RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF LICENCED TRAINER CASSANDRA SCHMIDT

Appeal Panel:	**Mr P Santucci – Convenor**
	Mrs J Foley
	Mr P Losh
Appearances:	**Stewards: S Railton Chairman of Stewards**
	Appellant: T Sharman solicitor
Date of Hearing:	**1 November 2023**
Date of Reasons:	**8 November 2023**

REASONS FOR DECISION

1. **The Panel:** On Sunday 18 December 2022 at Taree the appellant Cassandra Schmidt, a licenced trainer, presented a filly, *Miss Mazerati* for racing in Race 1 the Maiden Handicap over 1000m. The horse was originally listed as an emergency, and only received a late call up on the morning of the race. The horse won.

2. Post-race urine samples were taken and two prohibited substances were detected being cobalt and heptaminol. The levels of cobalt detected were analysed to be 164 ug/L and 150 ug/l by the respective labs. Accordingly the levels were in excess of the 100ug/l threshold for such prohibited substances.

3. On 19 January 2023 the stewards conducted an inspection of the appellant's stables, and samples of certain feed and products were taken. In short, the stewards have been unable to determine the basis upon which such levels of cobalt could have been detected in the horse. Although that is a topic to which the Panel will return in further detail below.

4. On 14 June 2023 licenced trainer Cassandra Schmidt was charged and pleaded guilty to three charges brought under the Australian Rules of Racing. The first two charges related to alleged breaches of AR 240(2) in respect of the presence of a prohibited substance in a horse

at a race meeting. The third charge relates to a failure to keep adequate records of treatments administered to the filly by midnight on the day of such administrations.

5. The stewards imposed penalties as follows:

   (a) Charge 1 in respect of the presence of cobalt - 12 months disqualification (reduced from 16 months in light of the early guilty plea);

   (b) Charge 2 in respect of the present of heptaminol 2 months suspension of her trainer's licence. But both penalties under AR240(2) were to be served concurrently.

   (c) Charge 3 in respect of the record keeping the Stewards imposed a $300 penalty.

   (d) In respect of Miss Mazerati, in accordance with AR240(1) the horse was disqualified from the race and the placings were amended.

6. The current appeal concerns only an appeal against the severity of the 12 month disqualification arising from Charge 1 relating to the presence of cobalt in the horse.

7. At the hearing of the appeal the appellant was represented by Mr T Sharman, solicitor, and the Stewards were represented by Mr S Railton.

8. AR 240(2) is in the following terms:

> **AR 240** 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 was in charge of the horse at any relevant time breaches these Australian Rules.

9. The particulars of Charge 1 are as follows:

> The details of the charge being that licensed trainer, Ms Cassandra Schmidt, did commit a breach of AR240(2) by reason of the following matters.
>
> 1. She is a licensed trainer with Racing NSW and was the trainer of Miss Mazerati when the filly was brought to Taree racecourse on 18 December 2022 for the purpose of participating in Race 1 the Maiden Handicap over 1 000m.
>
> 2. Following running in Race 1, post-race urine sample N262927 was taken from Miss Mazerati.
>
> 3. Cobalt was certified in sample N262927 when analyzed by two Official Racing Laboratories namely, the National Measurement Institute at a level of 164ug/L and

Racing Analytical Services Ltd at a level of 150ug/L. Such levels being in excess of 100ug/L, the threshold excepted under Schedule 1, Part 2, Division 3 - Prohibited List B thresholds, part 1

4. Cobalt is a prohibited substance as it: a. Either directly or indirectly has an action and/or effect on the nervous system, the musculo-skeletal system, the endocrine system and the blood system. Such substances prohibited under Schedule 1, Part 2, Division 1 - Prohibited List B, parts 1 (a), 1 (e), 1 (f), and 1 (i).

Background and undisputed facts

10. The appellant was the trainer of Miss Maserati. The appellant lives on a property near Redbank in New South Wales and has been involved in racing and the care of horses all of her life. She comes from a proud racing family. At the earliest possible time the appellant obtained a trackwork licence as a 14 year old and commenced riding horses before school. The appellant went on to have a successful career as a jockey. Following that time the appellant commenced a formal role with Racing NSW acting as a mentor to other young jockeys. After several years in the employ of Racing NSW the appellant decided to become a licenced trainer. She had only been a trainer for a period of some months at the time Miss Maserati presented with cobalt in her system. The panel received evidence of the appellant's good character, standing, and skill within the racing industry from Mr R N Godbolt of Jack High Lodge, Port Macquarie.

