

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z645/2017

CATCHWORDS

Rule 190(1) of the Australian Rules of Harness Racing - prohibited substance detected in blood – charge of failing to present a horse free from prohibited substances – guilty plea - application for review of monetary penalty under sub-section 83OH(1) of the *Racing Act 1958* (Vic) – whether to affirm decision.

APPLICANT	Timothy O'Brien
RESPONDENT	Harness Racing Victoria
WHERE HELD	Melbourne
BEFORE	A Dea, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	18 January 2018
DATE OF ORDER	13 February 2018
CITATION	O'Brien v Harness Racing Victoria (Review and Regulation) [2018] VCAT 180

ORDER

Under section 51(2)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the 2 August 2017 decision of the Racing Appeals and Disciplinary Board to impose a fine of \$6,000 on the applicant is affirmed.


A Dea
Senior Member



APPEARANCES:

For Applicant	Mr WJ Allgood, representative
For Respondent	Mr S Svanosio, representative

REASONS

Introduction

- 1 On 8 April 2017, the horse *Perspective* won the Mark Gurry & Associates Cup Final (Group 3) at Mildura. The prize money was \$30,000.
- 2 *Perspective* was found to have excess bicarbonate in its blood on race day and was disqualified.
- 3 *Perspective*'s trainer is Ms Brooke Hansen. Mr Timothy O'Brien is Ms Hansen's business and de facto partner. He is a licensed stablehand.
- 4 As a result of *Perspective*'s test results, Harness Racing Victoria (HRV) charged Mr O'Brien and Ms Hansen with breaching rule 190(1) of the Australian Rules of Harness Racing (the rules). That rule says:

A horse shall be presented for a race free of prohibited substances.
- 5 The Racing Appeals and Disciplinary Board (Board) heard and determined the matter on 2 August 2017. Both Mr O'Brien and Ms Hansen pleaded guilty. The Board found the charges proved and decided to impose the following:
 - Ms Hansen – a fine of \$6,000, with \$3,000 suspended for 12 months; and
 - Mr O'Brien – a fine of \$6,000.
- 6 Mr O'Brien has applied to the Tribunal for review of the Board's penalty.¹

Background to the charges and the Board's decision

- 7 Mr O'Brien took *Perspective* to Mildura about a week before the race. *Perspective* was stabled at premises Mr O'Brien and Ms Hansen had used in the past. The stables were busy, especially on race day, with many people coming and going. Mr O'Brien was with *Perspective* for almost all of the time. He was away from the stables for a couple of hours on race day when he went to a local pub for lunch.
- 8 Ms Hansen did not go to Mildura because she was required at home to attend her full time job and to look after the other horses.
- 9 Prior to competing, a blood sample was taken from *Perspective*. On testing, *Perspective*'s blood sample showed it had a plasma carbon dioxide (TCO₂) concentration in excess of the allowable threshold: the allowable threshold is 36.0 millimoles per litre and *Perspective*'s test showed greater than 39.0 millimoles per litre.
- 10 Dr Richard Cust is a Veterinary Consultant to HRV. He made a witness statement for the Board hearing which was also before me.² Mr O'Brien

¹ Under section 83OH of the *Racing Act 1958* (Vic).

² Dated 6 June 2017.

did not challenge its contents or require Dr Cust to attend for cross-examination.

- 11 Dr Cust stated the above test results were consistent with Perspective having been administered bicarbonate, most likely on race day.
- 12 In simple terms, his evidence was that alkalising agents, such as bicarbonate, are administered to horses for three reasons:
 - To replace fluids and electrolytes lost during strenuous training and racing;
 - To lessen the chance of horses 'tying up' or getting azoturia, myoglobinuria or myositis,³ during exercise; and
 - *'By buffering the hydrogen ion or acid production at the neuromuscular end points, the time to fatigue may be prolonged.'*
- 13 Dr Cust referred to research on the effects of alkaline such as bicarbonate and expressed the view that there appeared to be a sound scientific basis for concluding that it had a performance enhancing effect as it prolonged endurance or delayed fatigue.
- 14 Mr O'Brien told the Board he had given Perspective molasses in water in the week leading up to the race. In the witness statement, Dr Cust said, to his knowledge, molasses has no known influence on the level of TC02. He added that, although molasses appears to assist horses eating feed and drinking water and several trainers in other jurisdictions are known to feed their horses large amounts, those trainers have not had their horses return higher than average TC02 levels.
- 15 Dr Cust expressed the opinion that the regular administration of molasses would not produce TC02 levels above the allowable threshold. He said the most likely cause of Perspective's test results was race day administration of an alkalising agent, most likely bicarbonate.
- 16 Perspective was tested a number of times in the following weeks with no adverse results.
- 17 An analysis of wagering data for the race on 8 April 2017 raised no concerns.

