APPEAL NO. 776

DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**BRUCE ARNOLD STANLEY**
APPLICATION NO:	**A30/08/776**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MS K FARLEY SC (MEMBER)**
DATE OF HEARING:	**19 JULY 2016**
DATE OF DETERMINATION:	**28 JULY 2016**

IN THE MATTER OF an appeal by Mr Bruce Arnold Stanley against the determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 12 May 2016 finding the Appellant guilty and on 2 June 2106 imposing a disqualification of eighteen months for breaches of Rule 190(1) & (2) of the Rules of Harness Racing.

The Appellant Mr Stanley appeared in person.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

By unanimous decision of this Tribunal, the appeal by Mr Bruce Stanley against conviction and penalty for breaches of Rule 190(1) & (2) of Harness Rule of Racing is dismissed.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL NO. 776

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**BRUCE ARNOLD STANLEY**
APPLICATION NO:	**A30/08/776**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MS K FARLEY SC (MEMBER)**
DATE OF HEARING:	**19 JULY 2016**
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IN THE MATTER OF an appeal by Mr Bruce Arnold Stanley against the determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 12 May 2016 finding the Appellant guilty and on 2 June 2106 imposing a disqualification of eighteen months for breaches of Rule 190(1) & (2) of the Rules of Harness Racing.

The Appellant Mr Stanley appeared in person.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr P Hogan, Member.

I agree with those reasons and conclusions and have nothing further to add.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS K FARLEY SC (MEMBER)

APPELLANT:	**BRUCE ARNOLD STANLEY**
APPLICATION NO:	**A30/08/776**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MS K FARLEY SC (MEMBER)**
DATE OF HEARING:	**19 JULY 2016**
DATE OF DETERMINATION:	**28 JULY 2016**

IN THE MATTER OF an appeal by Mr Bruce Arnold Stanley against the determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 12 May 2016 finding the Appellant guilty and on 2 June 2106 imposing a disqualification of eighteen months for breaches of Rule 190(1) & (2) of the Rules of Harness Racing.

The Appellant Mr Stanley appeared in person.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr P Hogan, Member.

I agree with those reasons and conclusions and have nothing further to add.

Kare Farley

KAREN FARLEY SC, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL NO. 776

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT:	**BRUCE ARNOLD STANLEY**
APPLICATION NO:	**A30/08/776**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MS K FARLEY SC (MEMBER)**
DATE OF HEARING:	**19 JULY 2016**
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IN THE MATTER OF an appeal by Mr Bruce Arnold Stanley against the determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 12 May 2016 finding the Appellant guilty and on 2 June 2106 imposing a disqualification of eighteen months for breaches of Rule 190(1) & (2) of the Rules of Harness Racing.

The Appellant Mr Stanley appeared in person.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

Introduction

These are appeals against conviction and penalty.

APPEAL AGAINST CONVICTION

Rule 190 of the Rules of Harness Racing ("the Rules") is in the following terms

190. Presentation free of prohibited substances

(1) A horse shall be presented for a race free of prohibited substances.

(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.*

The Appellant was the trainer of ENJOY A MALABU. He presented that horse to race at Gloucester Park on 7th November 2014 where it raced and finished first. He again presented the horse to race at Gloucester Park on 29 November 2014, where it raced and again finished first.

The Racing and Wagering Western Australia ("RWWA") Stewards of Harness Racing ("the Stewards") opened an inquiry into the finding of cobalt in the post-race urine samples in each case. On 15 April 2015, at the first sitting of the inquiry, the Appellant was charged with offences arising out of the presentations. The Stewards said (**T114 - 115 of 15 April 2015**):-

"...So the charge we allege is in relation to presentation aspects as covered by Rule 190 Part (1) and (2), and the particulars of the charge Mr Stanley are that you, as the trainer presented ENJOY A MALABU to race in Race 8 at Gloucester Park on the 7th of November 2014, where it raced and finished 1st, not free of the prohibited substance cobalt, evidenced by a concentration of cobalt at a level in excess of 2micrograms per litre in urine...."

(The reference in the transcript to "2micrograms" is a typographical error. It should read "200 micrograms")

and

"The second charge is also in relation to the same rule which I've just read. And the particulars of that charge are that, you Mr Stanley as the trainer presented ENJOY A MALABU to race in race 2 at Gloucester Park on the 29th of November 2014, where it raced and finished 1st, not free of the prohibited substance cobalt, evidenced by a concentration of cobalt at a level in excess of 200 micrograms per litre in urine."

The Appellant pleaded not guilty. On 12 May 2016, the Stewards found him guilty on each charge. On 2 June 2016, the Stewards imposed a disqualification of 18 months in total.