11. It appeared to the panel that the charges laid against the appellant came as a shock and a source of great disappointment. It is also noted that disqualification of the appellant for some considerable time is likely to cause the appellant the obvious financial hardship of depriving her of living as a trainer.

Relevant principles

12. A breach of AR240(2) requires no fault, and may be described as a "strict liability" rule. That is to say, a breach of the rule occurs whether or not the person is at fault or deliberately or knowingly caused the horse to present with a prohibited substance in its system.

13. In the present case no deliberate wrongdoing is alleged against the appellant. To the contrary the stewards noted, and the Panel accepted, that she is a person of high regard within the racing industry.

14. Nevertheless it was accepted by the appellant that the protective purposes of the rules of racing required the imposition of some penalty on the appellant. We need not repeat here the

well-known authorities that emphasise that the imposition of penalties on licenced persons are not intended to "punish", but rather serve a "protective" function.

15. Even in cases where, such as here, there is no deliberate or knowing conduct on the part of the appellant, such strict liability rules are intended to promote vigilance on the part of licenced persons. The presence of a prohibited substance in a racehorse always has the effect of bringing racing into disrepute and needs to be punished accordingly: *The Appeal of Ms Collette Cooper* dated 15 February 2018.

16. In cases concerning the application of AR240(2) and the presentation of a horse for racing with a prohibited substance the relevant principles are oft repeated.

17. Prohibited substances cases can be described as 'generally' falling into three categories, as follows (see *In **Kavanagh** v Racing Victoria Limited (No.2) (Review and Regulation)* [2018] VCAT 291 [15]; citing ***McDonough** v Harness Racing Victoria*):

    (a) the **first**, where through investigation, admission, or other evidence, the racing authority or tribunal can establish positive culpability on the part of the licenced person;

    (b) **second,** where the racing authority or tribunal, is left with no real idea as to how the substance came to be in the horse, either because an explanation is proffered but rejected, or because a trainer concedes he or she has no idea;

    (c) **third,** the trainer may provide an explanation that is accepted and demonstrates an absence of culpability on the part of the licenced person.

18. In each case the onus is on the licenced person to explain, if the be such an explanation, how the prohibited substance came to be in the horse.

The appellant's argument as to the 'possibility' of feed contamination with cobalt reducing culpability of the appellant.

19. In the present case Mr Sharman for the Appellant made a submission that the Panel could find that there may be cases that sit somewhere between the third and second categories where, as here, the appellant had offered some explanation for the presence of the cobalt arising from certain feed, and it could not be positively ruled out by the stewards.

20. The factual basis for that submission, was the horse was fed on the day before the race with "Riverina Pre-Trainer", which had returned elevated levels of cobalt when tested by the stewards following the inspection of the appellant's stables.

21. The circumstances of the feeding were described in the appellant's evidence as follows. The horse was left to graze outside in a paddock for most of the day because she could become difficult if left in a stable. The paddock was on a separate property, a 10 minute drive from the stables. In addition to grazing outside, the horse was also given Riverina Pre-Trainer at the beginning of the day, along with lucerne chaff. It was the appellant's evidence before the Panel, that any food left with the horse at the end of the day would be taken with the horse so she could eat it that night in the stable.

22. The results of the testing of the Riverina Pre-Trainer were in evidence before the panel. According to the Report of the National Measurement Institute Report No RN1381291, dated 8 February 2023:

    (a) the Riverina Pre-Trainer contained cobalt in levels of 2.2 mg/kg;

    (b) the lucerne chaff contained cobalt in levels of 0.47mg/kg

23. The appellant also relied upon a number of statements of the Dr Curl the veterinarian called to give evidence before the stewards inquiry. The appellant urged on the Panel that taken as a whole Dr Curl's evidence did not ultimately demonstrate that the feed was *not* the source of the contamination, and left open the '*possibility*' of contamination through the feed.