Mr O'Brien's position

- 18 At the hearing, Mr O'Brien was represented by Mr WJ Allgood. Mr O'Brien gave evidence and also made some submissions.
- 19 Mr O'Brien did not dispute any of the evidence presented to the Board as to the way the tests were conducted or as to the results. He did not challenge

³ *'Azoturia'* is an abnormal excess of nitrogen compounds in the urine which can affect horses exercised after a period of stabling, causing painful stiffness in the hindquarters and back, and dark urine containing products of muscle cell destruction; *'myoglobinuria'* is the presence of myoglobin in the urine, usually associated with rhabdomyolysis or muscle destruction; and *'myositis'* is soreness in muscle due to inflammation.

any of the other expert evidence presented to the Board, including that of Dr Cust.

- 20 Mr O'Brien did not dispute the Board's finding he had breached rule 190(1).
- 21 Having said that, Mr O'Brien was at pains to say during his evidence that he had not administered the prohibited substance, which was understood to have been bicarbonate, to Perspective.
- 22 Mr O'Brien emphatically stated neither he nor Ms Hansen would ever act in that way and did not on 8 April 2017. Mr O'Brien explained he would have been stupid to take such a risk as he knew a number of horses would be swabbed given the prize money involved and there was a real chance Perspective would be tested as it had won its heat well. Mr O'Brien stated that none of him, Ms Hansen or any of their associates placed bets on Perspective.
- 23 Mr O'Brien and Mr Allgood expressed concerns about whether HRV had taken appropriate or adequate steps to investigate how the bicarbonate got into Perspective's feed. Mr O'Brien suggested it might have been added to the horse's water/molasses mix as the bucket was sitting outside the stable and was potentially accessible by anyone. As I understood it, Mr O'Brien believed another trainer or associate of a horse in the race might have fed Perspective bicarbonate as it was a real chance of winning and that action might well have led to the horse being disqualified.
- 24 HRV has not at any stage alleged that Mr O'Brien (or Ms Hansen) administered the prohibited substance. There was no evidence to support such an allegation. Equally there was no evidence pointing to any other person.
- 25 As is apparent from its words, rule 190(1) does not require proof that the person presenting the horse *knew* it had been administered a prohibited substance – it is what is known as a strict liability offence. Rule 190(2), (3) and (4) say:
- (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.
 - (3) If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub rule (1), the trainer of the horse and the person left in charge is each guilty of an offence.
 - (4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.
- 26 Given:
- the nature and content of rules 190(1) and (4);

- there was no allegation Mr O'Brien administered the prohibited substance; and
- Mr O'Brien has not challenged the Board's finding that he presented the horse with a prohibited substance,

it is neither necessary nor appropriate for me to assess the extent of the HRV's investigation or who was most likely to have administered the bicarbonate to Perspective.

- 27 Having said that I have noted Mr O'Brien's uncontradicted evidence on affirmation that he was not the person involved.
- 28 Mr O'Brien contended that the amount of the fine imposed was excessive. In his written and oral submissions, Mr Allgood relied on:
- Mr O'Brien's evidence that neither he nor Ms Hansen administered the bicarbonate to Perspective;
 - Their continuing cooperation in the investigation and Board processes;
 - Their long history in the sport and their positive standing in the industry;
 - Their past clean records; and
 - Their desire to be ongoing contributors to the success of harness racing in part demonstrated by Ms Hansen taking up full time employment elsewhere to provide financial support to the business.
- 29 I accept those matters and also noted two personal references for Mr O'Brien which were presented to the Board.
- 30 Mr Allgood also contended that the fine was excessive as compared to like circumstances. There was specific discussion of two other cases.
- 31 In the first, a stablehand was fined \$3,000 after presenting a horse with an excess TCO2 reading. The stablehand's role was confined to delivering the horse to the track on race day and he was young and new to the industry. He was initially disqualified for six months but, on review, sought the imposition of a fine by the Tribunal. Having served 32 days of the disqualification period, the \$3,000 fine was imposed.⁴ The Tribunal decided to disqualify the trainer of the horse for two years.⁵
- 32 In the second case, both the trainer and stablehand were found guilty of presenting a horse with an excess TCO2 reading.⁶ The trainer was fined \$7,000 and the stablehand was fined \$1,500 with that fine wholly suspended. Mr Svanosio informed me that the stablehand in the second case was also young and new to the industry and only delivered the horse to the race.

⁴ Mr Charlie Martin – 8 October 2012.

⁵ Mr John Scott – 28 February 2013.

⁶ Mr Brent Lilley and Mr Kyle Marshall respectively – 11 November 2013.