The inquiry and the Stewards' reasons for conviction

The first hearing was on 15 April 2105. At the proceedings on that day, the Appellant was charged. The inquiry was then adjourned and resumed almost a year later, on 1 March 2016. The inquiry was then further adjourned, and resumed on 28 April 2016. On that date, the evidence concerning conviction was finalised. The Stewards delivered their decision and reasons by letter to the Appellant dated 12 May 2016. Little point is served in repeating here

the 22 pages of the Stewards reasons. I agree with the observations made at paragraph 2 of the reasons, where the Stewards said:

"Some of this material presented by you, however has not been of great assistance or relevance to the matters before us. Much of it being the result of apparent internet searches of an array of articles and commentary on matters associated with cobalt. In presenting these materials to us, you were not always able to make salient points or observations with the panel left to attempt to discern the relevancy of the materials and how they related to your case. Some of these materials actually appeared to contain information potentially against your interests. On other occasions your submissions were of purely hearsay nature of discussions held with a variety of persons. The quality and relevancy of such evidence questionable and problematical. We have nevertheless considered all the materials and whilst we may not address each one directly, we have not ignored any relevant matters."

And at paragraph 5:

"Given the broadness of your approach not all of your submissions were relevant, properly appreciative of the evidence and were at times punctuated with misunderstandings and misapprehensions of the evidence. For example the confusion that arose in relation to the Exhibit 9 and the value of 0.24mg/kg reported by the Chem Centre and whether that was greater or less than the value of 0.4mg/kg which took several pages of transcript to resolve. A subsequent review of the recording revealed the reference to 0.4mg/kg was a typographical error and Dr Medd had correctly read the reported value. Ultimately nothing turned on any of this, however that point was apparently lost on you completely at the time. As a result numerous pages of transcript resulted on a largely irrelevant point. Other similar matters that 'knit-picked' the transcript, not always correctly, or other matters of questionable relevance that did not go to the heart of anything determinative took matters to unhelpful digressions."

The grounds of appeal against conviction

The Appellant's Notice of Appeal was filed on 15 June 2016. It is in the following terms:

"Conviction and penalty for charges 1 and 2. Rule 188 2 A K cobalt Rule threshold of 200 was gazetted Through the rules of Government on the 28/11/2014. Charge 1 was on the 7/11/2014 this was three weeks before the rule was gazetted."

The Appellant provided further particulars of his appeal by email to the Tribunal dated 10 June 2016. The particulars (with spellings not corrected) are as follows:

Appeal will be focused on-

(1) The rule 188 (2) (A) (K) the cobalt threshold of 200ugl that was gazetted through the government on the 28th November 2014 into the rules of racing three weeks after my first charge.

(2) The accredited methods of the Chemcentre.

(3) The method IMET2EUMS that was on the reports that the Chemcentre presented to the stewards in evidence.

(4) The laboratorys the ChemCentres in Perth and the NMI in Sydney there scope of accreditation to what method was accredited by NATA at the time of testing.

(5) The Chemcentre could not differentiate between inorganic or organic cobalt or vitamin B12.

(6) The lack of attention in that they the stewards didn't believe that the feeding of faba beans was in any way possible for the elevated levels in my horses.

(7) I also asked the Chemcentre at the inquiry for validation of there methods IMET1EUMS and IMET2EUMS under the ISO/IES 17025 international standard? The Chemcentre failed to produce there validation at any stage through the inquiry.

The particulars can conveniently be grouped into categories:

- By Particular (1), the Appellant complains that the Stewards gave the Rule retrospective effect in relation to the first charge against him, that arising out of the presentation on 7 November 2014.
- Particulars (2), (3), (4) and (7) seek to attack the evidentiary value of the certificates, by questioning the accreditation of the laboratories.
- Particular (6) complains of the Stewards' finding that there was no "innocent explanation" for the levels.
- Particular (5) makes no sense and can be disregarded.

It should be noted at this point that nowhere in his grounds or particulars does the Appellant allege any error on the part of the Stewards in coming to their decision on both conviction and penalty. The matters he raises were all covered at some length in the evidence before the Stewards and are comprehensively dealt with in their reasons. The Tribunal here on appeal is simply being asked to review all of the evidence and come to a different conclusion. However, because the Appellant is unrepresented, his grounds and submissions should be examined to

see if in fact there was any error justifying setting aside the Stewards' decisions.

Particulars (2), (3), (4) and (7) – the certificates

Both Chemcentre (WA) in Western Australia and the National Measurement Institute ("NMI") in New South Wales are approved laboratories for the purposes of Rule 191.

On 3 March 2015, the Chemcentre provided a certificate to the Stewards reporting a level of 450 micrograms per litre (µg/L) in the post-race urine sample from 7 November 2014. On 9 March 2015, The NMI provided a certificate which reported a level of 471 µg/L on the reserve portion of that sample. These certificates relate to what has been called the first charge.

