

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**REVIEW AND REGULATION LIST**

VCAT REFERENCE NO.Z58/2018

**CATCHWORDS**

Harness Racing – presentation charge – presence of cobalt above the allowable threshold of 100 µg/L in urine – plea of guilty – review of penalty – *Australian Harness Racing Rule 190(1)*

<b>APPLICANT</b>	Darren Cole
<b>RESPONDENT</b>	Harness Racing Victoria
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member E Wentworth
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	28 August 2018
<b>DATE OF ORDER</b>	7 December 2018
<b>DATE OF REASONS</b>	7 December 2018
<b>CITATION</b>	Cole v Harness Racing Victoria (Review and Regulation) [2018] VCAT 1930

**ORDER**

- 1 The decision of the Harness Racing Appeals & Disciplinary Board dated 19 January 2018 is affirmed.
- 2 The stay ordered by the Tribunal on 24 January 2018 is set aside with effect from 12 December 2018.

  
E Wentworth  
Senior Member



**APPEARANCES:**

For Applicant	Mr D Sheales of Counsel
For Respondent	Ms E Brimer of Counsel

## REASONS

### What this case is about

- 1 Mr Darren Cole has pleaded guilty to a charge of breaching Australian Harness Racing Rule 190(1) – that a horse shall be presented for a race free of prohibited substances – in respect of the horse “Exciteusrubycee” at Maryborough on 13 April 2017.
- 2 The horse finished fifth in Race 4. Analysis of a pre-race urine sample collected from the horse revealed the presence of cobalt above the allowable threshold. The allowable threshold is 100 µg/L (micrograms per litre) in urine. The level detected was 184 µg/L.
- 3 HRV agrees that there is no evidence that cobalt enhances performance. The basis of the charge is simply that cobalt above the threshold of 100 µg/L is a prohibited substance and as such, the horse was presented for the race not free of a prohibited substance.
- 4 On 19 January 2018, the Harness Racing Appeals & Disciplinary Board imposed a 12-month suspension of Mr Cole’s trainer and driver licences, to commence at midnight on 22 January 2018.
- 5 Mr Cole applied to VCAT for a review of the Board’s decision. By consent, on 24 January 2018 VCAT ordered that the Board’s decision was stayed until further order.
- 6 On a separate charge of failing to produce a logbook, the Board fined Mr Cole \$250.00. He does not dispute that penalty.
- 7 This case is about the penalty to be imposed on Mr Cole for breaching Rule 190(1).
- 8 Mr Cole submits that the penalty of 12 month’s suspension on the other charge is too high and that a shorter period of suspension is warranted. HRV submits that the penalty imposed by the Board is appropriate.
- 9 Rule 190(1) is a strict liability offence. Harness Racing Victoria (HRV) does not have to prove how the horse came to have the prohibited substance in its system.
- 10 Under Rule 190(2), if a horse is presented for a race in breach of the rule, the trainer of the horse is guilty of the offence. Under Rule 190(4), the offence is committed regardless of the circumstances in which the prohibited substance came to be present.
- 11 Breach of Rule 190(1) is a ‘serious offence’ under the Local Rules of Harness Racing. By s 50M of the Racing Act 1958 (Vic), the Harness Racing Appeals & Disciplinary Board was required to hear and determine the charge.
- 12 In this case, for the reasons that follow I have affirmed the decision of the Board.