- 33 Mr Allgood contended that these lesser fines were more appropriate for Mr O'Brien who was also in the role of stablehand.
- 34 Mr Allgood also contended that the fines for presentation with bicarbonate were disproportionate when compared to other prohibited substances. In particular he drew my attention to three late 2017 decisions of the Board where arsenic was detected in horses. In all three cases, fines of \$3,000 (with \$2,000 suspended for 12 months) were imposed.
- 35 Mr Allgood also referred me to a matter where a horse with meloxicam was presented for a race and a fine of \$4,000 (with \$2,000 suspended for 12 months) was imposed.
- 36 Mr Allgood contended that the penalty imposed on Mr O'Brien should be entirely set aside or reduced to no more than \$2,000.

HRV's position

- 37 At the hearing before me, Mr S Svanosio, HRV Investigative Steward, represented HRV. Mr Svanosio had also represented HRV before the Board.
- 38 Mr Svanosio contended that the evidence and submissions about:
- how the bicarbonate came to be administered;
 - the unlikelihood that Mr O'Brien would have taken such a risk in the circumstances of the race, including the high probability of the horse being swabbed; and
 - the adequacy, or otherwise of the Board's investigation.
- were irrelevant to my decision because there was no challenge to the finding of a breach of rule 190(1).
- 39 Mr Svanosio contended the fine was a *'just and merciful punishment'* consistent with others imposed by the Board for first time offences. Mr Svanosio produced a table which set out the results of 23 other hearings concerning excess TCO2 levels between March 2010 and September 2016. The outcomes show that fines of between \$6,000 and \$8,000 were imposed.
- 40 Mr Svanosio distinguished the two cases noted above which dealt with charges against both a trainer and a stablehand. He emphasised the fact that, in both cases, the stablehands were young, new to the industry and were only in charge of the horses for a short period of time. By contrast, he noted Mr O'Brien's 20 year history in the industry and the fact he was in charge of Perspective for the week leading up to the race and on race day, while Ms Hansen was not present during that period.
- 41 On the question of differences in fines for different prohibited substances, Mr Svanosio contended that the cases involving arsenic were not of assistance as it has been shown not to be a performance enhancing substance.

- 42 In the case involving meloxicam, an anti-inflammatory agent, the Board found it had been administered by a veterinarian as part of legitimate treatment. The sample was collected at a trial meeting where there was no prize money in issue and so there was no suggestion it was intended to improve the horse's performance.
- 43 Ms Svanosio contended that it would be inappropriate for me to, in effect, undertake an enquiry into the Board's decision making process for the range of substances prohibited under the rules. The Chair of the Board, Mr Brian Collis QC, presided over this matter. I was informed by Mr Svanosio that Mr Collis had presided over the other cases he relied on involving excess TC02 levels. I was told Mr Collis had also presided on cases involving other prohibited substances.
- 44 Mr Svanosio stated he was aware of the financial strain experienced by Mr O'Brien and Ms Hansen. However, he contended that the penalty imposed on Mr O'Brien was appropriate given the nature of his involvement with Perspective and the need for the penalty to meet the need for general deterrence. He referred to the seriousness of the breach of the rules, the Board's interest in maintaining the integrity of the industry and the confidence of industry participants, the wagering public and the public more generally.

Double penalty?

- 45 I acknowledge the practical consequences of the fines imposed on Mr O'Brien and Ms Hansen have been significant and have placed them in financial difficulty. To a point, it is understandable that they might feel they have been penalised twice for the same breach and that is unfair.
- 46 However, that approach does not reflect the way the rules are drafted and are to be applied or adequately recognise that people have different responsibilities for horses and to the industry.
- 47 Rule 190(3) states that *both* the trainer of the horse and the person left in charge are each guilty of an offence if a horse is presented in breach of rule 190(1). By charging both Mr O'Brien and Ms Hansen, the Stewards gave effect to the rule. Where they both pleaded guilty, it was open to the Board, and in my view appropriate, to exercise its powers under rule 256 to impose penalties on them both.
- 48 As a result, I cannot accept the contention that Mr O'Brien and Ms Hansen have been subjected to a double penalty or that they have been punished twice – their business and personal relationships were properly treated as separate from the decision to bring charges against them both and then impose penalties when they pleaded guilty.

The amount of the fine

- 49 Mr O'Brien expressed concerns about the total amount of the fine and the fact none of that imposed on him was suspended.

