APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED TRAINER MICHELLE RUSSELL

Appeal Panel:	**Mr R. Beasley SC, Principal Member; Mr C. Tuck; Mr S. Parr**
Appearances:	**Racing New South Wales: Mr M. Van Gestel, Chairman of Stewards** **Appellant: Ms J. Hillier, Barrister, instructed by Mr G Potter of Commins Hendriks, Solicitors**
Date of Hearing:	**12 July 2021**
Date of Reasons:	**15 July 2021**

REASONS FOR DECISION

Principal Member

Introduction

1. On Tuesday 14 July 2020, the racehorse *Taliano* (**the horse**) finished first in race 2 run at the Murrumbidgee Turf Club meeting at Wagga Wagga that day. The horse is trained by the Appellant in these proceedings, licensed trainer Michelle Russell.

2. Prior to the running in the race, a pre-race urine sample had been taken from the horse. Analysis at the National Measurement Institute showed that the horse's urine contained 147 ug/L of cobalt: Ex 7. Analysis at the Racing Analytical Services Ltd laboratory showed an amount of cobalt of 166 ug/L: Ex 11. Both these amounts of cobalt are above the threshold allowable limit of 100 ug/L for cobalt, which is a prohibited substance under the Australian Rules of Racing (**Rules**): Schedule 1 Part 2 Division 3.11 of the Rules. The horse's urine sample was also found to contain heptaminol, which is also a prohibited substance under the Rules.

3. As a result of the findings from the laboratories referred to above (which are Official Racing Laboratories under AR2), at a Stewards' Inquiry conducted on 21 October 2020, Racing NSW Stewards from the South East Racing Association charged the

Appellant with two breaches of AR240(2), which is known as the presentation rule, and which is in the following terms:

> "**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."

4. At the Stewards' Inquiry the Appellant was also charged with a breach of AR104(1) for failing to keep accurate treatment records for the horse in the period up to and including the relevant race day of 14 July 2021.

5. The Appellant pleaded guilty to both breaches of AR240(2), and to the breach of AR104(1). After considering matters relevant to penalty, the Stewards imposed the following penalties:

- Charge 1 – AR240(2) (cobalt) – 12-month disqualification commencing on 21 October 2021.

- Charge 2 – AR240(2) (heptaminol) – 2-month suspension, to be served concurrently with the penalty imposed for Charge 1.

- Charge 3 – AR104(1) – $300 fine.

6. Pursuant to AR240(1), the horse was also disqualified from its first placing in the race referred to above.

7. The Appellant has appealed against the severity of the penalties imposed in relation to Charges 1 and 2 to the Panel. She lodged her appeal on 23 October 2020, on which day she also applied for a stay. Her application for stay was originally refused.

However, upon receipt of certain expert evidence, which is referred to later in these Reasons, a stay was granted on 28 April 2021. The Appellant remains on a stay pending the outcome of this Appeal.

8. At the appeal hearing, the Appellant was represented by Ms J. Hillier of counsel, instructed by Mr G. Potter of Commins Hendriks Solicitors. The Stewards were represented by Mr M. Van Gestel, the Chairman of Stewards.

Evidence

Lay evidence

9. There was no oral evidence called at the appeal hearing. Instead, both Mr Van Gestel and Ms Hillier were content to rely on the evidence contained in the Appeal Book, together with some additional expert reports. As to the Appeal Book (Ex A), it contained the transcript of the Stewards' Inquiry, as well as the exhibits at that Inquiry which on appeal have retained the number given to them at the inquiry. Some further expert reports were tendered which are referred to below.

10. The Appellant's evidence at the Stewards' Inquiry was that the only product of relevance that she administered to the horse prior to the race meeting was VAM. This was administered intravenously on the Sunday morning prior to the horse competing in its race on the Tuesday. VAM is a product known to contain vitamin B12 and also some cobalt. A 10ml dose was administered to the horse: see the evidence generally at T13-14. The Appellant denied giving any other administrations of any products prior to 14 July 2020 that might explain the readings of cobalt and the detection of heptaminol in the horse's urine. The only other evidence of relevance was that the horse was being fed a product called Equilibrium B1 Cool Mix. Subsequent analysis of that mix was found to contain 6.4mg/kg of cobalt, which while higher than prior analyses made of the cobalt content of this feed, was still not at an amount that would explain the high level of cobalt in the horse's urine: see the evidence of Dr T. Koenig at T24.1182-.1189.

