

RACING APPEAL PANEL OF NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF MR GARRY MCCARNEY

Appeal Panel: **Mr R. Beasley SC – Principal Member; Mr T Carlton, Mr C Clare**

Date of hearing: **21 April 2017**

Date of decision: **21 April 2017**

Date of reasons: **24 April 2017**

Appearances: **Mr McCarney – Mr B Kelly, Barrister, instructed by Mr P Grant, Solicitor**

Racing New South Wales – Mr Marc Van Gestel, Chairman of Stewards

REASONS FOR DECISION

Introduction

1. On 21 April 2017 the Panel made orders dismissing this appeal, and confirming the penalty imposed by the Stewards. The following are the Panel’s written reasons.
2. The appellant, Mr Garry McCarney, is a licensed trainer. On 1 February 2017, he pleaded guilty to two breaches of AR 178 of the Australian Rules of Racing (‘the Rules’). That rule is in the following terms:

AR 178. Subject to AR178G, 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.

3. The particulars of the charges are attached to these reasons as Appendix “A”. In summary, Mr McCarney pleaded guilty to breaches of AR 178 because his horse

Southern Flight was found to have cobalt (a prohibited substance under the Rules: see AR 177B(2), AR 178B(1) and (2), and AR 178C(1)(l)) in its urine samples taken pre and post that horse running at Narromine on 12 November 2016, above the threshold amount for that substance. Further, his horse *Head to Toe* was also found to have cobalt above the threshold amount in its urine following that horse racing at the same race meeting. The relevant threshold for cobalt is 100 micrograms per litre of urine: AR 178C(1)(l). The readings for *Southern Flight* ranged from 256 to 272 micrograms per litre pre-race, and 180 to 195 post-race. For *Head to Toe*, the readings were 154 and 158 micrograms per litre.

4. It can be noted that both horses won the races they competed in at Narromine on 12 November. Under AR177, both horses were disqualified following the findings from the urine samples.
5. After considering aggravating and mitigating factors as they saw it, the Stewards imposed a penalty of a 12 month disqualification for each offence. After considering whether the penalties should be served concurrently or cumulatively, the Stewards determined that the total penalty that should be imposed was a 15 month disqualification.
6. Mr McCarney appealed to this Panel against the severity of the total penalty imposed on him. He was represented by Mr B Kelly of Counsel. The Stewards were represented by Mr Marc Van Gestel, the Chairman of Stewards. Although an appeal to the Panel is by way of rehearing, and fresh evidence may be given (s43(1) *Thoroughbred Racing Act*), the evidence consisted solely of the transcript and exhibits from the Steward's Inquiry. Most of the appeal time consisted of submissions by the parties. The Panel was greatly assisted by the submissions of both Mr Van Gestel and Mr Kelly.

Findings of Fact

Southern Flight elevated reading 1 August

7. Mr McCarney pleaded guilty to the charges. There was no dispute concerning the findings in relation to the samples, or as to whether cobalt is a prohibited substance. There were no credit issues raised in the Stewards' Inquiry. No submission was made that the results of the urine samples were caused by any dishonesty, or an attempt to cheat.

8. How the horses came to have the positive cobalt readings is not completely clear. However, one of the horses, *Southern Flight*, had a reading of 60mcg of cobalt per litre in its urine on 1 August 2016: Ex 25 page 33. This was discovered after a urine sample was taken from the horse following it winning at Forbes. This is significant for two reasons. First, it is ten times the mean base amount for horses: see the evidence of Dr Suann, the Chief Veterinarian of Racing NSW, at T21 L1022. Secondly, because of this, Mr McCarney was put on notice by Stewards about cobalt. His stables were inspected by Mr Sam Fitzgerald, the Deputy Chief Steward, Central Districts & Western Racing Associations, on 1 September 2016. A discussion took place between the appellant and Mr Fitzgerald about what might have caused the reading of 60mcg for cobalt, but nothing was identified: Ex 27 p 35.
9. Further, on 12 November 2016, prior to the two horses running at Narromine, Mr Fitzgerald spoke again to the appellant about *Southern Flight* and the prior cobalt reading, and explained why a pre-race urine sample would be taken, a matter that the appellant said he was expecting: see Ex 28 pp40-41.
10. Despite the elevated (but legal) level of cobalt detected in *Southern Flight's* urine on 1 August, and despite being spoken to by Stewards on 1 September, Mr McCarney nevertheless allowed his horses to consume a product containing cobalt in the three days leading up to the races on 12 November 2016. The circumstance of how this occurred are set out in the following paragraphs.