### **Determining penalty – the general principles**

- 13 The power to impose a penalty for breach of the Rules is primarily protective.
- 14 It is well-established that the purposes and objects of the rules relating to prohibited substances 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 with regard to the drivers and other horses involved in the race
  - 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/medication has been administered it.<sup>1</sup>
- 15 In determining penalty, consideration must be given to the purposes and objects of the rules and to specific and general deterrence – the need to deter the individual from repeating the conduct and the need to deter others from engaging in the conduct.
- 16 Whether or not the individual pleaded guilty is also be relevant to penalty – a plea of guilty will usually reduce the penalty otherwise to be imposed because it indicates insight and remorse. Similarly, credit will be given for cooperation with the Stewards, particularly early cooperation.
- 17 The individual's disciplinary record will be relevant to specific deterrence – specific deterrence may be less important if the individual otherwise has a clean record and may be more important if the individual has a history of breaches of the Rules indicating that a higher penalty is warranted to deter them from offending in future.
- 18 The financial consequences of the proposed penalty will not be determinative – penalties such as fines, suspension or disqualification will inevitably cause financial hardship, Nevertheless they may be necessary for protective reasons, including the importance of protecting the integrity of racing by deterring the individual or others from engaging in the conduct. On the other hand, it is important that any penalty be no more severe than is necessary to achieve those protective purposes.
- 19 Like the RAD Board, the Tribunal will take into account penalties in comparable cases, mindful that consistency is important and assists those penalised and others in the industry to understand and accept the consequences that will follow breaches of particular rules. No two cases are identical however; different considerations may have more or less

---

<sup>1</sup> *Demmler v Harness Racing Victoria* [2017] VCAT 600, [23].

importance, and each case must be decided on its own facts and circumstances.

- 20 Reduced or absent culpability may in the particular circumstances be relevant to penalty but the onus will be on the trainer to prove any asserted reduced or absent culpability.
- 21 In the Racing Appeals Tribunal decision in *McDonough v Harness Racing Victoria*, referred to by Garde J in *Kavanagh v Racing Victoria Limited*,<sup>2</sup> Judge Williams discussed the relevance of culpability to penalty and the onus on the trainer to demonstrate to the Tribunal that he or she lacks culpability.
- 22 Judge Williams in *McDonough* observed that the prohibited substance cases generally fall into one of three categories:

First where through investigation, admission or other direct evidence the Authority, in this case Harness Racing Victoria, can establish before the Tribunal a positive culpability on the part of the person responsible, perhaps the trainer.

For example, the trainer administered the drug to the horse either himself or at his direction or had otherwise acted in some way as to be instrumental in the commission of the offence. Within that category the culpability may be in the class of deliberate wrongdoing or it may be through ignorance or carelessness or something similar.

Secondly, where at the conclusion of any evidence and plea the Tribunal is left in the position of having no real idea as to how the prohibited substance came to get into the horse. This may be with the trainer giving some explanation which the Tribunal is not prepared to accept or the trainer may simply concede that he has no explanation.

I might say that this second category is perhaps the most commonly experienced scenario. Indeed as again His Honour Mr Barry Thorley ... said:

"The common experience is of course that the Stewards have no idea as to how it is in the case of any racehorse that the prohibited substance came to be in it. They immediately, as is required, opened an inquiry. It is very seldom indeed that that inquiry demonstrates the actual culprit. Why is that? For the obvious reason that the sole knowledge of what transpires is within the stable and its staff and its professional advisors. No doubt one can speculate that there are many ways in which a horse may present with a prohibited substance. One can contemplate the act of some intruder by stealth of night entering the stable and administering some drug. One can contemplate the consumption by the animal accidentally of some substance left lying around negligently or the ingestion of some grasses which produce adverse results. One can contemplate that there was an actual, albeit mistaken administration within the stable of

---

<sup>2</sup> (No 2) (Review and Regulation) [2018] VCAT 291, [15].

some product which was really intended for the horse in the adjoining stall, but mistakenly administered to the horse in question. One can even imagine that the horse might lick a rail or some place which had previously been contaminated. The number of examples one can contemplate is manifold."

As I say, that is perhaps the most common scenario that the Tribunal is left with.

Thirdly, the trainer (or other person being dealt with) may provide an explanation which the Tribunal accepts and which demonstrates that the trainer has no culpability at all. An obvious example would be if the trainer could satisfy the Tribunal that his horse had been nobbled, and it had been nobbled notwithstanding the presence of reasonable measures to prevent same.

And of course there could be various other factual scenarios where the horse could somehow be the subject of the administration or ingestion of a prohibited substance without any culpability either directly or indirectly on the part of the trainer. This category represents cases where the trainer does establish to the Tribunal's satisfaction, the onus being on him, that he is free of blame, that he himself was not instrumental in the administration of the prohibited substance and that he has done all he could be expected to do to prevent same.