Expert evidence

11. At the Stewards' Inquiry, evidence was given by Dr Toby Koenig, the Chief Veterinarian of Racing NSW. In essence, Dr Koenig's evidence was that with a product like VAM, it is possible, shortly following administration, for a horse's urine sample to contain an amount of cobalt above the threshold level of 100ug/L. However, a race-day urine sample containing a level of cobalt above the threshold would only be likely to occur– based on a number of studies referred to below – if the product was administered to the horse relatively close to the time of the sample being taken, such as on a race day (which of itself would be a breach of the Rules). His evidence was that following a period of something like 24 hours, after the administration of VAM in accordance with manufacturer's guidelines, a horse's urine sample should show a level of urine *"consistent with the baseline population of maybe 5 or 10"* ug/L: T23.1112-.1140. The clear effect of Dr Koenig's evidence was that if the horse had been administered a 10ml dose of VAM on the Sunday morning, as was the Appellant's evidence, then by the Tuesday race day when the horse's urine sample was taken, the level of cobalt in its urine should be consistent with the baseline of horses, and well below the 100ug/L threshold limit.

Dr D. Major

12. The Appellant relied on two reports of Dr Derek Major dated 19 February 2021 (Ex A1) and 7 May 2021 (Ex A2) respectively.

13. In his report of 19 February 2021, Dr Major stated that the horse's urine sample contained the following:

    (i) heptaminol;

    (ii) an abnormally high level of selenium;

    (iii) a significant quantity of vitamin B12.

14. From this he drew the conclusion that *"the horse has received an injectable substance containing heptaminol, selenium and vitamin B12"*. He went on to explain the nature of the vitamin B molecule as containing around 181 separate atoms tightly bound within one cobalt atom. He described vitamin B12 as essential to life, but as having no beneficial effect at above required levels for good health. He also raised the possibility that vitamin B12 could *"yield a false positive result when testing for inorganic cobalt ions"*.

15. Dr Major's report of 7 May 2021 also attached an analysis of the urine sample performed by Mr Ross Wenzel at the Trace Elements Laboratory following an order being made by the Panel last year that a urine sample from the horse should be provided to the Appellant so that she could have her own testing conducted on it. In his 7 May 2021 report, Dr Major confirms that analysis of the urine showed a cobalt reading of 156ug/L. This is consistent with the analysis conducted by the official racing laboratories. In Dr Major's opinion, however, 123ug of the 156ug came from the "destructive analysis of the vitamin B molecule". His evidence was that this is "inert" in a horse, and hence could not have any "performance-enhancing effects" on the horse. What was left, then, was 33ug/L of inorganic cobalt ions.

Dr A. Cawley

16. Mr Van Gestel tendered a report from Dr A. Cawley of the Australian Racing Forensic Laboratory dated 11 June 2021 (Ex 29). Dr Cawley is the Science Manager of Racing NSW. In his report, Dr Cawley makes several criticisms of the reports of Dr Major, and the opinions expressed therein. It is not necessary to set out in these Reasons all of Dr Cawley's criticisms, but some fundamental ones are set out below.

17. The Trace Elements Laboratory at which Mr Wenzel performed testing on the urine sample for the purposes of Dr Major's 7 May 2021 report is not accredited to the standard required under AR2 – that is, it is not an official racing laboratory: Cawley report [6]. Further, and this is not a criticism of the Trace Elements Laboratory per se, that laboratory is accredited for the purposes of analysis of human samples rather than equine: Cawley report [6]. While the Panel views this of relevance, it is not alone

a reason for ignoring or setting aside the expert views of Dr Major, or the work of Mr Wenzel.

18. There is additionally however, in Dr Cawley's view, a fundamental irrelevance in the major point sought to be made by Dr Major concerning the difference between (in Dr Major's opinion) the 123ug/L of cobalt in the horse's urine attributable to vitamin B12, and the 33ug/L of inorganic cobalt ions. This is because the legal threshold for cobalt of 100ug/L under the Rules is based on total cobalt, and not any specified form of cobalt: Cawley report [17](a).

