

APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED TRAINER PETER GREEN

Appeal Panel: **Mr R. Beasley SC (Principal Member); Mrs J. Foley; Mr C. Tuck**

Appearances: **Appellant: Mr D. Sheales of Counsel instructed by Mr M. Hammond of Hammond Nguyen Turnbull Lawyers**

Racing New South Wales: Ms K. Campbell, RNSW Legal Counsel and Mr S. Railton, Chairman of Stewards

Date of Hearing: 2 February 2023

Date of Reasons: 6 February 2023

Rule involved: AR 240(2)

Outcome: Appeal against severity of penalty allowed

REASONS FOR DECISION

The Panel

Introduction

1. At a Stewards' Inquiry conducted on 14 December 2022, licensed trainer Mr Peter Green (**the Appellant**) pleaded guilty to two charges brought under AR240(2) of the Australian Rules of Racing (**the Rules**). That rule provides as follows:

AR240 Prohibited substance in sample taken from horse at race meeting ...

(2) Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who is in charge of the horse at any relevant time breaches these Australian Rules.”

2. The charges related to the detection of the prohibited substance **dobesilate** detected in pre-race blood samples taken from the horse Butch'n'Bugs prior to that horse racing at the Royal Randwick Racecourse on 9 July 2022 and 6 August 2022.

3. Butch'n'Bugs finished in sixth place in race 5 at Randwick on 9 July 2022, and in eighth place in race 2 at Randwick on 6 August 2022. As a result of the detection of the prohibited substance in his blood samples, the horse was disqualified from those placings and connections lost the allocated prize money. Following the Appellant's plea of guilty to the two breaches of AR240(2), the Stewards determined that the appropriate penalty was a suspension of his licence to train for 8 months for each breach. Taking into account his guilty plea, that base penalty was reduced to a suspension of 6 months for each charge.
4. The Stewards determined that the penalties be served cumulatively, resulting in a total suspension of 12 months. That suspension was to commence on 18 December 2022, but a stay was granted on the penalty until resolution of this appeal (which the Stewards did not oppose).
5. The Appellant's appeal to the Panel was in relation to severity of penalty only. He was represented at the appeal hearing by Mr D. Sheales of Counsel, instructed by Mr M. Hammond. The Stewards were represented by Ms K. Campbell, legal counsel for Racing NSW, assisted by the Chief Steward for Racing NSW Mr S. Railton.
6. Ms Campbell called the chief veterinarian for Racing NSW, Dr P. Curl, to give evidence, and he was also examined by Mr Sheales. Likewise, Ms Campbell called Mr J. Keledjian, the General Manager of the Australian Racing Forensic Laboratory, who also gave brief evidence.
7. The Appellant was called to give evidence by Mr Sheales, as was Mr Chris Lawlor, the Managing Director of International Animal Health Products, a company that manufactures feed supplements and medicines for thoroughbred horses. An expert veterinary report of Dr Derek Major dated 29 January 2023 was tendered by the Appellant, but Dr Major was not required for cross-examination. The Appeal Book was also tendered by consent which contained a transcript of the Stewards' Inquiry, together with the exhibits from that inquiry.
8. Shortly after the commencement of the appeal, the hearing was adjourned while Ms Campbell and Mr Sheales held discussions in an attempt to agree certain factual

matters. The Panel was greatly assisted by the agreements reached which shortened the hearing. Leaving aside what ultimately proved some relatively minor disputes about the evidence, the sole matter the Panel needed to determine was the appropriate penalty to be imposed for the two breaches of AR240(2).

Findings of Fact

9. There was no dispute that dobesilate is a prohibited substance, and hence the detection of it in the blood samples taken from the horse involved a breach of AR240(2).

10. Dobesilate is a synthetic substance and is not listed as a registered medicine by the Australian Government Therapeutic Goods Administration. There have only been two known detections of this substance in thoroughbred horses in Australia which will be referred to below. The following matters are also clear regarding this substance from the evidence:
 - (a) There is no recognised use for dobesilate in thoroughbred horses.

 - (b) Calcium dobesilate is used in substances to treat the human conditions of haemorrhoidal disease and varicose veins: Dr Curl's report, Ex. 30, p 97 of the Appeal Book. However, it does not appear to be used in Australia for these conditions.

 - (c) In 2011, a pilot study was undertaken to assess whether calcium dobesilate had a therapeutic effect for navicular disease in horses¹. There were "encouraging" signs that it might, but it was impossible for the experts conducting the trial to be certain of this or to draw anything like a firm conclusion. In his evidence, Dr Curl agreed that the scientific research and evidence fell well short of allowing any conclusion to be drawn (even on the balance of probabilities) that calcium dobesilate has any therapeutic benefit to horses.

