

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z688/2016

CATCHWORDS

Harness Racing, trainer – whether administered or caused to be administered anabolic androgenic steroid to horse.

APPLICANT	Mr Luke Kilduff
RESPONDENT	Harness Racing Victoria Racing Appeals and Disciplinary Board
WHERE HELD	Melbourne
BEFORE	Gerard Butcher, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	9 March 2017
DATE FOR SUBMISSIONS	30 April 2017
DATE OF ORDER	1 November 2017
CITATION	Kilduff v Harness Racing Victoria Racing Appeals and Disciplinary Board (Review and Regulation) [2017] VCAT 1780

FINDING

The Tribunal finds that the applicant administered or caused to be administered an anabolic androgenic steroid namely testosterone propionate to the horse 'United Legacy' between 1 May 2014 and 26 August 2015.

ORDER

The principal registrar is directed to fix a date for the purpose of a penalty hearing. Allow one day.

Gerard Butcher
Senior Member



APPEARANCES:

For Applicant

Mr D.C. Hallows of Counsel

For Respondent

Mr A.C. Anderson of Counsel

REASONS

- 1 The applicant (Mr Kilduff) is a trainer of horses engaged in harness racing and at all relevant times the trainer of 'United Legacy'.
- 2 On 3 June 2015 Mr Kilduff presented United Legacy a gelding, to compete in Race 7 at the Melton harness meeting. Following Race 7, a urine sample was collected from United Legacy with subsequent analysis of that sample revealing the presence of testosterone above the allowable level.
- 3 This became the subject of the first of three charges brought against Mr Kilduff by the Stewards of Harness Racing Victoria. Before the HRV, RADB Mr Kilduff pleaded guilty to this charge of presenting United Legacy to race when not free of testosterone, a prohibited substance when present in geldings at a concentration in excess of 20 micrograms per litre. The concentration was revealed by analysis as being 33 micrograms per litre.
- 4 On 6 August 2015 an out of competition sample was collected from United Legacy. Subsequent analysis of the sample revealed the presence of the anabolic androgenic steroid testosterone at a concentration of 63 micrograms per litre. This became the subject of the second charge. Mr Kilduff pleaded guilty to this charge of being a trainer of a horse when a sample is taken and when that sample reveals the presence of prohibited substance in excess of the permitted concentration as above.
- 5 On 6 August 2015 and 26 August 2015, hair samples were taken from United Legacy. Analysis of these samples revealed the presence of testosterone propionate. These results, together with the results of the analysis of urine samples taken on 3 June 2015 and 6 August 2015 led to the third charge, being one of administering or causing to be administered an anabolic steroid, namely testosterone propionate to the horse United Legacy between 1 May 2014 and 26 August 2015. I shall return to the significance of the date 1 May 2014 below.
- 6 On 4 August 2016 the Harness Racing Victorian Racing Appeals and Disciplinary Board found all the charges proven.

THE ISSUE BEFORE THE TRIBUNAL

- 7 Mr Kilduff did not contest the findings of the RADB in relation to charges 1 and 2. The issue before the Tribunal is solely charge 3 that is whether Mr Kilduff administered, or caused to be administered, testosterone propionate to United Legacy after 1 May 2014. He denied any such administration and contends that the presence of the prohibited substance is as a result of natural causes.

THE STANDARD OF PROOF

- 8 The standard of proof is on the balance of probabilities to a comfortable level of satisfaction.

THE PROHIBITED SUBSTANCE

- 9 Testosterone is an anabolic and androgenic male hormone, produced naturally in both males and females. Anabolic steroids have growth promoting effects and also have effects on cardiovascular, hepatic and endocrine systems. The use of any anabolic steroid gives an unfair performance advantage by increasing muscle mass and endurance.

PREVIOUS LAWFUL ADMINISTRATION

- 10 Prior to 1 May 2014, the administration of testosterone to horses engaged in harness racing was permitted. Between 1 January 2013 and 25 January 2014, United Legacy was administered with approximately thirteen 500mg doses of the drug Testaprop, a steroid. The latter of these dates was 493 days prior to the collection of the urine sample on 3 June 2015 and 578 days to the last hair sample on 26 August 2015.

THE HEARING

- 11 Both Mr Kilduff and Harness Racing Victoria were represented by Counsel.
- 12 Mr Anthony Pearce, an Investigative Steward at the relevant time gave evidence of the taking of a clear sample on 25 June 2016 and presented a summary of relevant samples. Mr Pearce also gave evidence that on 6 August 2015 and 26 August 2015, stable visits were conducted at Mr Kilduff's premises without warning and that no steroids were found on the premises. He also confirmed that Mr Kilduff has no prior history in relation to prohibited substances.
- 13 Mr Kilduff gave evidence. He confirmed administration of Testaprop to United Legacy prior to 1 May 2014 but denied subsequent administration.