Generally cases will fall into one of these three categories of case. Obviously the first category where there is positive evidence of culpability to varying degrees, is the worst from the point of view of the trainer or other person concerned and high penalties as are appropriate would be likely to flow.

The second category, the lack of evidence category, may or may not end up being similar to the first category, every case depending on its own individual facts.

As to the third category where there is little or no culpability, one would expect any penalty to reflect the absence of culpability or its low level. Within this category of cases there may in appropriate situations be instances where it is deemed not to be appropriate that the sentence express denunciation or general deterrence at all and indeed where it is appropriate to impose no penalty at all.<sup>3</sup>

- 23 I was given a summary of a 2017 NSW decision, concerning Mr Ron Quinton, which would appear to be in the third category.
- 24 Two of Mr Quinton's horses returned readings of cobalt over the allowable threshold of 100 µg/L– 118 µg/L and 157 µg/L respectively. Tests of the Barastoc Phar Lap feed Mr Quinton was using found the cobalt levels of the feed were 40-50 times the 0.5 milligrams of cobalt per kilogram listed on bags taken from the stables. Apart from disqualification of the horses from their races, no penalty was imposed on Mr Quinton.

---

<sup>3</sup> [2008] VRAT 6 (citations omitted) ('*McDonough*').

## **Evaluation of the evidence**

- 25 I heard evidence from Mr Cole and from Professor Paul Mills, called by HRV, and Professor Colin Chapman, called by Mr Cole.
- 26 The evidence also included test results for samples of a number of products found during a stable visit that were subsequently analysed for cobalt concentration; and test results of samples of soil and water collected from Mr Cole's stable.
- 27 The tests of substances and liquids taken by stewards indicated nothing untoward – the highest cobalt level was 21.3 mg/kg. The report compared the results with 'the cobalt concentration of a known veterinary preparation such as a VAM injection, it contains approx. 98mg/L of cobalt [mg/kg can be approximately equated to mg/L for liquids]'.
- 28 As appeared from Professor Mill's evidence, discussed below, on the basis of Mr Cole's reported treatment regime, in the absence of a log book, the components of the regime did not of themselves explain the levels of cobalt found in Exciteusrubycee's urine on 13 April 2017.
- 29 I also had a table of results for Exciteusrubycee on 13 April 2017 and 17 May 2017 and results for other horses recording that:
- On 13 April 2017, Exciteusrubycee had levels of cobalt – 184 µg/L;
  - On 17 May 2017 her result was 9 µg/L; and
  - Between August 2015 and August 2017, 22 tests were carried out on samples from other horses trained by Mr Cole. The results ranged from 2 µg/L to 51 µg/L, and 17 of those were below 30 µg/L.
- 30 The table indicates that Exciteusrubycee result on 13 April 2017 was significantly higher than her result on 19 May and well beyond the range for other horses trained by Mr Cole and tested over a two year period.
- 31 As is apparent from Mr Cole's evidence, set out below, he could provide no explanation for the 13 April result other than that Exciteusrubycee had been eating the soil in her yard and that had somehow affected the result, and the suggestion, made for the first time under cross-examination, that she was not a great drinker (and therefore may have been under-hydrated).

## **Mr Cole's evidence**

- 32 In the record of interview with Stewards on 17 May 2017 Mr Cole said:
- He had never given cobalt and there was no way he could have given cobalt to any horse.
  - The horse did nothing different in the week leading up to the race. It would not have missed being worked every day. It had normal feeds, normal supplements or injectables, but not on the day before or race day.

- He does not withhold water on race day, the horses have full access to plain water.
- There were no health issues with the horse or any concerns leading up to the race, no vet treatments or need to call the vet.
- When asked if there was anything different, he replied, 'Well she's actually not a great eater any more but I think that's because she's little'.
- When asked if there was anything out of the ordinary, he replied, 'She's slow. She's no good. She doesn't know she's Exciteusinthecity's [sister], I'll tell you that, and I don't think if I gave her two litres of cobalt she'd improve'.
- When asked about his knowledge or understanding of cobalt, he replied 'Nothing, cause I don't know anything about it. I know quite a few people have been done by it, but I don't know - I wouldn't even have a clue what it's meant to do'. He said he 'wouldn't even know what it comes in'.
- He had not kept a log book since December (2016) when he was in Perth – he left it over there and hadn't got back into it since.
- He said the 'topliners' get the regular treatment regime but Rubycee probably did not because 'she's not much good, not worth wasting the money on. No extras in her feed. She just gets the basics'.
- He does not give or inject B12 and has not used VAM for 10 years 'if ever', and doesn't inject Hemabuild.

