

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANTS: MR ROSS OLIVIERI

APPLICATION NO: 22/11409

PANEL: MR ROBERT NASH (CHAIRPERSON)
MR PHILLIP GLEESON (MEMBER)
MS JOHANNA OVERMARS (MEMBER)

DATE OF HEARING: 20 JANUARY 2023

DATE OF DETERMINATION: 10 FEBRUARY 2023

IN THE MATTER OF an appeal by ROSS OLIVIERI against a determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 6 December 2022 to impose a disqualification of 6 months for breach of Rule 190(1), (2) and (4) of the Rules of Harness Racing

Mr Olivieri self-represented.

Mr Denis Borovica represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Overview

1. On 10 February 2023, this Tribunal dismissed the Appellant's appeal against conviction for the breach of Rule 190(1), (2) and (4) of the RWWA Rules of Harness Racing ("Rules") and allowed the appeal against penalty with the penalty of 6 months disqualification imposed by the RWWA Stewards substituted with a disqualification for a period of 3 months.
2. Detailed oral reasons were given when the determination was announced on 10 February 2023. The following reasons are the Tribunal's written reasons.

Reasons

3. Ross Olivieri (**Mr Olivieri** or **the Appellant**) appealed against the conviction and penalty imposed by the RWWA Stewards on 6 December 2022 where they imposed a disqualification of his trainer's licence for 6 months, for presenting the mare, **TAKING THE MIKI (Horse)** at Race 5 at Northam on 3 September 2022 not free of the prohibited substance, Pregabalin.
4. Rule 190(2) provides that if a horse is presented for a race otherwise than in accordance with Rule 190(1), the trainer of the horse will be guilty of an offence. Rule 190(1) provides that a horse shall be presented free of prohibited substances. It is not in issue that Pregabalin is a prohibited substance.

5. Rule 190(4) provides that an offence will be committed under Rule 190(2) regardless of how the prohibited substance came to be in the horse.

Background

6. Mr Olivieri has been a licensed trainer for approximately 45 years. He is married to Dr Jemma Hayman, a veterinarian and the managing owner of the Horse.
7. On 2 November 2022 Dr Buddhika Dorakumbura (**Dr Buddhika**) from the racing chemistry laboratory, ChemCentre, reported that Pregabalin was confirmed in the post-race urine sample taken from the Horse, after it won Race 5 at Northam on 3 September 2022.
8. In response to the report of the positive swab, on 4 November 2022, RWWA Industry Veterinarian, Dr Judith Medd, and Senior Investigative Steward, Paul Criddle, attended Mr Olivieri's stable in Oakford.
9. At the investigation, Mr Olivieri's medications and medical records for the Horse were inspected and confiscated. No entries of Pregabalin were identified. Dr Hayman's order records were scrutinised and no orders of Pregabalin were identified.
10. Mr Olivieri and Dr Hayman were unable to explain the presence of Pregabalin in the post-race sample and both stated that neither of them had ever heard of Pregabalin before they were advised of the positive swab.
11. Mr Olivieri initially queried whether the ChemCentre could have made a mistake. Dr Hayman, however, conceded that there was nothing untoward in the manner in which the post-race sample was taken.
12. Following his interview, Mr Olivieri advised that it had come to his attention that a licensed employee of his, Graham Playle, had been prescribed Lyrica (Pregabalin) and had been on the medication for many years.
13. Mr Playle was interviewed and said he had been prescribed Pregabalin by his doctor and had been on this medication for approximately 12 years. Mr Playle said he handled the Horse on a regular basis but did not believe he had been the cause of the presence of Pregabalin in the Horse's post-race sample.
14. On 5 November 2022, Mr Criddle received Mr Playle's prescription for Lyrica from Dr Hayman. Dr Hayman advised that upon further discussion with Mr Playle it was established that he was on annual leave (31 August 2022 to 12 September 2022) and did not attend the stable during this period.
15. Mr Olivieri and Dr Hayman both considered the presence of Pregabalin in the Horse's swab must have been the result of an inadvertent contamination and were pursuing their own investigations to come up with a plausible explanation.
16. On 7 November 2022, Mr Olivieri emailed Mr Denis Borovica, Chief Racing Integrity Officer at RWWA, noting that his dogs were being treated with Gabapentin for injuries they had sustained which required surgery and he queried whether there may be any connection between the two substances. He wrote that he and Dr Hayman had never '*heard of pregabalin let alone used it on ourselves or a horse*'.
17. It was later confirmed by the ChemCentre that Gabapentin did not contain Pregabalin.

