

Racing Appeals & Disciplinary Board

22 February 2018

HRV RAD Board Hearing – Nick Tardio

On 21 February 2018, the Harness Racing Victoria (HRV) Racing Appeals and Disciplinary (RAD) Board considered a charge issued against trainer Nick Tardio under Australian Harness Racing Rule (AHRR) 190(1).

AHRR 190(1) reads as follows:

A horse shall be presented for a race free of prohibited substances

The charge related to a pre-race urine sample collected from the horse “Kissed Flush” at Mildura on 4 April 2017. “Kissed Flush” finished ninth in Race 8, the “Mark Gurry and Associates Cup (2nd Heat)”. Racing Analytical Services Limited (RASL) reported that analysis of the urine sample revealed the sample to contain a prohibited substance, namely cobalt, above the allowable threshold of 100 micrograms per litre (µg/L). The reserve sample analysis by the Racing Science Centre (Qld) confirmed the result.

Mr Tardio was represented by Mr O’Dea (solicitor) and pleaded not guilty to the charge. Mr O’Dea and Mr Tardio participated in the hearing by telephone. Mr Svanosio appeared for the HRV Stewards. Mr Paul Zahra (Scientific Manager at RASL) gave evidence and was cross-examined.

Preliminary issues

In correspondence sent to HRV late on 20 February (received on 21 February) Mr O’Dea indicated that he would argue that Mr Tardio had no case to answer relying on rule 191(7) (set out below) and requested “copies of any certification that RASL and QRIC have with regards to their instruments used to obtain the results presented in the brief”. Documents showing the accreditation of RASL by the National Association of Testing Authorities and the HRV Policy showing approval of the Racing Science Centre (Qld) as an analytical laboratory were provided by Mr Svanosio at the commencement of the hearing.

Mr O'Dea submitted that the evidence of the results of the urine sample should be excluded because they did not comply with section 10 of the *National Measurement Act 1960* (Cth) and the relevant regulations, particularly regulation 73.

Section 10 provides:

When, for any legal purpose, it is necessary to ascertain whether a measurement of a physical quantity for which there are Australian legal units of measurement has been made or is being made in terms of those units, that fact shall be ascertained by means of, by reference to, by comparison with or by derivation from:

- (a) an appropriate Australian primary standard of measurement;*
- (b) an appropriate Australian secondary standard of measurement;*
- (c) an appropriate State primary standard of measurement;*
- (d) an appropriate recognized-value standard of measurement;*
- (e) an appropriate reference standard of measurement;*
- (f) 2 or more standards of measurement, each of which is a standard of measurement referred to in paragraph (a), (b), (c), (d) or (e);*
- (g) an Australian certified reference material;*
- (h) a certified measuring instrument;*
- (i) one or more standards of measurement, each of which is a standard of measurement referred to in paragraph (a), (b), (c), (d) or (e) and an Australian certified reference material;*
- (j) one or more standards of measurement, each of which is a standard of measurement referred to in paragraph (a), (b), (c), (d) or (e) and a certified measuring instrument; or*
- (k) one or more standards of measurement, each of which is a standard of measurement referred to in paragraph (a), (b), (c), (d) or (e), an Australian certified reference material and a certified measuring instrument;*

and not in any other manner.

Mr O'Dea submitted that the hearing was judicial in nature and that the evidence of the urine sample results relied upon by the Stewards had to comply with section 10(h). Mr O'Dea provided written submissions and other material in addition to his oral submissions. He referred to *Breedon v Kongras* (1996) (unreported, Supreme Court, WA, Owen J, 25 September 1996).

Mr Svanosio submitted that there was no requirement that RASL or the Racing Science Centre (Qld) use testing equipment that complies with the *National Measurement Act*. He provided copies of and relied upon two decisions of the South Australian Racing Appeals Tribunal (*Trotta*, RAT 11/2017 and *Borg*, RAT 2/2017).

In relation to this issue, the HRV RAD Board decided that it was not satisfied that there is a requirement that testing equipment be calibrated or otherwise approved under the *National Measurement Act* and noted that Mr O'Dea could not point to any specific requirement. Therefore, the Board did not accept that the evidence of the sample readings from RASL and the Racing Science Centre (Qld) should be excluded. The HRV RAD Board is not a court of law and the current proceedings are not a prosecution. The Board is established by legislation and operates pursuant to its own rules, which include VLR 50(1)(g) which provides that "the rules of evidence as generally applied in a court of record shall not apply".