24. We were taken in detail to the transcript of the Stewards enquiry. We set out below some of the relevant extracts not to be exhaustive but to provide context for the Appellant's submission. Dr Curl explained at about lines 712 and following:

> The Riverina Pre Trainer does actually seem to have quite high levels of cobalt in it and then if we're talking the Riverina Pre Trainer at the amounts suggested given that NMI are saying it's 2.2mgs per kilogram. So you're getting up to 16.72mgs of cobalt
> 715 from that and then together with the lucerne chaff, that's another 0.47. So if a horse were to eat the whole daily ration of that feed, that's 17.19mgs of cobalt, which I must say is high and would seem to be almost three times higher than the analysis on the back of their product would suggest because they would seem to imply that it has around 6mgs at that level of feed versus the 16.72 again from the NMI results. But if
> 720 the trainer is saying that that wasn't fed on race morning, I think that's very unlikely to cause the elevations that we're seeing in the urine sample.

25. Again at line 1515-1540, but in particular at lines 1529 and following Dr Curl said:

> But given that the levels in that Riverina Pre Trainer grain mix are so much higher than they state they should be, and given, you know, that we're talking over three times higher than the IFHA advice of the day before racing, I would advise the trainer to carefully consider continuing to use that feed without addressing that concern. But based on the studies at least, I'd probably stick to what I said initially, that none of the scientific data would seem to support that voluntary consumption of feeds, even at the same level that was forced into a horse's mouth, seems to exceed the threshold. And even in the oral forced administration it only seemed to do it for a number of hours. Nevertheless, the information is out there with the IFHA advice not to give anymore by mouth. Whether or not that means by oral dosing syringe, supplements in feed or the feed itself, is not entirely clear. But as I say, this feed, we're talking over three times higher than that 5mgs that they refer to in their advice.

26. It was emphasised for the appellant that Dr Curl had recognised that the levels of cobalt contained in the Riverina Pre Train feed were over three times than the "*analysis on the back of their product*", and that was in addition to the levels of cobalt detected in the chaff.

27. In light of those factual matters the appellant submitted that neither the state of the science generally concerning the presence of cobalt in horses following consumption, nor the particular evidence in this case could positively rule out the possibility that the horse returned elevated cobalt levels because of the consumption of the Riverina Pre-Trainer feed.

28. It was argued for the appellant that the consequence of such a 'possibility' – should it be found by the Panel- was that appellant's case fell below the level of culpability associated with the "second category" of *McDonough* cases.

29. In support of that submission the appellant drew upon the decision of this Panel in *In the matter of the Appel of Licenced Trainer Henley* dated 10 January 2020, in which T Hale SC was presiding with J Murphy and T King. In that case the Panel said at [23]:

> The present case comes within the second category. The evidence does not establish how the prohibited substance came to be present in the horse. **However, there may be circumstances which sit somewhere between the second and third categories.** For example, the evidence does not reveal how the administration of the prohibited substance occurred but the evidence establishes that strict procedures were in place, designed to prevent such an occurrence. [emphasis added]

30. Building upon that authority, the appellant recalled that often in the circumstances in which a trainer is presented with a positive sample result, he or she will have little if any practical

idea, less still, technical or financial resources, to demonstrate how a substance like cobalt came to be in a horses system.

31. In those circumstances, the appellant argued this was a case in which the appellant having demonstrated that the *'possibility'* that the cobalt had derived from the particular feed, the appellant has a much lower moral culpability. It was suggested that the culpability was somewhere much closer to the third category of case.

32. The appellant ultimately contended that the case was one akin to the *Matter of Licensed Trainer Russell Osborne* 19 September 2023 in which a 3 month suspension of Mr Osborne's licence. In that case the Stewards' report in that case identifies that the cracked maize in that case returned levels of cobalt in the order of 11mg/kg (much higher than the present). Although it is true that the conclusion expressed by the stewards in that report was that cracked maize was a 'possible' source of the cobalt.

The Stewards submissions

33. Mr Railton for the stewards joined issue in respect of the factual contentions presented by the appellant. The stewards pointed to whole of Dr Curl's evidence including his written report that was before the tribunal, and the parts of the transcript of his evidence in which it is made clear he had not intended to depart from the conclusion that the elevated levels of cobalt in the feed could not account for the present results.