EXPERT EVIDENCE

- 14 At the outset of the hearing, a conclave took place between Paul Zahra, the Scientific Manager at Racing Analytical Services Limited, a company that operates a National Association of Testing Authorities, Australian accredited laboratory, Associate Professor Catherine (Cate) Steel of the Faculty of Veterinary and Agricultural Sciences, University of Melbourne Equine Centre, Professor Ted Whitem, Head of School, The Melbourne Veterinary School, University of Melbourne, Dr Andrew Clarke and Dr Steven Barker, Professor Emeritus, Adjunct Professor, Department of Comparative Biomedical Sciences, Louisiana State University School of Veterinary Medicine.
- 15 It is noteworthy that Professor Barker participated in the conclave and throughout the hearing via Skype from the United States.

- 16 The experts were of considerable assistance to the Tribunal. However, it should be noted that Professor Barker took every opportunity to attack any evidence which he did not consider to be in Mr Kilduff's favour. At times this reached the point of advocacy on Mr Kilduff's behalf. Professor Barker's behaviour calls into question his role as an independent expert whose duty is to the Tribunal rather than a particular party and lessens the weight to be placed on his opinions.

MR KILDUFF'S DEFENCE TO CHARGE 3

- 17 Mr Kilduff's case can broadly be divided into two components:
- a an attack on the methodology and reliability of the tests; and
 - b possible causes of elevated readings.
- 18 Professor Barker was unrelenting in his attacks on the methodology and reliability of the tests. This is at odds with the pleas of guilty by Mr Kilduff in relation to charges 1 and 2. In any event, the attacks amounted to no more than mere speculation and were insufficient to allow me to be other than comfortably satisfied that the tests produced accurate results. Mr Zahra confirmed that tests were performed to the appropriate standard.

POSSIBLE CAUSES OF ELEVATED READINGS

- 19 It was pointed out on behalf of Mr Kilduff that, other than administration, there were the following possible causes of elevated readings:
- a Travel and exercise;
 - b Diet;
 - c Residue from previous legal administration;
 - d The horse is an outlier.

Travel and exercise

- 20 The level of exercise of United Legacy in participating in the race on 3 June 2015 and the half hour journey to the race track on that day present no more than would be expected of any horse participating and do not set United Legacy apart from others. This level of exercise was said to be capable of producing stress resulting in elevated levels. If this amount of travel and the exertion of participating in a race were capable of producing elevated levels one would expect elevated levels to be almost universal. Similarly, a one kilometre trip with swim/walk/training on 6 August 2015 is most unlikely to be so stressful on the horse as to produce elevated readings. I reject this possibility.

Diet

- 21 There was discussion that mouldy feed could produce testosterone but no evidence that United Legacy had any time consumed mouldy feed.

- 22 There was evidence that United Legacy had been given dietary supplements including Rice Bran Oil. Contamination of the oil would possibly produce testosterone but there was no evidence of contamination.

Outlier

- 23 A rig is a male animal with one or both testicles undescended or which has been partially castrated. Such an animal would have a naturally higher level of testosterone than one which has been completely gelded.
- 24 It was agreed that United Legacy is not a rig.
- 25 There was no evidence that United Legacy is otherwise naturally capable of having a level of testosterone than would be expected of a gelding.

Residue from previous legal administration

- 26 It is accepted that there were administrations of Testaprop to United Legacy while such administration was legal.
- 27 It was not contested that the last legal administration was on 25 January 2014. The following table is helpful.

Date	Days after 25/1/14	Reading
3 June 2015	493	33 m/l
6 August 2015	558	63 m/l
26 August 2015	578	negative

- 28 Additionally, there were three negative post race urine results on 24 February 2014, 25 August 2014 and 23 April 2015.
- 29 The history of three negative results after the cessation of legal administration followed by a short-term elevation of levels and followed shortly thereafter by a negative result satisfy me that the legal administration played no part in the 2015 readings. Argument about the duration of retention of testosterone in hair samples did not assist me. Similarly, the three negative results on 24 February 2014, 25 August 2014 and 23 April 2015 together with the negative result on 26 August 2015 satisfy me that United Legacy is not an outlier.

CONCLUSION

- 30 Mr Kilduff had exclusive control over United Energy. He knew how to administer Testaprop. I am comfortably satisfied that the elevated levels of testosterone did not occur naturally. I must therefore conclude, and I do with comfortably satisfaction, that the only probable means by which the elevated levels were reached was administration by Mr Kilduff. I so find.

FURTHER CONDUCT

- 31 Despite counsel for Harness Racing Victoria having included submissions concerning penalty in his final written submissions, a further hearing is to be held concerning the matter of penalty.

Gerard Butcher
Senior Member