007 Blocks containing cobalt

11. On about 8 November, an owner of the horses arrived at Mr McCarney's stables with what are described as 007 blocks. The packaging of the 007 blocks promoted the product as an "*Essential Mineral & Trace Element Supplement Providing Race, Show & Workhorses Extra Vigour, Stamina, Muscle & Bone Strength*". The label clearly showed that "cobalt" was one of the main ingredients, in an amount of 400mg per kilo.
12. According to the appellant's evidence at the Steward's Inquiry, the owner of the horses who delivered the blocks described them as a "treat": T15 L748.
13. Mr McCarney did not check the packaging of the 007 blocks: T16 L 788-795; T 17 L841-850; T18 L 888. He conceded he should have: T 16 L 801.

14. The 007 blocks are not designed to be consumed in one go by horses. They are licked by the animal. A 2 kilogram block generally takes several weeks to consume. Ultimately, the 007 blocks given to the two horses were taken from the appellant's stables on 1 December 2016, in order to be tested. The evidence was that *Southern Flight* had by then ingested 600gms of a two kilo block, and *Head to Toe* had ingested 340gms of a smaller block. Obviously, the horses would have ingested less than this by race day (12 November).
15. The testing of the blocks revealed a curiosity. While the packaging states that the blocks contain 400 mg of cobalt per kilo, the block given to *Head to Toe* had 700mg of cobalt per kilo. The reading for the block given to *Southern Flight* was 1040mgs per kilo. Another unused block contained 1190 mg of cobalt per kilo: see Ex 38 p 86 and Ex 36 p 81.

Expert opinion regarding 007 Blocks

16. With the exception of the undisputed evidence from the testing laboratories, the only expert evidence given at the Steward's Inquiry came from the Chief Veterinarian of Racing NSW, Dr Craig Suann.
17. Of principal relevance, Dr Suann was asked his opinion as to whether the 007 blocks were likely to have caused the elevated cobalt levels detected in the urine samples taken from the horses on 12 November. While he felt the blocks were likely to have made a contribution to the levels of cobalt, his evidence was that he would be "surprised" if the blocks could have resulted in the cobalt levels in the horses after only four days: T21 L 1014. He found that scenario "hard to believe": T 21 L1032. Another hypothesis for the readings, and in particular the pre and post-race levels detected in *Southern Flight*, would be that a large pre-race administration was given to the horse: T22 L1058-1079. There was no direct evidence of this however, only Dr Suann's hypothesis.

Submissions of the Appellant

18. Mr Kelly submitted that in the absence of there being any evidence of any substance being administered to the horse that contained cobalt other than the 007 blocks, the Panel should find that the consumption of some of these blocks caused the elevated cobalt levels in the horses on 12 November. His submission was that Dr Suann's evidence was not definitive, nor based on thorough analysis.

19. On the back of urging this finding of fact, Mr Kelly submitted that Mr McCarney had been no more than careless. That carelessness was in not checking the labelling of the blocks to notice that they contained cobalt. He further submitted that this carelessness itself was mollified by the inaccuracy of the 007 block's labels in relation to the amount of cobalt they contain.
20. As what was involved here was no more than carelessness, Mr Kelly submitted that this put the appeal squarely in the category of the case involving the trainer Peter Moody in Victoria: *RVL Stewards v Peter Moody*, Racing Appeals and Disciplinary Board, Vic, 16 March 2016. That case involved the careless administration of a product (Avalia) to a horse (through its feed) to treat a hoof condition. The substance contained cobalt. Mr Moody was found guilty of a breach of AR 175(h)(ii) (an offence relating to administration of prohibited substances, but not for the purpose of performance enhancement), and was penalised by way of a 12 month suspension, with six months of that suspension itself suspended.
21. Mr Kelly's ultimate submission was that based on these matters, and a number of subjective factors relating to the appellant (discussed below), the nature of the penalty should be altered from disqualification to suspension. No serious complaint was made as to the length of the penalty.