34. In particular Mr Railton drew our attention to the evidence of Dr Curl in his Report dated 5 May 2023, and in transcript to the effect that:

    (a) The population mean urine cobalt level is less than 10 micrograms per litre;

    (b) Results of trials investigating the use of commercially available cobalt-containing supplements have demonstrated that the average half-life for washout was in the range of 4 – 6 hours and that all levels measured in urine returned to single-digit baseline figures within 24 hours (Report [13(c)]);

    (c) The scientific evidence was indicate that even after repeated administration of commercially available cobalt containing supplements, the expectation is that urinary cobalt levels return to single-digit baseline figures within 24 hours (Report [14]);

    (d) Based on the literature it is reasonable to assume that a horse with a urinary cobalt concentration of more than 100 micrograms per litre on race day has been subject to

the administration of/exposure to cobalt-containing substances on race day or within one clear day, or the administration of an extreme 'doping dose within five days of racing (Report [16]);

(e) Oral dosing of a horse with feed would be unlikely to produce the requisite concentration of cobalt, and would at most only sustain the prohibited concentration for a number of hours (transcript 767-794, 810-830, 129-1131, 1530-1540, 1589-1597)

35. The Stewards also emphasised that *Osborne's* case was one in which the horse had access to the contaminated maize on race day. That was by contrast to the circumstances of the present case where Miss Mazerati would have consumed the feed at the latest the night before the race. In those circumstances, and in light of Dr Curl's evidence, it was submitted the Panel could be satisfied that the Riverina Pre-Trainer was not the source of the contamination.

36. Further the stewards submitted that due regard must be had to the onus imposed on the licence trainer to demonstrate exculpatory circumstances, and that in the present case pointing to the existence of elevated cobalt in the feed that would have been consumed the night before a race was insufficient to reduce culpability on that account.

Consideration

37. Although persuasively presented by Mr Sharman, the Panel rejects this particular argument mounted by the appellant.

38. First, at the level of fact we accept the submission of the stewards that the evidence of Dr Curl demonstrates that the consumption of the particular feed stock, being Riverina Pre-Trainer could not have been the source of cobalt in such high levels in the horse on the day of racing.

39. That is particularly so given the appellant's evidence that the horse last had access to the feed the night before the race, and Dr Curl's evidence that the presence of cobalt diminishes rapidly after 4-6 hours, and reduces to single digit baseline figures within 24 hours. On balance we conclude that the consumption of the Riverina Pre-Trainer the night before was not going to give rise to the level of cobalt detected following the race.

40. Second at the level principle. The description of cases falling "between" certain categories is a difficult analogy. Insofar as the appellant was arguing that there may be cases of the second

kind in which no explanation can be found, but there may nevertheless be differences of moral culpability from case to case - so much may be accepted. It is of the very nature of sentencing that other cases are only but a rough guide, and no two cases will be the same even where they both concern the unexplained presence of a prohibited substance in a horse on race day.

41. But to take that submission further and to suggest it is enough to present a mere possibility of feed contamination to reduce moral culpability to the level of the third category of cases would be to ignore the burden of proof on the appellant.

42. No doubt that burden may often be a practically difficult one to satisfy for a trainer. But it serves an important protective function, including reiterating the vigilance required in feeding horses in training for the races. The onus on the trainer encourages full and frank cooperation with any investigation, so that the licenced person has an incentive to assist in demonstrating the source of contamination. It also furthers the protective purpose of ensuring there is no incentive for a licenced person to merely present a range of possibilities in the hope of evading serious penalty for deliberately wrongful conduct that cannot otherwise be explained by the stewards.

43. Insofar as the appellant had immediately cooperated with the investigation in the present case and during the inspection and investigation, those matters can be (and have been) taken into account on sentencing. But it is ultimately unhelpful to try to describe this as a case falling between the second and third category.

44. Rather it is a case of the second kind, in which the specific circumstances of the case need to be considered in order to ensure the penalty is appropriate.

45. We consider those matters next.

The Panel's consideration of general sentencing principles and comparable penalties

46. The rejection of the appellant's primary argument likening the case to *Osborne* is not the end of the matter.

47. The submissions and debate in respect of the penalty to be imposed in light of the specific circumstances of the appellant's case, the need for general and specific deterrence and consistency with other penalties imposed, can be swiftly resolved.