- 50 My role is to make a fresh decision taking into account all of the available evidence and material. I am required to make the correct or preferable decision under section 51 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) to affirm, set aside or vary the amount of the fine imposed by the Board.⁷
- 51 Although my discretion is open, it is appropriate for me to have regard to other cases as that ensures consistency and predictability for like cases. I am also able to take into account the Board's special knowledge and expertise.⁸
- 52 The transcript of the hearing shows the Board was made aware of other similar cases. It was apparent the Board was aware of Dr Cust's evidence about the particular effects of TC02 and made its decision as to amount with that in mind.
- 53 After referring to Mr O'Brien and Ms Hansen's involvement in the industry and unblemished records, the Chair of the Board and presiding member, Mr Collis QC said:

Given the level of the TCO level, this is a serious breach and it is a serious breach notwithstanding that the horse was stabled away from its normal stables for a few days prior to this race. We accept the evidence of Dr Cust that the most likely cause of the high level of TCO was a race-day administration.

The Board has to give due regard to deterrence, both specific deterrence as far as these two people are concerned, and general deterrence as far as other people in the industry are concerned.

There has to be some consistency with respect to penalty and we have taken into account other penalties which have been imposed in respect of these sorts of breaches. We also take into account the purposes of the rules relating to prohibited substances which are to ensure, as far as possible, that the integrity of racing is protected, racing is conducted on a level playing field, horses race without the assistance of drugs, racing is conducted safely with regard to the horse itself and also other drivers and other horses involved, and racing is conducted fairly from the perspective of the betting public so that a horse's performance will not vary from start to start, depending on whether or not a particular substance has been administered to it. We also give due regard to the fact that under the rules, Rules 195 and 200, the horse will be disqualified from this particular race which was race 5 at Mildura on 8 April 2017 that the prize money that the horse one will have to be returned.

Giving due regard to these matters, it is the decision of the board that Ms Hansen be fined the sum of \$6000 and that the sum of \$3000 of

⁷ See *Drake v Minister for Immigration and Ethnic Affairs* [1979] 46 FLR 409.

⁸ See the Victoria Supreme Court, Court of Appeal's decision in *Macedon Ranges SC v Romsey Hotel Pty Ltd* [2008] VSCA 45 at paragraph 53.

that be wholly suspended for a period of 12 months, so that if there are no further similar breaches, that will not have to be paid.

As far as Mr O'Brien is concerned, he was in charge of the horse some days prior to this race, we impose a fine of \$6000.

- 54 I was referred to her Honour Judge Jenkins' 2013 decision in *Pekin v Harness Racing Victoria Racing Appeals and Disciplinary Board*,⁹ which dealt with a trainer of a horse with TCO2 readings of 37.5 and 36.6. The Board imposed a fine of \$8,000 for the breach of rule 190(1), with \$2,000 suspended for 12 months. Her Honour affirmed that decision.
- 55 I accept Mr O'Brien and Ms Hansen have been very upset about this matter and that it has had a significant impact on their business. Having heard from Mr O'Brien, I am confident he and Ms Hansen will take even greater care with their horses' feed and care from now on.
- 56 On the question of the amount, I accept HRV's submissions that the fine of \$6,000 for a first offence in respect of bicarbonate was consistent with other fines. It is also comparable to the effective amount imposed on Mr Pekin which was affirmed by Judge Jenkins.
- 57 There is nothing before me which indicates Mr O'Brien (and Ms Hansen) was treated differently as compared to others who committed a like offence for the first time.
- 58 It is also clear from the above extract that the Board placed greater responsibility on Mr O'Brien's duty to present the horse clear of prohibited substances given he was in charge of Perspective in the lead up to the race.
- 59 Mr O'Brien gave evidence before me which indicated that, although the horses are in Ms Hansen's name, he had day to day responsibility not only for their care but also their training. Given Ms Hansen has commenced working out of the business on a full time basis to support their joint endeavours, the evidence suggested her involvement has been curtailed.
- 60 I am satisfied those were relevant matters and that a reasonable response to Ms Hansen's more limited involvement in how Perspective was presented on race day was to suspend half of the fine.
- 61 At the hearing I stated that, if I considered it necessary for me to hear further from the parties about differing fines being imposed for differing prohibited substances, I would make orders for further submissions or a further hearing.
- 62 I have concluded neither of those steps is necessary after having regard to Dr Cust's report and the fact that bicarbonate is known to enhance performance where arsenic is not. Given the circumstances in the case involving meloxicam, the penalty applied in that case does not assist me.
- 63 I have also given weight to the Board's particular expertise, not only in TCO2 cases, but also in relation to its role in deciding penalties in cases

⁹ (Review and Regulation) [2013] VCAT 1266.

involving other substances. The outcome in this case was consistent with the approach the Board has taken since March 2010 and with the Tribunal's 2013 decision in *Pekin*. I do not consider it necessary or desirable for me to undertake an enquiry into the range of penalties applied by the Board where the decision before me is demonstrably reasonable and fair by comparison with other like cases and on its own facts.

64 For these reasons, I have affirmed the Board's decision.



A Dea
Senior Member