The Stewards Inquiry

18. At the Stewards inquiry on 24 November 2022, Mr Olivieri accepted that the offence was one of strict liability and plead guilty. He continued to assert that he and Dr Hayman had never treated a horse with Pregabalin and contended there had been an inadvertent contamination. He hypothesised that Mr Playle must have carried a Lyrica (Pregabalin) capsule on his person which could have dislodged from his clothing and accidentally fallen into the Horse's feed.
19. Mr Olivieri provided a copy of his patient medication histories and a letter from his primary pharmacist, Georgina Dutry. The letter stated that Pregabalin is prescribed for humans in low doses initially in order to monitor for possible side effects, which can be 'nasty'. She stated that it would not be appropriate to give an animal Pregabalin unless it was being constantly monitored for side effects, such as drowsiness and dizziness. She said there was a prospect that giving Pregabalin to a horse may cause it to become tired, possibly agitated and confused. She could not recall a vet ever prescribing Pregabalin for a horse in her 25 year career.
20. The Stewards considered the theorised possibility by which a capsule may have been inadvertently carried by Mr Playle and fallen into a horse's feed was highly speculative and inherently unlikely and dismissed it.
21. Dr Buddhika gave evidence that this was the first time the ChemCentre had ever reported a reading of Pregabalin. The in-house screening limit for the purposes of testing was established as 20 nanograms per ml. As the detected amount was over 20 nanograms, she guessed it was 30 nanograms per ml. To provide some context to the level of the substance that was detected, she stated that in humans the therapeutic concentration ranges from 1.3 microgram per ml to 7.5 microgram per ml in plasma, being in the order of 100 times higher than the detected level in the Horse's urine. She said therefore the level detected was low.
22. As to the nature of Pregabalin, Dr Medd gave the following evidence:
 - a) it acts on the mammalian central nervous system, so as to reduce the intensity of pain signals being sent to the brain;
 - b) it is an analgesic, anticonvulsant and anxiolytic;
 - c) it does not occur in nature and is synthesised in a laboratory;
 - d) it is manufactured for human use to treat neuropathic and nerve pain as an adjunct to controlling seizures and also treating anxiety disorders;
 - e) there is no registered form available for animals, so it would have to be prescribed in the human form or a compounded form would have to be made up by a chemist;
 - f) the potential use of the drug could be masking lameness and so the drug is classified as being 'therapeutic';
 - g) it is excreted in unchanged form and therefore does not alter its nature as it passes from the blood stream into a mammal's urine; and
 - h) a side effect of Pregabalin is the potential for sedation.
23. When reaching their decision as to penalty, the Stewards did not accept that there was a plausible explanation of inadvertent contamination. Accordingly, in determining the penalty to be imposed, the Stewards did not consider there could be any mitigation afforded on the basis that Mr Olivieri had provided a plausible explanation for the presence of Pregabalin.

The Appeal

24. By his Notice of Appeal dated 9 December 2022, Mr Olivieri appealed against the penalty imposed on the basis that it was excessive in all the circumstances, being a contention that the penalty was manifestly excessive.

25. Shortly before the hearing of the appeal on 20 January 2024, Mr Olivieri filed amended appeal grounds which were as follows:
- a) **Ground 1 - Appeal against conviction** - that based on the irrelevant trace level amount detected the Stewards have erred in their application of Rules 188, 188A, 190(1), (2) and (4) and 195;
 - b) **Ground 2 - Appeal against penalty** - the penalty being a disqualification of six (6) months is excessive in all the circumstances of the case; and
 - c) **Ground 3 - Appeal against TAKING THE MIKI being disqualified** - that based on the irrelevant trace level of Pregabalin claimed detected, the Stewards have erred in their application of Rules 188, 188A, 190(1), (2) and (4) and 195.
26. The Stewards did not oppose the amendment of the grounds of appeal, even though grounds 1 and 3 both challenged the conviction in circumstances where Mr Olivieri had pleaded guilty before the Stewards.
27. Mr Borovica, on behalf of the Stewards, contended that the appeal should be dismissed on the grounds that there was no merit in the appeal against conviction as this was a strict liability offence to which Mr Olivieri had already pleaded guilty. He submitted the penalty was appropriate in all the circumstances because Mr Olivieri's further evidence did not provide a plausible explanation or theory for the contamination. He further submitted that if the theory of contamination being put forward by the Appellant had any reasonable prospect, it ought to be referred back to the Stewards for further consideration and determination.