¹ "Effects of calcium dobesilate on horses with an increased signal intensity on the navicular bone in fat suppressed images on MRI: Pilot study", Janssen et al, *Pferdeheilkunde* 27 (2011) 6 (November/Dezember) 601-608

- (d) Likewise, there is what Dr Curl describes as a “theoretical” possibility that dobesilate might be a substance that could reduce bleeding in thoroughbreds. This is because of the substance’s “ability to decrease capillary permeability”: Ex 30, p.96 Appeal Book. Again, Dr Curl agreed that it was not possible to draw a firm conclusion that dobesilate would assist or decrease bleeding in horses, and hence it was not possible to find that on the balance of probabilities that dobesilate has any form of performance enhancing effect.
 - (e) The conclusions drawn by Dr Major in his report of 29 January 2023 are consistent with Dr Curl’s evidence in that it is his view that “[t]here is no clinical evidence of any significant pharmacological effect of Dobesilate in the horse” and “[t]he possibility that Dobesilate ‘has a pharmacological potential to alter materially the performance of a horse’ is remote”: page 9 of Dr Major’s report.
 - (f) There was no evidence that Butch’n’Bugs had ever bled from both nostrils or that it has been suspended from racing from bleeding. There was no evidence that the horse had navicular disease. The evidence was that the horse was generally sound.
11. Mr Green’s evidence was that he had never heard of dobesilate prior to being charged with the breaches of the Rules the subject of this appeal. It was not detected in samples of feed taken from his stables. However, in 2020, dobesilate was found in pellets processed by Mr Lawlor’s firm. This followed the detection of the substance in a sample taken from a horse who had been fed products supplied by a horse nutritionist. Those products were purchased from Mr Lawlor’s firm. Eight batches of this feed supplement were provided to the Australian Racing Forensic Laboratory via Racing NSW for testing. Four of these batches were prior to pelleting (after the products are blended together in a mixer but prior to them being transferred to a pellet machine to make small pellets), and four post-pelleting. Two of the post-pelleted samples returned positive detection results for dobesilate.
12. Mr Lawlor in his evidence described the lengths he went to in order to seek to understand how dobesilate could have contaminated the supplements his company was manufacturing. The oil used in the pelleting machine was investigated. The

yeast used to grease the machine was considered. Emails were sent to and enquiries made of the manufacturers of the raw materials. In the end, all of his enquiries came to nothing.

13. Mr Green purchases products from Mr Lawlor's firm, but these were not administered to Butch'n'Bugs. As mentioned above, Butch'n'Bugs' feed came from another manufacturer, was tested by Racing NSW, and dobesilate was not detected.
14. Dr Curl found that the detection of dobesilate in the blood samples of the horse was consistent with either a prior administration to the horse of a substance containing dobesilate, or to the horse being exposed somehow to the substance: Ex 30, Appeal Book p96. In stating this in his report, Dr Curl was not seeking to indicate one was more likely than the other. Nor did he suggest any particular substance containing dobesilate was a likely culprit. Equally, nothing in the environment of the Appellant's stables was identified as a possible source. There was further no evidence before the Panel as to precisely when the dobesilate first entered the horse's system - there was no evidence of a rate of metabolism of the substance in horses.
15. This leaves the evidence of Mr Green, which the Panel accepts. That is, we relevantly accept that he did not deliberately administer dobesilate to the horse (either as a substance on its own or within some other product, preparation or supplement). Further, on the evidence before the Panel, there is no basis for making a finding that he could have done anything differently in terms of the management and operation of either his stables or his training routine that would have prevented the breach of the Rules. The horse was clearly exposed to dobesilate, but we do not know how. The evidence of Mr Lawlor, which the Panel also accepts, only further underscores the mystery.

Resolution

16. The Panel has from time-to-time imposed penalties on licensed persons who have deliberately administered prohibited substances to horses for the purpose of attempting to enhance the performance of a horse. They are of course charged under a different rule. Those licensed persons almost inevitably receive long disqualifications. There are other occasions where prohibited substances are detected in pre or post-race samples of horses either through inadvertence, or where it is not

possible to make a finding how the prohibited substance came to be in the horse's system. On occasions, breaches of AR240(2) have resulted in significant suspensions. An example of this is in relation to the prohibited substance cobalt, which when detected in breach of AR240(2) has resulted in suspensions or disqualification even for first offences of 12 months or more. This is likely to do with the strong possibility established in evidence in those matters that cobalt has a performance-enhancing effect on horses.