33 In the record of interview with Stewards on 21 July 2017, Mr Cole said that:

- He and his wife had sat up for nearly 24 hours looking for a solution because they felt they had been accused of something they have never done. He said the only thing they could come up with was the soil which she had been eating and licking, that they had stopped putting her in her normal yard because she was poohing extremely large amounts of dirt. They thought that could be the only reason. So now they put her in the box at night or on the grass when racing – she never used to leave the yard except for on a Saturday.
- Rubycee would have received Tripart two days before the swab was taken at Maryborough but not on race day and not on the day before.
- He is against cheating and said that was why he was furious at the first interview, for which he apologised. He said he was in total shock.

34 In his evidence at the hearing Mr Cole said that:

- For the last five years he has been more or less full time as a trainer but he also owns a pub.

- When asked whether he had any explanation as to how the cobalt got in to the horse he said that on the day he was told about the result, he did not believe it. He thought it was a shame because the horse had come from the RSPCA and although he had got her back from skin and bone she was not much good.
- In cross-examination he agreed that he had no concerns about her, she had normal feeds, he didn't change her feed.
- He confirmed that she had full access to water but also said that she was not a great drinker. He agreed he had never said that before, that he had told the stewards she was not a great eater but it was the first time he had mentioned not drinking.

### Expert evidence

- 35 Professor Mills is a professor of veterinary pharmacology in the School of veterinary science at the University of Queensland. He was awarded a PhD in veterinary pharmacology in 1994, which involved investigation of the effects of inflammation of drug kinetics in racing animals. He is a member by examination of the Chapter of Veterinary Pharmacology in the Australian and New Zealand College of Veterinary Science. He is the Australasian editor for the Journal of Veterinary Pharmacology and Therapeutics. He has over 150 scientific publications.
- 36 Professor Chapman has qualifications and practical and research experience in both pharmacy and veterinary science, holding high level academic positions in pharmacy. He is currently Professor Emeritus of Pharmacy at Monash University and adjunct professor at James Cook University.
- 37 Each is well qualified. In assessing whether there was an explanation for the level of cobalt found in Exciteusrubycee urine that reduced or extinguished Mr Cole's level of culpability, however, I have given greater weight to the opinion of Professor Mills. I did so principally because Professor Mills based his conclusions on the evidence of the particular horse's circumstances, the various test results and the reported feed, water and supplement regime.
- 38 Professor Chapman's report was more in the nature of a criticism of the use of urine tests as a way to read cobalt levels and a criticism of the setting of the threshold.
- 39 In Professor Chapman's view, urine tests are not an accurate way to read cobalt levels, because urine "thickness" or "density" can profoundly influence the concentration of cobalt in urine. He said that a major reason horse urine varies in concentration is dehydration, which is in turn associated with water deprivation and/or excessive perspiration. In his view, urinary drug concentration should be adjusted to allow for the effect of USG (urine specific gravity).