Submissions of the Stewards

22. Mr Van Gestel submitted that, consistent with Dr Suann's evidence, the blocks may have had some impact on the cobalt levels, but some unknown source was also involved.
23. However, even if the sole source of cobalt in this appeal was the 007 blocks, Mr Van Gestel submitted that more than minor carelessness was involved here. Mr McCartney made no attempt to check what the 007 blocks contained. The owner was simply that – an owner. Not a vet, nor anyone else with expertise in giving supplements to racehorses. Had Mr McCartney checked the label of the blocks, alarm bells should have gone off when he saw that they contained cobalt, particularly given the prior legal but elevated level of cobalt detected in *Southern Flight's* urine sample on 1 August, and the discussion about that on 1 September. Mr Van Gestel submitted that the facts in this

case were not properly distinguishable from prior cases such as *Moses* (RAT, 2 December 2015, see especially [32] and [51]-[52]), and other appeals he drew the Panel's attention to (see below) where twelve month disqualifications have been imposed in circumstances where:

- there is no evidence about what caused the elevated cobalt levels
- the persons penalised have good records, and have cooperated and pleaded guilty at the first available time.

Findings and decision

Source of cobalt

24. The Panel acknowledges that the only evidence of a substance containing cobalt in the stable are the 007 blocks. It does not follow from this alone though that a finding should be made that the blocks are the sole culprit.

25. The expert evidence from Dr Suann was that he would be “surprised” that the blocks alone were an answer to the cobalt levels in this case. He found that “hard to believe”, and expressed views on alternative theories. This evidence was not perfect in that it was not based on a completed calculation, but it nevertheless carries considerable weight, and represented Dr Suann's general view. It is the only expert opinion in the evidence. We also note that very little of the 007 blocks would have been consumed between 8 and 12 November – in part the basis for Dr Suann finding it hard to believe that the 007 blocks had done more than contribute to the highly elevated cobalt levels. Further, there is no explanation for the elevated level of cobalt (ten times the normal mean reading) detected in *Southern Flight* on 1 August. That elevated level is suggestive of some other source of cobalt than the 007 blocks, which were not introduced to the stable until 8 November.

26. Ultimately, we are comfortably satisfied that the cobalt levels here are the result of the 007 blocks, and some other, unidentified source.

Nature of penalty to be imposed

27. We will set this out in more detail below, but given our finding on carelessness and the source of cobalt, we agree with Mr Van Gestel that it is difficult to find a proper distinction between this appeal, and the appeals of *Moses* (RAT, 2/12/15), *J Smith* (9/8/16), *Lawson* (16/6/16) and *Farley* (10/5/16), to which the Panel's attention was drawn. Each of those licensed persons was penalised by way of a 12-month disqualification for a breach of AR 178 involving cobalt. In each case the cause of the elevated reading was unknown. The only distinction here is that part of the elevated reading is known (the 007 blocks), but not the whole cause.
28. However, even if we were to accept that the 007 blocks were the sole culprit, we would not alter the nature of the penalty imposed here from a disqualification to a suspension as the appellant seeks. We accept that the appellant did not act dishonestly, but describing his actions as mere carelessness is in our view generous. The appellant was training at least one horse he knew had recently had an elevated level of cobalt in its urine. While below the threshold in AR 177C(1)(l), given that cobalt is a prohibited substance, and given that *Southern Flight* had ten times the base amount of cobalt in its urine on that prior occasion, the appellant should have been on alert about the substances and products his horses were being given. Rather than doing that, he allowed his horses to consume a product given by an owner in circumstances where he made no attempt to check what it was, or what it contained. It contained cobalt. That at least involves a high level of carelessness.
29. As discussed in [20] above, the Panel's attention was drawn to the Victorian decision of *Peter Moody*. We are not bound by the reasoning in that case, but we take the view that it should be considered. However, while intending no disrespect, we consider we should place more weight on decisions and reasoning of the Racing Appeal Tribunal of this State, unless there is an extremely good reason not to. In any event, our view is that the level of carelessness here is such that a disqualification and not a suspension is warranted.