48. We find the circumstances of the appellant are as follows:

(a) The appellant was an inexperienced trainer, but a person of the highest regard in the racing industry from her time as both a jockey and mentor to other jockeys.

(b) The appellant pleaded guilty at the earliest possible opportunity.

(c) The appellant immediately assisted with the investigation of the stewards when notified of the positive sample result. In particular in respect of Charge 2 she gave frank evidence about the administration of particular treatments that were considered by the stewards to be the likely cause of the positive result for heptaminol;

(d) The stewards drew attention to the fact, and we accept, that the record keeping of the appellant in respect of the treatments administered to the horses in her care was less than adequate. However, that appears to arise from the absence of clear processes, and the recording of treatments partially kept in a diary and partially in formal records. As the stewards accepted this appeared to be from a failure to transpose and maintain an updated central record system and not from any deliberately wrongful conduct on the part of the appellant.

(e) We also accept the submissions made for the appellant that the poor record keeping ought not be treated as an "aggravating" factor in circumstances where it has already been the subject of separate penalty under Charge 3. Nevertheless, and importantly for the appellant, the failure to maintain stringent record keeping practices within the stables means that such a fact is not otherwise available to her as a mitigating factor, as it has been in other cases: see *Henley* [23];

(f) While it is indisputable that the appellant will face particular hardship from any suspension, it is not hardship that puts her in any different position to any other trainer who may breach the rule. In that respect, the Panel does not propose to adopt a particular discount for the appellant's circumstances: see *Sprague* [32].

49. Through synthesis of those factors and aware that the presence of any prohibited substance in a horse, no matter the circumstances, reflects poorly on racing, the Panel felt that an appropriate penalty in the present case was 10 months.

50. It was necessary to evaluate that conclusion in light of the submissions we received in respect of comparable cases.

51. The Panel was referred to the decision of the Racing Appeal Tribunal in the *Matter of Severity Appeal by John Sprague* dated 27 June 2018, in which a disqualification of 10 months was imposed (reduced from 16 month for the particular circumstances of the case).

52. We were also taken to *Henley* in which 11 months was imposed, in a case where accurate records of treatment were kept, however the appellant in that case did not plead guilty at the earliest possibility opportunity.

53. Finally, were taken in some detail to the case of *Appeal of Licence Trainer Michelle Russell* dated 15 July 2021 (R Beasley SC, Principal member, was sitting with C Tuck and S Parr) in which a suspension of 12 months was reduced by the appeal panel to 10 months, in particular in light of her many years as a trainer. Notably, however, in that case a warning had been issued to Ms Russell in respect of elevated levels of cobalt being detected in samples from that particular horse on an earlier occasion: *Russell* [32].

54. During argument before the Panel the stewards only explanation for how the present case could be treated as any more culpable or requiring the imposition of a greater penalty than *Sprague, Henley,* or *Russel*, was that in each other case the licenced person had many years experience without offence against the relevant rule.

55. However, we are not satisfied that the difference in experience levels is sufficient in the present case to require the imposition of a higher penalty. The appellant is a person of high regard and a strong reputation with racing generally. Her inexperience may even suggest a lower level of culpability for the vigilance required to avoid contamination with cobalt.

56. But more importantly, and the factors on which we place greatestes weight is distinguishing the present case from *Henley* and *Russell* is that first, the appellant pleaded guilty as early as possible (cf *Henley*); and second, there had been no earlier specific warning in respect of the presence of elevated (although not prohibited) levels of cobalt in the horse on an earlier occasion (cf *Russell*).

57. In those circumstances we are satisfied that the imposition of a penalty of 10 months disqualification is appropriate.

58. Pursuant to rule AR 238(7) we propose to defer the commencement of the penalty until Wednesday 15 November 2023 and to expire on Sunday, 15 September 2024.

Orders

59. We make the following orders:

1. Appeal allowed.
2. The period of 12 months disqualification imposed by the stewards is set aside, and in lieu thereof, the appellant is disqualified for a period of 10 months (to be served concurrently with the 2 month suspension imposed by the stewards in respect of Charge 2).
3. Pursuant to rule AR 238(7) the commencement of the penalty be deferred until Wednesday 15 November 2023 and to expire on Sunday, 15 September 2024.
4. The appeal deposit is to be refunded.

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