calcium carbonate.

Principal Member: When you say “not fit for purpose”, are these reasons you’re providing that the refractometry tool would not fit for purpose because of these variables in equine urine and you wouldn’t necessarily get an accurate reading for USG? Is that what you’re saying?

A. Cawley: That is correct, Mr Chairman. There is no valid measurement for USG in equine urine.” (T47.2303-48.2346)

45. In relation to the specific opinions set out in Professor Chapman’s second report (referred to above at [38]), Dr Cawley’s evidence was:
- (a) In response to the opinion set out by Professor Chapman at [13] of his second report, Dr Cawley reaffirmed his view there is “no valid USG measurement for equine urine”: T52.2569.
 - (b) Dr Cawley agreed with the opinion set out at [18] of Professor Chapman’s second report that you cannot tell whether a horse’s urine is concentrated merely by looking at it.
 - (c) While agreeing with the opinion expressed by Professor Chapman at [21] of his second report, Dr Cawley stated again that the studies relied upon are “not relevant to the measurement of cobalt in equine urine”: T53.2589.
 - (d) In response to Professor Chapman’s table at [29] of his second report and the opinion expressed at [31], Dr Cawley expressed the opinion that the matter is more complex than merely taking into account USG. There may be other important matters such as “*the presence of proteins, glucose and bacteria, just to name a few, which would be likely of higher variance in the equine situation, with samples collected in ... human sports and, therefore USG will give an incorrect indication of the extent of dehydration. It shouldn’t be seen as a silver bullet in that context.*” (T53.2619-.2628)
 - (e) Dr Cawley disagreed with the opinion of Professor Chapman set out at [38] of his second report, but indicated it was best left to the evidence of Dr Suann: T54.2640-.2650.

46. In his evidence, Dr Suann explained the background of how the 100mg/L of urine threshold was reached for cobalt, which included consideration of urine samples collected from horses “*exposed to a range of conditions and ... variations in hydration status*”: see generally T62.3060-64.3137.
47. In relation to whether any correlation can be drawn between plasma and urine concentrations of cobalt, Dr Suann explained that it depended upon how the cobalt got in the horse’s system – i.e., was it ingested, was it injected etc.? He referred to a study of *Ho et al*, tables from which were admitted into evidence and became Exhibit R4. The effect of Dr Suann’s evidence was that, depending on how the cobalt was administered - for instance, a race day administration (of the product VAM for example) - which lead to a horse having a cobalt concentration in its urine of well over 100mg/L, but a cobalt concentration in its plasma of well under the legal threshold of 25mg/L. Dr Suann also referred in his evidence to studies by *Wainscott et al* (2014) (Exhibit R5) and *Knych* (2014) (Exhibit R6) where high doses of cobalt intravenously injected into horses can lead to the legal threshold for plasma being exceeded (but whereas also the urine reading becomes exceedingly high). Ultimately, Dr Suann’s evidence was as follows:

“What I’ve been trying to demonstrate, I guess, is that there isn’t a simple relationship between blood and urine levels. It depends on a variety of factors, but particularly the amount of cobalt administered, in what form it’s administered, how it’s administered, whether by injection...” (see generally T66-70 and T70.3442-.3445)

48. During the course of cross-examination, Dr Suann did concede that if urine is concentrated, then the concentration of constituents in the urine will be “slightly elevated”: T72.3555-.3559. His view, however, was that dehydration was only likely to have a “marginal effect” on the cobalt concentration in a urine sample: T73.3607-.3620. Dr Suann also expressed the view that “*no racing laboratory in the world would attempt to measure urine specific gravity*”. He explained that this was because:

“There are esteemed experts in analytical chemistry, in particular equine process and you also have a human sort of testing process, but I’m sure that it comes to a conclusion similar to Dr Cawley’s in that

because of the inconsistency, the lack of how much maybe, if you will, of urine, the fact that it's full of calcium carbonate crystals, the fact that it's full of mucous and protein, which human urine does not have. Human urine is more consistent with water, whereas horse urine is viscous, thick and full of all sorts of both suspended and dissolved components. The available technology is [not] conducive to give us any specific gravity measurement in horse urine.” (T79.3634-.3646)

Appeal Ground 3 – Resolution

49. The essence of the Appellant's case in relation to this ground of appeal is that the horse's urine could have been concentrated such that the results of the analysis by the two laboratories could have been “false positives” or “probably” were false positives.

50. One difficulty for this ground of appeal is that neither AR 178 nor AR 178C(1)(l) provide any textual support for the notion that the dehydration of the horse, or its USG, needs to be taken into account. If 100mg/L of cobalt (or more) is detected in a horse's urine, then there has been a breach of AR 178. Issues such as dehydration and USG do not readily appear relevant on a reading of the text of the rules. In my view, the drafters of the rule did not contemplate taking into account a scenario that with some administrations or consumptions of cobalt, or of a product containing cobalt, a given horse might be found to have 90mg/L of cobalt in its urine when hydrated, or on a mild day, but 110 mg/L when not so hydrated, or on a hot day. If the reading is 100 or more, then the rule is breached. If it is 90, then (perhaps fortuitously), the rule is not breached.