19. Dr Cawley also makes some criticism of a paper authored by Mr Wenzel and Dr Major (along with Carly Hesp and Philip Doble) published in the Journal of Trace Elements in Medicine and Biology titled *"Determination of vitamin B12 in equine urine by liquid chromatography – inductively coupled plasma – mass spectrometry"* (**Wenzel, Major et al Journal Paper**) (Ex 31). At least part of the criticism Dr Cawley makes is that it seems at least unusual to him that a study could be described as "definitive" when it is based on results from only one horse following the administration of *"a 1mg/ml injectable solution of cyanocobalamine … purchased as nature vitamin B12 injection"*. However, as is pointed out by Ms Hillier, this is a peer reviewed journal article. Further, of some significance in this paper is that two hours following the administration to the horse being studied, the cobalt level in its urine was 169.7ug/L. Four hours after administration the cobalt level had dropped to 62.2ug/L (which is under the threshold limit set under the Rules), with a further drop to 13.3ug/L at 6 hours, and down to 3.6ug/L after 12 hours. These results, set out in Table 3 of Ex 31, appear consistent (as Mr Van Gestel pointed out) with the evidence that Dr Koenig gave at the Stewards' Inquiry about the likelihood of a horse administered with VAM returning to baseline cobalt levels in its urine at least by 24 hours after administration. In the Wenzel, Major et al Journal Paper referred to above, while a high level of cobalt was detected just 2 hours after administration, within 6 hours the horse had returned to what can be considered a baseline level of cobalt for horses.

20. Also in Dr Cawley's report, he refers to a study made by Dr D. B. Hibbert of the results of 5,816 race day thoroughbred equine urine samples collected in Australia

during 2015. These showed a mean and median urinary cobalt concentration to be 8.3ug/L and 3.4ug/L respectively. It appears that the "normal" equine urinary cobalt level is <22ug/L. Dr Cawley also referred to a review by Racing Australia of 42,477 thoroughbred race day equine urine samples taken between September 2016 and September 2019, which showed a mean urinary cobalt concentration of 5.1ug/L. This has led Dr Cawley to the view that *"administration of cobalt-containing products are the reason for urinary equine cobalt levels of 22ug/L or higher".* In other words, where a horse has a cobalt level in its urine above 22ug/l, this is not explained by that being a "natural" level of cobalt. A horse being administered a cobalt containing product is the highly likely explanation for a level above 22ug/l.

Dr T. Koenig

21. Mr Van Gestel also tendered a report from Dr T. Koenig dated 18 June 2021 (Ex 30). In this report, Dr Koenig refers to two studies where horses administered with cobalt-containing substances had their cobalt levels peak about 2 hours following administration, but where all were below the legal threshold within 8-12 hours post-administration. This seems consistent with table 3 results from the Wenzel, Major et al Journal Paper, and has led Dr Koenig to the view that:

> *"It is a reasonable assertion that any thoroughbred horse with a urinary cobalt concentration in excess of the allowable threshold on race day has been the subject of administration of a registered cobalt-containing substance within one clear day or on the day of racing."* (Dr Koenig's report p.3, last para)

22. It may be that the words "reasonable assertion" used by Dr Koenig are the result of (appropriate) scientific conservatism. There is no evidence before the Panel that would explain a level of cobalt at over 100ug/l in a horse's urine other than a race day administration, or the unintended ingestion of a cobalt containing product by the horse through some means also on race day. Further, such ingestion or administration would appear to be likely to have occurred within 4 hours of the urine sample being taken.