- 40 Professor Chapman opined that it is possible that the high concentration of cobalt detected in urine sample provided by the horse was because the urine sample was concentrated and/or contained a lot of vitamin B 12.
- 41 He conceded, however, that he had extrapolated from general reasons why a horse may have a higher result (dehydration, intake of vitamin B12) and had not referred in his report to the evidence of the particular horse's feed, water and supplement regime. Relevantly, there was no evidence that the horse was dehydrated, the evidence was that water was not withheld, there were no concerns about the horse and Mr Cole did not administer B12. Professor Chapman had assumed that Mr Cole had not given Tripart, whereas the evidence was that Tripart (which contains cobalt) had been given.
- 42 He also conceded that if the horse's urine concentration was normal – that the horse was not dehydrated – then 184 mcg/L could be taken as accurate.
- 43 I observe here that it is well beyond the scope of this review application and the Tribunal's jurisdiction to determine the appropriate threshold level for cobalt to be a prohibited substance or to seek to resolve scientific debate about the valid way to test for cobalt.
- 44 I note, however; Professor Mills' evidence that the threshold was established to acknowledge that a small amount of cobalt and vitamin B12 will be present in all horses and to account for many variables, including hydration, since it could be expected that horses may be presented to race with some variations in physiological status. The common factor, however, will be that the horse is fit to race. Dehydration, which is a medical term, would prevent a horse racing.
- 45 In Professor Mills' opinion:
- After analysing the constituents of the various products said to have been given to the horse, the reported treatment regime was unlikely to have resulted in the cobalt levels detected in the horse's urine sample on 13 April 2017.
  - After considering the analysis of samples of soil and water collected from Mr Cole's stable, noting that the concentrations of cobalt in the water were less than 1 mg/L and in soil between 8.7-12 mg/L, the latter appeared similar to what has been reported in soils generally in Australia. On that basis, his view was that the soils and water in the stables of Mr Cole were similar to many other stables in Australia. Furthermore, the cobalt concentrations would only be relevant to cobalt measured in urine if the horse actually ate the soil (which he thought was highly unlikely) or consumed feed grown in the soil (since the cobalt content in forage is related to soil concentrations).
  - In his supplementary report he expressed his opinion that it was highly unlikely that the cobalt concentration in the soil would have significantly contributed to the high levels of cobalt in the urine of the

horse for several reasons: cobalt is not well and is highly variably absorbed from the gastrointestinal system in the horse and may be absorbed based on need; even administration of high levels of cobalt in the form of supplements by mouth. The same horse returned urinary cobalt concentration of 9 ng/mL one month later – it would be unexpected to have significant changes in behaviour – i.e. eating soil – over this period of time.

- Referring to a number of other products found during the stable visit that were subsequently analysed for cobalt concentration, he opined that if one or more had been administered prior to racing, particularly if injected, they could possibly have contributed to the cobalt levels detected, depending on the total amount of product administered and how close to sample collection this occurred. He noted, however, that he was not stating that any of these supplements were indeed administered to the horse, and one could not be certain how much and when any additional supplements could have been administered, but that some additional administration of cobalt must have occurred in the period leading up to the sample collection for the cobalt concentration reported to have been measured. He described this as a likelihood, being further supported when considering the 17 May 2017 sample which returned a cobalt concentration of 9 mcg/L which is similar to the normal range reported from many other horses in Australia.
  - Professor Mills' conclusion was that some additional cobalt must have been administered, and much closer to race day, than indicated.
  - He agreed in cross-examination that accuracy of labelling was an issue and said that anyone using unregistered products has to be careful – that is a message of general importance
  - He agreed in cross-examination that there were no specific or reported cases of long-term harm from cobalt to horses that have participated in studies – the conclusion is based on studies in other species
- 46 I accept Professor Mills' opinion that the reported treatment regime was unlikely to have resulted in the cobalt levels detected in the horse's urine sample on 13 April 2017. I also accept his opinion that it was highly unlikely that the cobalt concentration in the soil would have significantly contributed to the high levels of cobalt in the urine of the horse.
- 47 While there is a possibility that the horse ate the soil and that doing so may have resulted in the cobalt found in the urine, I am not satisfied that this is any more than speculation. At the conclusion of the evidence it remained an unproven possibility.
- 48 Dehydration is not a possibility open on the evidence. Not only was water available for the horse, Mr Cole had no concerns about her.