Length of disqualification

30. In reaching our own view about penalty, we have considered all the subjective matters put to us by Mr Kelly in relation to the appellant. The appellant is nearly sixty-five years of age, and has trained horses for about forty seven years. His record is not

unblemished, but is by no means a bad record, and his last offence of significance was nearly fourteen years ago. He trains about ten horses, and it is his sole source of income. His only assets are his family home and stables. No dishonesty was involved in the breach of the Rules here. Rather, it involved both carelessness, and some undisclosed cause.

31. The severe impacts caused by a disqualification are not lost on the Panel. However, the offending is objectively serious. It is stating the obvious that when horses win races, but are subsequently disqualified because prohibited substances are detected in pre or post-race samples, real harm is done to the image of racing. In penalising Mr McCartney, the Panel must bear in mind the need to uphold the integrity and image of racing (*D Smith*, RAT, 20/3/15). We have also considered the issues relating to general and specific deterrence, and the subjective matters relating to the appellant. Those matters include the appellant's early guilty plea and cooperation, for which he is entitled to a discount. We have also considered the other appeal matters referred to us, as consistency in determining penalty is obviously desirable.
32. In the matter of *Kevin Moses* (2/12/15), the RAT held that a twenty five percent discount should be allowed for early plea and cooperation: see *Moses* at [52]. A twenty five percent discount is consistent with other appeals where an early plea has been entered and cooperation afforded to the Stewards in their Inquiry. We will apply the same discount here. Without taking a strictly "mathematical" approach, the application of the discount in *Moses* led to a disqualification of 12 months.
33. The Tribunal's decision in *Moses*, and the Panel's (Mr Clugston PM, Mr Hale SC, Mr Fletcher) in the appeal of *Farley*, have set a precedent of a 12 month disqualification for breaches of AR 178 involving cobalt in circumstances where the appellant has pleaded guilty and cooperated. While in this appeal we have considered the subjective circumstances relating to the appellant, nothing in our view provides a proper basis for imposing a penalty of less than 12 months without the risk of infringing on the principal that the Panel should make consistent decisions regarding penalty.
34. For all the above reasons, we consider that the penalty that should be imposed here is a 12 month disqualification for each breach of AR 178.

35. Under AR 196(3), penalties are to be served cumulatively “unless otherwise ordered”. Absent then ordering otherwise under AR 196(3), the total penalty for the two breaches would be a two year disqualification.
36. We consider it is appropriate here to “otherwise order” to some extent pursuant to AR 196(3). The offending involved the same prohibited substance, and occurred at the same time. However, the penalties cannot be served concurrently in their entirety. That would mean that no penalty at all would be imposed for the second breach. That would not be appropriate given the serious nature of both breaches of AR 178, including that each horse won their race while they had a prohibited substance in their system, and both were subsequently disqualified. In the circumstances, and considering totality in sentencing, we would “otherwise order” under AR196(3) such that the total penalty to be imposed is a fifteen-month disqualification. This is the same penalty imposed by the Stewards.

Orders

37. The Orders we make (announced on 21 April 2017) are as follows:
 1. Appeal against severity of sentence dismissed.
 2. Total penalty of 15 months’ disqualification confirmed.
 3. Disqualification to commence on 28 April 2017, and to expire on 27 July 2018, following which Mr McCarney may reapply for his license.
 4. Appeal deposit forfeited

Appendix A

Licensed trainer Mr Garry McCarney 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 Garry McCarney, did bring Southern Flight to Narromine racecourse for the purpose of engaging in Race 4 Class 1 Handicap, on the 12 November 2016 and a prohibited substance was detected in urine samples taken from Southern Flight prior to and following it running in that race as:

- a. cobalt was detected in samples taken from Southern Flight prior to and following that mare running in Race 4 Class 1 Handicap at Narromine, on the 12 November 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)(l), 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)(l), excepted from the provisions of AR178B;

Licensed trainer Mr Garry McCarney 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 Garry McCarney, did bring Head To Toe to Narromine racecourse for the purpose of engaging in Race 1 Fillies and Mares Maiden Handicap, on the 12 November 2016 and a prohibited substance was detected in a urine sample taken from Head To Toe following it running in that race as:

- a. cobalt was detected in a sample taken from Head To Toe following that mare running in Race 1 Fillies and Mares Maiden Handicap at Narromine, on the 12 November 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)(l), 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)(l), excepted from the provisions of AR178B;