Submissions

Appellant

23. Ms Hillier provided the Panel with some written submissions dated 12 July 2021 which she supplemented with oral submissions. In essence, Ms Hillier's key submission, founded on Dr Major's report, was that very little of the cobalt detected in the horse's urine here could have had any performance-enhancing effect. She said it was clear from Dr Major's report that the sample analysed by Dr Major and Mr Wenzel of cobalt in the amount of 156ug/L contained 123ug/L of organic cobalt derived from vitamin B12. This is inert in a horse and cannot have any performance-enhancing effect. This left only 33ug/L of inorganic cobalt ions, below the legal threshold limit. This submission was not made in any attempt to withdraw the guilty plea made by the Appellant, but as a mitigating factor. In essence, while the level of cobalt in the horse's urine was clearly above the legal threshold limit, most of that cobalt was organic and derived from vitamin B12 and could not possibly have had any performance-enhancing effect on the horse. This, Ms Hillier submitted, was a primary reason why a 12-month disqualification imposed in relation to Charge 1 was excessive.

24. Ms Hillier also set out a number of facts pertinent to the subjective circumstances relating to the Appellant which highlight a matter that the Panel accepts – a 12-month disqualification will have a very severe financial impact on the Appellant and her young family, for whom she is the sole income winner. Ms Hillier also of course relied on the fact that the precise cause as to why the horse had such a high level of cobalt in its system on race day has not been able to be determined, save that the Appellant was not charged with, and there is no other evidence of, race day administration by the Appellant.

The Stewards

25. For reasons set out in Dr Cawley's report, Mr Van Gestel said the Panel should place little if any weight on the evidence of Dr Major. He also submitted that the opinions expressed by Dr Major are in any event misplaced – the charge here is based not on

any attempt to affect the performance of the horse in a race, but simply on a horse's urine sample having a concentration of a prohibited substance above a legal threshold limit. That was clearly made out on the evidence.

26. Further, Mr Van Gestel submitted that the undeniable scientific findings here as evidenced by the official racing laboratories have regularly resulted in a penalty being imposed for a cobalt offence of a 12-month disqualification for a first offence. Mr Van Gestel in particular placed reliance on the decision of the Racing Appeal Tribunal in the *Appeal of John Sprague* (RAT, 27 June 2018) as setting a benchmark for penalties to be imposed for like offending involving cobalt. Mr Van Gestel also submitted that the Panel should place little reliance on the recent decision of the Racing Appeals Tribunal in the *Appeal of Atkins* (RAT, 9 June 2021) which involved the prohibited substance trendione that is commonly found in products given to fillies and mares for safety and welfare reasons when they are in season. There is no proper analogy to be drawn, Mr Van Gestel submitted, for a breach of AR240(2) in relation to trendione as compared to cobalt.

Resolution

27. Appeals in relation to AR240(2) are always unfortunate when there is no definitive evidence as to how a prohibited substance has come to be in a horse's system. Based on all of the expert evidence referred to above, however, it would seem extremely likely that the horse was either administered, or somehow ingested, a cobalt-containing product closer to the time its urine sample was taken on Tuesday 14 July 2020 than the administration of VAM the horse was given the previous Sunday. That should not be taken as a finding that the Appellant was being untruthful to the Stewards in the evidence she gave at the inquiry, or even that she is mistaken. The Panel accepts that the horse was administered VAM on the Sunday morning prior to the Tuesday race. Based on the expert evidence, however, it seems unlikely in the extreme that with no other ingestion or administration of a cobalt product the horse could have retained a cobalt level in its urine of between 147 and 166 ug/L by race day on the Tuesday.

28. That said, the Panel approaches penalty in this matter on the basis that there is no definitive explanation as to what happened of relevance between the administration of VAM on the Sunday morning, and the pre-race urine sample being taken from the horse on Tuesday.

29. The matters raised by Dr Cawley in his report of 11 June 2021 that are critical of certain aspects of Dr Major's report are also of concern to the Panel. That does not mean that the Panel has any relevant doubts about either Dr Major's expertise, or his level of experience. Ordinarily, however, there may be some cause to be at least cautious about placing reliance on results from laboratories that are not accredited for testing equine urine or blood samples.

30. For reasons also identified by Dr Cawley, and as submitted by Mr Van Gestel, the Panel does not consider much of Dr Major's opinion evidence to be relevant to the particular circumstances of the charge here. Even if we were to take Dr Major's opinion at its highest concerning organic or inorganic cobalt ions, this is not directly relevant to a breach of AR240(2). The charge is not that the horse was given a substance that did have a performance-enhancing effect, or that the Appellant gave it a substance in an attempt to, or for the purposes of, enhancing the horse's performance. That is not any part of the charge under AR240(2) (cf AR 244(1)). The Appellant was instead charged with presenting the horse to race where a pre-race urine sample has been found to contain an amount of cobalt (a prohibited substance) above the threshold limit allowed.