- 49 It is remarkable, in my view, that on 13 April 2017, Exciteusrubycee had levels of cobalt – 184 µg/L significantly above her 17 May 2017 result of 9 µg/L; and significantly above the levels found in other horses trained by Mr Cole tested between August 2015 and August 2017 – 22 tests, with results ranging from 2 µg/L to 51 µg/L, and 17 of those below 30 µg/L.
- 50 I am not satisfied that the difference leads inevitably to the conclusion that Mr Cole administered cobalt or a substance containing cobalt at sufficient levels on race day and I do not adopt the view of Professor Mills that it is likely that additional cobalt was administered on race day. I am satisfied; however, that something out of the ordinary happened on that day.
- 51 Overall, while no deliberate wrongdoing has been proven, the evidence does not discharge the onus Mr Cole has, to prove reduced or absent culpability.
- 52 In my view this case falls into the second category in *McDonough*: at the conclusion of the evidence the Tribunal is left in the position of having no clear evidence of how the substance came to be present in the levels detected and I decline to speculate or find, in the absence of positive evidence, that cobalt was deliberately administered.

#### **Penalty: application of the principles**

- 53 HRV provided a table of Harness Racing Victoria cobalt matters since 2014 at the Board and VCAT. Of the six presentation cases,<sup>4</sup> the penalties ranged from 12 months suspension to 15 months disqualification.
- 54 The cases in the table show a range of circumstances – whether or not the trainer pleaded guilty or not guilty, whether they had prior offences, how long they had been licensed, how far above the allowable threshold (which until November 2016 was 200 µg/L) was the detected level of cobalt, and what assessment was made of culpability. None is a direct comparison in my view.
- 55 I also had a summary of the 2017 NSW decision in *Quinton*, referred to above. It is not a comparable case in my view.
- 56 Mr Sheales, on behalf of Mr Cole, submitted that historical penalties where the threshold was higher should not be used as a direct comparison – the Tribunal should take into account that the results in this case were below the previous threshold. Further he submitted, historical penalties are too high and should not be used as a comparison, because the basis of them – that cobalt enhanced performance and caused harm – has been subsequently disproved.
- 57 There is no doubt that the allowable threshold has been lowered – from 200 µg/L to 100 µg/L. HRV has the power to set the thresholds and to change them if it considers appropriate. In my view, the penalties in previous cases nevertheless provide a useful indication of the range of penalties that are

---

<sup>4</sup> Demmler (2014), Farrugia (2015), Hardy (2015), Grech (2016), Graham (2016), Chisholm (2017).

open in a case where the allowable threshold has been exceeded, as it was in this case. None, in my view, provide a direct comparison.

- 58 I agree that there was a view taken in previous cases that cobalt enhanced performance. The HRV concedes that there is no evidence that it does so. Previous cases also refer to the suggestion in the published literature that cobalt, administered in very high doses, may be harmful, and Professor Mills in his report referred to the studies, but it is not submitted on behalf of HRV that I should find that cobalt at the levels detected in Exciteusrubycee caused harm.
- 59 Where the offence involves a prohibited substance, as in this case, the propensity of the substance to cause harm to the horse may be relevant to penalty, but it remains the case that a decision has already been made that the substance is prohibited and allowable thresholds have been set at different times. It is not my role to determine whether cobalt should or should not be a prohibited substance and if so, what should be the allowable threshold.
- 60 In this case, Mr Cole's record is in his favour. He has been a licensed trainer for 27 years in total. His offence record shows no serious prior offences. He was fined \$500.00 in June 2016 for a race day administration matter which, as conceded by HRV, signifies the lower end of the scale.
- 61 Mr Cole's guilty plea is also in his favour. Although he expressed strong disbelief when initially told of the test results, he cooperated with the stewards' investigation.
- 62 This is not a case, in my view, where disqualification is required in the interests of specific deterrence.
- 63 On the other hand, Mr Cole has not proven that he had reduced or absent culpability.
- 64 General deterrence is important. This is a strict liability offence. Trainers have the responsibility of ensuring that horses are not given anything – whether feeds, supplements or direct administration that would take a horse's cobalt level over the allowable threshold. They have the responsibility to learn about and pay attention to the cobalt concentrations in commercially available supplements including injectables. They also must take into account the message of general importance Professor Mills referred to, that labelling may not be accurate and anyone using unregistered products has to be careful.
- 65 In my view, suspension of Mr Cole's owner and trainer licences for 12 months appropriately addresses general deterrence. In the circumstances I will affirm the Board's decision and lift the stay.

**E Wentworth**  
**Senior Member**