17. There have been other appeals to the Panel involving the detection of prohibited substances where the licensed persons involved have not been penalised by way of suspension or disqualification. Two examples of these are the *Appeal of Chris Waller* (10 February 2017, involving methamphetamine) and the *Appeal of Gary Portelli* (4 September 2020, involving the detection of a prohibited substance used in hair restorer by Mr Portelli's foreman). Mr Waller received a \$5,000 fine in circumstances where it was impossible to know how the methamphetamine came into his horse's system, but where it was clear it was not deliberately administered, and his stable was run to very high standards. Mr Portelli's breach of the rule was confirmed, but no penalty was imposed, it being considered by the Panel that he too ran his stable to high standards, and could not have known in advance that he should tell his staff not to use "Regaine". Ms Campbell also provided the Panel with a long list of penalties for breaches of AR240(2)(and its predecessor), dating back to 1987, which demonstrate that the penalties imposed for breach of this rule can result in anything from the imposition of a modest fine (a not infrequent penalty), to a long suspension or disqualification.
18. The issue for resolution in this appeal is essentially whether the offending here is closer to a breach of AR240(2) involving cobalt, or closer to the situations involving Mr Waller and Mr Portelli.
19. We are unanimously of the view that whilst all breaches of AR240(2) are objectively serious, the breach here is at the lower end of the scale.
20. It has been stated many times that the primary object of the imposition of penalties for breaches of the Rules is the protection of the sport. Penalties are imposed to uphold the image and integrity of racing. To the extent that a deterrent effect is relevant, it is

to deter others from engaging in conduct involving breach of the Rules that would damage the image and reputation of racing.

21. In the circumstances of this case, a penalty is of little utility as far as deterrence is concerned. There does not seem much, if anything, the Appellant could have done to prevent the breaches. Accepting that he did not deliberately administer the dobesilate to the horse, then it is a complete mystery as to how it got in the horse's system. Perhaps it was in some feed; perhaps not. We do not know. We are also unable to point to anything that the Appellant specifically should have done in relation to the management and operation of his stables that would have prevented the positive findings here.
22. Ms Campbell submitted that the Stewards were appropriately concerned that a newly emerging prohibited substance had been detected in a pre-race sample taken from a horse. Those concerns of the Stewards were heightened in circumstances where there was at least some evidence that the substance might have either a therapeutic or performance-enhancing effect. We accept that submission in so far as it shines light on the Stewards approach to penalty here. However, as stated above, the evidence falls well short of enabling the Panel to properly conclude that dobesilate has either a performance-enhancing or therapeutic effect. On the evidence before us, it seems a remote possibility that dobesilate might have either effect.
23. We appreciate that the Stewards' determination of penalty here was based on seeking to fulfill the objective of protecting racing. However, on this occasion, we do not consider that the suspension they have imposed is warranted in the circumstances. As much as penalties are imposed to uphold the integrity of the sport and to protect it, the image of the sport is not enhanced by the imposition of penalties that could be seen, when all the facts are considered, to be too severe.
24. In our opinion, it would not be just to suspend Mr Green's licence. That causes us to turn to whether a fine is appropriate. Mr Sheales made a strong submission that no penalty should be imposed here given that:
 - (i) Mr Green's evidence should be accepted that he was not involved in a deliberate breach of the rules;

- (ii) deterrence is of no or limited utility, and no specific advice or instruction could be rationally given to the Appellant to change any aspect of the operation of his stables or training business that would have prevented the breaches;
 - (iii) there is insufficient evidence to find that the substance has a therapeutic or performance enhancing quality; and
 - (iv) there is no basis for making any finding as to how it came into the horse's system, although there is evidence of it happening on a previous occasion in circumstances that are themselves evidence of this substance being detected in what can be described as both entirely innocent and mysterious circumstances.
25. We note that the Appellant has one prior offence for the administration of Lasix some five years ago, for which he was fined \$5,000. We consider that partly in light of the general circumstances, and also taking into account that this is a second offence involving detection of a substance that should not have been or is prohibited from being in a horse's system, the imposition of a fine is warranted. It is warranted in the sense of it providing a warning and message to trainers that they need to use extreme vigilance in all aspects of the manner of the operation of their stables and their training business to ensure that prohibited substances are not present in a horse's system that lead to breaches of AR240(2). We consider a fine of \$5,000 is appropriate.
26. One final matter should be noted. These reasons should not necessarily be viewed as setting a precedent for the appropriate penalty to be imposed for a breach of AR240(2) involving the substance dobesilate. It may be that further scientific study on this substance confirms it has no therapeutic use in horses, and no performance enhancing quality. Should any further scientific study or evidence point otherwise however, a breach of AR 240(2) involving this substance might result in a penalty of suspension or disqualification.
27. The orders of the Panel are therefore as follows:
- (1) Appeal against severity of penalty allowed.

- (2) The penalty of a suspension of the Appellant's licence of 6 months for each breach of AR240(2) is set aside, as is the total penalty of a 12-month suspension.
- (3) In lieu of the suspension, a total fine for both breaches of \$5,000 is imposed.
- (4) Appeal deposit to be refunded.