31. That takes the Panel to the decision of the Racing Appeal Tribunal in *Sprague* referred to above. As is clear from that decision, and many others of the Panel, a breach of AR240(2) is an objectively serious breach of the Rules. It is always a terrible look for racing when any horse races and is subsequently found to have had a prohibited substance in its system. While there is no finding made that the cobalt in this horse's system had a performance-enhancing effect, it is an even worse look for racing when a horse runs in a race with a prohibited substance in its system and wins.

32. The Panel has taken into account, and is sympathetic to, all of the Appellant's subjective circumstances. She has not been charged with cheating. She does not have

a relevantly bad record (although we note she has been given prior warning for a cobalt reading in the same horse that was very close to the threshold limit). She has been a trainer for 15 years, and we accept that this has been her sole source of income. She is responsible for young children. Any period of disqualification will have a significant financial impact upon her, and a 12-month disqualification as imposed by the Stewards will have a very significant financial impact.

33. However, as has now been stated in a number of relevant judgments by Courts, and in reasons for decision of this Panel (see *The Appeals of Hyeronimus and Paine*, Reasons for Decision on Penalty, RAP, 8 April 2021 at [9]-[10]; *The Appeal of Noel Callow*, RAP, 3 April 2017 at [37]-[41]), *NSW Bar Association v Evatt* (1968) 117 CLR 177 at 183-4 ; *Day v Sanders; Day v Harness Racing New South Wales* (2015) 90 NSWLR 764 per Leeming JA at [70] and Simpson JA at [131]; *The Appeal of Hunter Kilner* (RAP, 27/12/17)) the primary purpose of the imposition of penalties under the Rules of Racing is protective. It is not about punishment. It is about protecting the image and the integrity of the sport of racing. Deterrence is also relevant in the manner explained in the above judgments and reasons. Deterrence is relevant in circumstances where there has been no intent to breach AR240(2) – for example, where a licensed person has breached the rule not by any intent to do the wrong thing, but because they have failed to maintain proper stable practices, or heed the warnings of the Stewards in relation to certain products where there is a risk of a breach of the Rules through lax practices and cross-contamination. Penalties are imposed to deter that kind of conduct – and protect the sport and the racing public from it - as well of course for more deliberate cheating (which is not involved in this case).

34. In addition to the above, the Panel must pay proper regard to the decision of the Tribunal in *Sprague,* and other appeals set out in the precedent sheet provided to the Panel by Mr Van Gestel. Consistency in the imposition of penalties by this Panel is important. The imposition of inconsistent or erratic penalties will result in a loss of confidence by all concerned in the industry in the process of imposing penalties for breaches of the Rules. That is why the Panel must follow *Sprague* and other decisions of the Racing Appeal Tribunal unless we are very strongly satisfied that they are wrong for some reason. To the contrary, *Sprague* is a properly reasoned and

considered approach to the imposition of penalties for breaches of AR240(2) regarding cobalt. It and other relevant decisions demonstrate that unless there is something truly out of the ordinary, a first offence under AR240(2) involving cobalt, giving due mitigation discount for an early guilty plea, involves a period of disqualification of not less than 9 months, and more frequently 12 months for a first offence.

35. The submission made by Ms Hillier was that the appropriate penalty here would be to impose a penalty of effectively time served, and effectively converted to a 6-month suspension. That would simply not be consistent with prior penalties for a breach of AR240(2) (or its prior equivalent rule) that involve cobalt, including *Sprague*. A suspension in lieu of a disqualification is neither appropriate nor consistent with prior decisions.

36. The penalty ultimately imposed in *Sprague* was a disqualification of 10 months. This seems to have been by taking a starting point of a 16-month disqualification, and then deducting a not precisely formulated period of time from that penalty for plea and cooperation and then taking account of Mr Sprague's long association with the racing industry. There are other examples referred to in the precedent sheet regarding presentation breaches for cobalt, and also referred to in *Sprague*, where trainers have been disqualified for a period of 12 months in circumstances where they have pleaded guilty to a first breach of AR240(2) involving cobalt.