New Evidence Before The Tribunal

28. At the appeal hearing, Mr Olivieri sought to rely on the following further evidence:
- a) a report dated 6 January 2023 from Dr Thomas Tobin (**Dr Tobin**), a US based veterinary surgeon with an international reputation for his specialised equine knowledge and his knowledge of medications, drug testing and therapeutics;
 - b) a statutory declaration of his stable hand, Graham Playle, dated 11 December 2022;
 - c) a statutory declaration of himself dated 18 January 2023; and
 - d) written submissions, which included pictures of the yards where the Horse was kept.
29. The Stewards did not object to the report from Dr Tobin being tendered at the appeal nor the written submissions. They did object to the statutory declarations of Mr Olivieri and Mr Playle being received into evidence.
30. In the exercise of its discretion, the Tribunal allowed the additional evidence to be received into evidence.
31. Mr Playle, in his statutory declaration, said that at times he urinated on the grass in an area where the Horse could reach when grazing. He considered it was possible for the contamination to have come from the Horse grazing over the area he had urinated over, noting his daily dose of Pregabalin was 600mg and, therefore, was quite high. He said he did not raise this originally since at that time he was not aware how Pregabalin was processed through his system.
32. Mr Olivieri, in his statutory declaration, said that he had raised the issue of Mr Playle urinating at the stables as a possible cause of the contamination at the time of the investigation but that it had been dismissed by Mr Criddle as a possibility.

33. Dr Tobin's evidence was that a level of 30ng/ml of Pregabalin in the post-race urine sample represented a plasma concentration of about 1ng/ml, which he described as a trace level. He said that Pregabalin is excreted unchanged in human urine and is well absorbed orally. Consequently, Pregabalin can readily transfer in the environment from a human's urine to a horse, giving rise to trace level identification.

Grounds 1 and 3

34. In support of Grounds 1 and 3, Mr Olivieri contended that on a proper interpretation of Rules 188, 188A, 190(1), (2) and (4) and Rule 195, no offence under Rule 190(2) could be committed in circumstances where only a trace level of prohibited substance is detected in the Horse. He argued that the amount of Pregabalin detected in the Horse's post-race urine sample was so miniscule, that it was incapable of having any effect on the Horse's mammalian body systems and therefore did not constitute a prohibited substance within the meaning of Part 12 of the Rules. He referred to section 188A(1)(a) that defines prohibited substances as being substances that are capable at any time of directly or indirectly having an effect on a horse's mammalian body systems.
35. Mr Olivieri's argument focussed on the words of Rule 188(1)(a). That provision must be considered and construed in context. Rule 188A(1)(b) provides a further definition of prohibited substances as including analgesics and anticonvulsants without reference to them having the capability of having an effect on the mammalian body system.
36. The evidence is that Pregabalin was both an analgesic and anticonvulsant. Therefore, as such, it satisfies the definition of a prohibited substance under both paragraphs (a) and (b) of Rule 188A(1).
37. Rule 188A(1)(c) provides that a prohibited substance includes the metabolites, artefacts and isomers of the prohibited substances referred to in 188A(1)(a) or (b). There is no requirement that such metabolites, artefacts or isomers have any effect on mammalian systems.
38. In the Tribunal's view, it is clear that when the entirety of Rule 188A is considered, the reference in Rule 188A(1)(a) to the capability of a prohibited substance is directed to identifying the characteristics and nature of the substance, rather than requiring proof that in a particular instance the substance was detected in such quantity or concentration so as to actually be capable of having an effect on any of the mammalian systems of the Horse in question.
39. Grounds 1 and 3 are accordingly dismissed.

Ground 2 – Appeal against Penalty

40. The approach this Tribunal takes when reviewing penalties imposed by the Stewards, which involve an exercise of discretion, was set out by the Tribunal in *Prentice Appeal 816* at paragraph [59]:

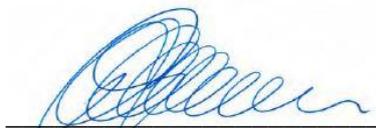
'The Tribunal will not substitute its own opinion for that of the Stewards simply because it may disagree with the Stewards' opinion as to what the appropriate penalty ought to be. The Stewards' deep understanding of the industry and how actions of its participants impact the industry and perceptions of the industry, are matters which are accorded considerable weight by this Tribunal. However, if it is demonstrated that a penalty imposed by the Stewards is manifestly excessive, or if the Stewards have misdirected themselves in some material way, or their decision has been the product of taking into account an irrelevant consideration or of a failure to take into account relevant consideration, then it is open for this Tribunal to reconsider the Stewards' determination of the penalty imposed. That is consistent with the approach that appeal courts take in reviewing criminal sentences on appeals: Dinsdale v R [2000] HCA 54 at 57 to 58, and reflects what has been said in numerous previous decisions of this Tribunal.'