51. It is true, however, as Mr Ryan has submitted, that AR 178D(3) provides that the accredited laboratory samples are only *prima facie* evidence of the amount of cobalt in the horse's urine, not conclusive evidence. Logically, this must mean that evidence may be adduced to throw doubt on the conclusiveness of the laboratory analysis. There was, however, no evidence of any inaccuracy in the testing procedures, or of any other error by the laboratories. That might of itself be an end to the matter. However, in my view, ground 3 fails at a factual threshold. There was no evidence adduced at the Stewards' Inquiry, or on the appeal, which persuades me that the Panel should find that the horse was dehydrated. It might have been a warm day, but this alone does not establish that. Nor, necessarily, does the means of transport to the racecourse. Of some significance, however, the amount (volume) of urine in the horse's sample did not suggest any particular dehydration. Further, considering all

the expert evidence, in my view, to suggest that the USG was possibly above 1.028, or any particular figure, is merely speculation. There is no evidence in my view upon which the Panel could make any proper finding that the horse's USG was 1.050 or 1.060, or any other figure. Perhaps the only finding that can be made is that it would have been somewhere between what appears to be the standard range of 1.020 and 1.050: see Dr Suann's evidence at T76.3741-.3744.

52. I accept the evidence of Dr Cawley also in this regard about the real difficulty of accurately measuring a horse's USG for the reasons that he stated in his evidence, which were mirrored to large part by Dr Suann's evidence. Nothing in the evidence persuades me that the findings of the accredited laboratories do not reflect a true and accurate reading of the amount of cobalt in the horse's urine. Its low blood reading, as explained by Dr Suann, does not throw any significant doubt on the accuracy of the urine reading. In short, on the basis of the facts before the Panel, I am comfortably satisfied that the amount of cobalt in the horse's urine is accurately stated in the certified findings of the accredited laboratories.
53. In my view, appeal ground 3 fails, as does the appeal against the finding of guilt.

Penalty

54. Numerous decisions of the Panel and Tribunal that were referred to in argument seem to have set a precedent of a 12-month disqualification for a first offence involving cobalt under AR 178, in circumstances where a plea has been entered.
55. Such a penalty is, of course, not imposed primarily as a means of punishment. Penalties under the Rules are primarily imposed to protect the image of the racing industry, and to uphold its integrity. The penalty imposed should send a message to the public in this regard.
56. The three-year disqualification imposed was, Mr Van Gestel submitted, an appropriate penalty bearing in mind the Appellant's record.
57. The disciplinary report for the Appellant revealed three relevant prior offences:

- (a) 4 May 2013: Breach of AR 178E(1) – administered medication to a horse on race day: 6 months’ disqualification.
 - (b) 25 October 2008: AR 178 – presented a horse to race with a prohibited substance – TCO2: 9 months’ disqualification.
 - (c) 18 November 2006: AR 178 – presented a horse to race with a prohibited substance – TCO2: 6 months’ disqualification.
58. These three prior offences must be taken into account, although I note that the two AR 178 offences occurred 8 years and more than 10 years ago respectively. Nevertheless, I think the Appellant’s record can be described as poor. Having said that, I accept the submission made by Mr Ryan that no part of the penalty for the offending here should amount to re-penalising the Appellant for his prior conduct.
59. I agree with the submission and approach of the Stewards that the Appellant’s disciplinary record is such that a penalty in excess of a 12-month disqualification is inevitable. However, in my view, the three-year disqualification imposed by the Stewards perhaps does not fully reflect the fact that the cobalt concentration in the horse’s urine did not significantly exceed the minimum legal amount, and may place too much weight on the two AR 178 offences which, as stated, occurred upwards of 10 years ago (noting that the offence in May 2013 involved an illegal administration of medication rather than a prohibited substance).
60. Further, it should be stated that while the Appellant does not receive a discount for challenging the finding of guilt, the penalty to be properly imposed on him is not to be increased because a plea was not entered. A plea merely results in a discount of what would otherwise be an appropriate penalty.
61. At the risk of stating the obvious, I also take into account that a lengthy disqualification will have a devastating effect on the Appellant, including possibly a devastating financial impact. Nevertheless, presenting a horse to race with a prohibited substance in its system is a very serious offence.

62. In my view, taking into account the seriousness of the offence, the extent of the breach, the Appellant's past record, and his personal circumstances, a penalty of a two-year disqualification is appropriate.

Mr J. Murphy and Mr K. Langby

63. We have read the Principal Member's Reasons for Decision in relation to both guilt and penalty. For the reasons outlined by the Principal Member, we agree that the appeal against the finding of guilt should be dismissed, and that a two-year disqualification should be imposed in lieu of a three-year disqualification.

Orders

- (1) The appeal against the finding of guilt is dismissed.
- (2) The finding of guilt under AR 178 is confirmed.
- (3) The appeal against penalty is allowed.
- (4) In lieu of a three-year disqualification, a penalty of a two-year disqualification is imposed. That penalty is to commence 6 days from the date of these Reasons. Upon its expiry, the Appellant may reapply for his licence.
- (5) Appeal deposit forfeited.

Annexure A

Licensed trainer Mr Kent Fleming you are hereby charged with a breach of AR178

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.

The details of the charge under AR178 being that you, licensed trainer Mr Kent Fleming, did bring Pitbull to Ballina racecourse for the purpose of engaging in Race 1 Class 2 Handicap, on the 26 December 2016 and a prohibited substance was detected in a urine samples taken from Pitbull prior to it running in that race as:

- a. cobalt was detected in samples taken from Pitbull prior to that gelding running in Race 1 Class 2 Handicap at Ballina, on the 26 December 2016;
- 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 and was detected at a level that is not, under AR178C(1)(1), excepted from the provisions of AR178B;
- c. further or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is an haematopoietic agent and was detected at a level that is not, under AR178C(1)(1), excepted from the provisions of AR178B;