Further, even if the *National Measurement Act* does apply, subsection 10(a) only requires that a measurement of a physical quantity "be ascertained by means of, by reference to, by comparison with or by derivation from (a) an appropriate Australian primary standard of measurement", which is the case here.

Mr O'Dea then sought an adjournment so that Mr Tardio could lead expert evidence. The expert that he proposed to call was not available immediately. This application was opposed by Mr Svanosio who submitted that Mr Tardio had not complied with VLR 50(5) which requires an expert witness report to be served 7 days prior to the hearing and states that a party may not otherwise call an expert witness without the consent of the HRV RAD Board.

The Board refused the application for an adjournment and did not grant consent for an expert witness to be called by Mr O'Dea, noting that the hearing had already been adjourned twice at the request of Mr Tardio's legal representatives (16 November 2017 and 12 December 2017) and that there had been ample opportunity for Mr Tardio and his representatives to prepare his case.

Submissions and evidence as to the charge

Mr Svanosio referred to the material in the brief of evidence, which was tendered. Mr Zahra was called and gave oral evidence.

Mr O'Dea took issue with the certificates (marked HRV 8 and HRV 11) because they indicated that the cobalt concentration was greater than 200µg/L, rather than an exact amount. He cross-examined Mr Zahra on this issue. Mr Zahra explained that the calibration range for the instruments used for testing the sample only goes to double the allowable threshold of 100 µg/L, that is, 200µg/L. Mr Zahra gave evidence that the results were accurate and that he was able to estimate that the actual reading was 215µg/L.

Mr O'Dea submitted that the certificate was not accurate because it did not show the actual reading; therefore the certification procedure was materially flawed and rule 191(7) applied.

The Board took into account the evidence contained in the brief, the oral evidence presented at the hearing and the provisions of rule 191, which states:

- (1) A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in or on a horse at, or approximately at, a particular time, or in blood, urine, saliva, or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse is prima facie evidence of the matters certified.*
- (2) If another person or drug testing laboratory approved by the Controlling Body analyses a portion of the sample or specimen referred to in sub rule (1) and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub rule (1) is conclusive evidence of the presence of a prohibited substance.*
- (3) A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse at a meeting shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the horse was presented for a race not free of prohibited substances.*

- (4) *A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the prohibited substance was present in or on the horse at the time the blood, urine, saliva, or other matter or sample or specimen was taken from the horse.*
- (5) *Sub rules (1) and (2) do not preclude the presence of a prohibited substance in or on a horse, or in blood, urine, saliva, or other matter or sample or specimen, or the fact that a prohibited substance had at some time been administered to a horse, being established in other ways.*
- (6) *Sub rule (3) does not preclude the fact that a horse was presented for a race not free of prohibited substances being established in other ways.*
- (7) *Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.*

The HRV RAD Board found Mr Tardio guilty of the charge, accepting that rules 191(1) and (2) applied and that it had not been proved “that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed”.

Penalty

Mr Svanosio submitted that it was a serious offence, that the rules in relation to prohibited substances are to ensure that the integrity of harness racing is protected and that racing is conducted safely and fairly. He also referred to other HRV RAD Board and VCAT decisions in relation to penalties for cobalt offences and Mr Tardio’s record, which includes a recent disqualification for a cobalt offence in South Australia. He submitted that an appropriate penalty in this case was a 2-year disqualification. Mr Svanosio stated that Mr Tardio did not hold a current licence, which was not contradicted by Mr Tardio.

Mr Tardio addressed the Board in relation to penalty and asked that any penalty be backdated to the date of the offence.

In determining penalty, the HRV RAD Board considered Mr Tardio's record, specific and general deterrence, the serious nature of the prohibited substance rules and penalties in relation to other cobalt cases. Mr Tardio was not eligible for a reduction in penalty for a guilty plea or cooperation with the Stewards.

Taking all of these matters into account, the HRV RAD Board imposed an 18-month disqualification to commence at midnight on 21 February 2018.

The HRV RAD Board also ordered (under rule 195) that "Kissed Flush" be disqualified from Race 8 at Mildura on 4 April 2017 and that the placings be amended accordingly.

HRV RAD Board Panel: Alanna Duffy (Chair), Rod Osborne