37. In this appeal, although the Appellant has gone to considerable trouble to test or challenge the expert evidence of Racing NSW, it must be noted that she did plead guilty at the earliest opportunity. Further, her desire to have the urine sample tested by her own experts should not be taken as a lack of cooperation. She also has been involved in racing for a relatively long period of time without relevant prior offending. While the financial hardship that the Appellant will suffer from a disqualification is far from unique (it is in fact common to most disqualifications or long suspensions), and is not the prime matter to consider when imposing penalty, the Panel has taken into account that she is a single mother who has until now derived her income from the racing industry.

38. Whilst all members of the of the Panel are of the view that the penalty of a 12-month disqualification imposed by the Stewards is by no means an inappropriate or excessive penalty for the offending here, Mr Parr and I do not see a convincing reason here as to why the Appellant should be penalised for a greater period than the penalty that was imposed in *Sprague*. In our view then, taking into account all relevant matters, the appropriate penalty in relation to Charge 1 is a 10-month disqualification in lieu of a 12-month disqualification. Mr Tuck is of the view that but for the Covid pandemic, the appropriate penalty for Charge 1 is the 12-month disqualification imposed by the Stewards. He would discount this by one month as a result of additional real and potential hardships associated with the Pandemic, and would impose a disqualification of 11-months. We all see no reason as to why the 2-month suspension (concurrent with the penalty to be imposed for Charge 1) is not appropriate for charge 2.

39. The Appeal is therefore allowed to the extent that the penalty to be imposed under Charge 1 is reduced from a 12-month disqualification to a 10-month disqualification. The Panel has set out below its orders, and also its understanding of when the Appellant will be entitled to reapply for her licence, factoring in the period of time that she has had the benefit of a stay. As at the date of the grant of stay on 28 April 2021, the appellant had been disqualified for 6 months and 1 week. She now has a further period of disqualification of 3 months and 3 weeks, which will end on 4 November 2021, on which day she may reapply for a license. If either party considers that a mistake has been made in relation to the day when the Appellant may reapply for her licence, they should (having sought to reach agreement amongst themselves) bring that matter to the attention of the Principal Member within 7 days of the date of these Reasons so that any correction can be to the orders. Further, for the avoidance of doubt, the stay granted on 28 April 2021 is now set aside, and the further period of disqualification is to commence immediately.

Mr Tuck

40. As indicated by the Principal Member in [38] above, while I otherwise agree with his reasoning, I consider that the appropriate penalty for the breach of AR 240(2) involving cobalt, taking account of the Appellant's plea and cooperation, and all other relevant factors, is the 12-month disqualification imposed by the Stewards, save for

the Covid Pandemic. I believe some discount should be allowed for this, and would impose an 11-month disqualification for the guilty plea to Charge 1.

Mr Parr

41. I agree with the reasoning of the Principal Member, and the penalty he proposes for the breach of AR240(2) (cobalt) as outlined in [38] above. The Appellant's personal circumstances are such that disqualification will have a severe financial impact on her and her family, and in my view the penalty of a 10-month disqualification consistent with the Racing Appeal Tribunal's decision in *Prague* is appropriate.

Orders

42. The orders of the Panel are as follows:

(1) Appeal against severity of penalty allowed.

(2) In lieu of a 12-month disqualification for the breach of AR240(2) involving the prohibited substance cobalt, (by majority) the Appellant is disqualified for 10 months.

(3) The penalty of a 2-month suspension for the breach of AR240(2) involving the prohibited substance heptaminol is confirmed.

(4) The 2-month suspension referred to above is to be served concurrently with the 10-month disqualification.

(5) As the Appellant was on a stay from 28 April 2021 (such stay now being lifted) until 15 July 2021 (having been disqualified from 21 October 2020 until the stay was granted), her 10-month disqualification recommences today, and ends on 4 November 2021. She is entitled to reapply for her licence on that day.

(6) Appeal deposit to be refunded.