41. In the case of presentation offences, if there is a plausible explanation for an inadvertent contamination, such an explanation may serve to mitigate the penalty imposed.
42. At the hearing of the appeal, Mr Borovica submitted that the Tobin Report offered nothing more than further hypothetical conjecture or speculation as to a potential contamination theory and contended that it took Mr Olivieri's position no further than he had taken it himself before the Stewards at the Inquiry.
43. Contrary to the Stewards' submission, in our view when considering the evidence as a whole, a reasonably plausible inference can be drawn that the trace amount of Pregabalin in the Horse's post-race urine sample was the result of an inadvertent and unwitting transmission from Mr Graham Playle to the Horse.
44. The following evidence supports the drawing of that inference:
 - a) the amount of Pregabalin found in the Horse was a trace quantity;
 - b) Mr Graham Playle was receiving a high dosage of Pregabalin;
 - c) Mr Playle worked in close physical proximity with the Horse;
 - d) Pregabalin is transmitted from the bloodstream into urine unchanged in form;
 - e) Pregabalin is a drug prescribed for humans and is not prescribed for use in horses;
 - f) there are significant risks of adverse side effects when using Pregabalin, including drowsiness, dizziness and confusion; and
 - g) save for the fact that Mr Playle was being prescribed Pregabalin, there was no evidence that Pregabalin had ever been used in the Olivieri stables either for humans or horses.
45. In our view, when the evidence is considered as a whole, a reasonably plausible inference can be drawn that the trace amount of Pregabalin found in the Horse's post-race urine sample, was the result of inadvertent and unwitting transmission from Mr Playle to the Horse. It seems the most probable transmission pathway was via Mr Playle's urine.
46. The Stewards were at a disadvantage in that they did not have the benefit of all the evidence that was before the Tribunal on the appeal. The finding by this Tribunal that there was a reasonably plausible inference that the positive swab was the result of an inadvertent and unwitting transmission from Mr Playle to the Horse, has been to a significant degree, drawn from and supported by the additional evidence adduced on the appeal, in particular the evidence of Dr Tobin. As a consequence, the Steward's determination of penalty did not allow for any mitigation that arises from that finding.
47. That said, however, in our view the Stewards did not err in determining that a disqualification was the appropriate form of disposition in this case.
48. The finding that there exists a plausible explanation for an inadvertent contamination does not exonerate Mr Olivieri nor render him entirely blameless. Rule 190(4) makes clear the offence is one of strict liability. There is a heavy onus on trainers to take all necessary precautions to avoid the risk of horses involved in racing from ingesting prohibited substances. That requires that trainers put in place hygiene standards in their training facilities that avoid such risks.
49. The need to maintain the integrity of racing is of paramount importance. The principles enunciated by Anderson and Owen JJ in *Harper v Racing Penalties Appeal Tribunal* (1995) 12 WAR 337, at pages 347 to 348 and in *R v Disciplinary Committee of Jockey Club, Ex parte Aga Khan* [1973] 1 WLR 909, at 914 (which are quoted in the Stewards' determination at paragraph 7) apply.

50. Mr Olivieri does not have a blemish free record. He received a 12 month disqualification for TCO2 in 2011, a 7 month disqualification for TCO2 in 1999, and a fine for Di-isopropyl-amine in 1991.
51. As Pregabalin is not a recognised veterinary registered medication, animal welfare concerns must be considered. It is well established that where human substances are detected and not commensurate with anti-inflammatory effect, disqualifications have been the mode of penalty in Western Australia.
52. We respectfully adopt with approval the comments made by the Stewards at paragraph 33 of their reasons:
- 'The detection of substances that are intended for human use in racing animals elevates the seriousness of offences of this kind. This is because such substances, unless prescribed for off label use by a veterinarian, have no place in the animal. To issue penalties consistent with that of routine therapeutic veterinary medications such as anti-inflammatories would be inconsistent and fail to reflect the seriousness of these other substances.'*
53. To substitute the penalty with a fine would not be appropriate and would not reflect the seriousness of an offence of this nature.
54. Having regard to all of the matters personal to Mr Olivieri and to the nature and circumstances of the offending, the Tribunal considered that the penalty of 6 months disqualification imposed by the Stewards should be substituted with a penalty of 3 months disqualification.
55. The Tribunal gave serious consideration to referring the matter back to the Stewards for a further hearing in light of the fresh evidence from Dr Tobin but determined not to adopt that course. In the Tribunal's opinion, it would have been difficult for the Stewards to undertake a rehearing without facing an accusation that they were tainted by prejudice, especially given how firmly it was argued on behalf of the Stewards at the hearing before the Tribunal that Mr Tobin's evidence offered nothing more than further hypothetical conjecture or speculation as to a potential contamination theory.
56. The Tribunal also considered that it would be highly undesirable for the matter to be sent back to the Stewards for rehearing given Mr Olivieri had already served two months disqualification, leaving him with the uncertainty as to whether he would receive a further period of disqualification after a further hearing by the Stewards with the prospect of yet a further appeal.
57. The Tribunal considered that in all the circumstances of the case, the most just and equitable way to proceed was to determine the appeal and reset the penalty on the basis of the materials before it.
58. Accordingly, the appeal against conviction was dismissed and the appeal against penalty was allowed with the disqualification of 6 months substituted by a disqualification of 3 months.



ROBERT NASH
CHAIRPERSON



PHILLIP GLEESON
MEMBER



JOHANNA OVERMARS
MEMBER