On 17 March 2015, the Chemcentre provided a certificate to the Stewards reporting a level of 260 micrograms per litre (µg/L) in the post-race urine sample from 29 November 2014. On 25 March 2015, The NMI provided a certificate which reported a level of 297 µg/L on the reserve portion of that sample. These certificates relate to what has been called the second charge.

The evidentiary value of the certificates arises from Rules 191(1) and (2), which are in the following terms:

"191. Evidentiary certificates

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.

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."

The Controlling Body in Western Australia is RWWA.

It is immediately apparent that the Rules say nothing about the accreditation of laboratories, simply requiring that a laboratory be approved. I assume, without deciding the point, that accreditation is necessarily implied into Rule 191. Only by applying that assumption can the Appellant's argument be considered at all. In my opinion, the Appellant's argument lacks merit in any event.

The National Association of Testing Authorities (NATA) does not have any statutory basis for its existence. Taken directly from its website (referred to by the Appellant at **T118 of 28 April**

2016) is the following simple description:

"NATA is a not-for-profit company operating as an association *owned and governed by its members and representatives from industry, government and professional bodies. NATA is largely self-funded and has memoranda of understanding with the Australian Government and various state and territory governments that recognise its key role in Australia's technical infrastructure. The Australian Government uses NATA-accredited facilities wherever possible and encourages state and territory governments and other instrumentalities to do likewise."*

Although there is no evidence in this case on the point, it can be safely assumed that the Controlling Body has approved Chemcentre and the NMI on the basis that both are NATA accredited.

On 20 August 2014, Chemcentre requested from Nata an addition to the scope of its accreditation to permit it to test for metals in equine urine, as opposed to urine simpliciter. By letter dated 26 November 2014, NATA granted the request, specifying the IMET1EUMS method. (exhibit 28 and exhibit 31). At the time of testing both samples, in early 2015, Chemcentre therefore had the necessary accreditation to test in equine urine, using the IMET1EUMS method. However, each of the Chemcentre's certificates, exhibits 1 and 3, reported that the IMET2EUMS method had been used. Chemcentre did not receive an accreditation to use IMET2EUMS until 2 September 2015 (part of exhibit 31), well after both samples had been tested. The Appellant's argument before the Stewards and before the Tribunal is to the effect that the Chemcentre's certificates should not be used, by way of Rule 191, because the Chemcentre operated outside the scope of its accreditation.

The Appellant's argument fails to understand the effect of the difference. The difference is explained in the letter to Chemcentre from NATA dated 2 September 2015. Primarily, IMET2EUMS is a duplicate method. It allows for results to be reported as µg/L instead of mg/L. Other differences between the two methods have nothing to do with cobalt. Chemcentre used IMET2EUMS before it was accredited to do so. Mr Russo, the Manager of Chemcentre, gave the explanation at **T33 to T 34 of 1 March 2016**:

"CHAIRMAN *Mr Stanley's samples, and you say if I understand rightly Mr Russo that that is an accredited NATA methodology...*

RUSSO *That is a NATA accredited method...*

CHAIRMAN *...test at that time.*

RUSSO *That is correct...*

CHAIRMAN *...and there's been one since...*

RUSSO *...the change has, has been made to add 2 to the number instead of 1, EU2MS*

which, the initial accreditation was in August 2014...

CHAIRMAN *August 2014...*

RUSSO *August 2014. That was when it was sent for accreditation...*

CHAIRMAN *And that's the method that...*

RUSSO *And we .....*

CHAIRMAN *...is referred to in this Exhibit 5, your laboratories....*

RUSSO *Yes.*

CHAIRMAN *Yes go on and then you were talking about some other method that's come in...*

RUSSO *Sorry the method then was modified then to change the units from micrograms, sorry milligrams per litre to micrograms per litre as per the Rules...*

CHAIRMAN *Yes.*

RUSSO *...so that the methodology used to generate the data was done the same way."*

To use an analogy, the Appellant's argument is that a distance one metre is not one metre because the person reporting the distance is only accredited to report it as one hundred centimetres. It is an argument which finds no favour with me.

Whilst the Appellant refers to the accreditation of the NMI in his particulars, and it was a matter he pursued at some length at the sitting of the inquiry on 1 March 2016, he has provided nothing to support his complaint. In fact, he made no argument at the inquiry or before us that the NMI operated outside the scope of its accreditation and it is therefore difficult to understand why he raised the matter at all.

Particular 6 – innocent explanation

The Appellant spent a large part of the time at the inquiry trying to demonstrate that the cobalt levels in the horse came about by way of feeding FABA beans, which themselves had absorbed higher levels of cobalt than usual.

All of that was irrelevant to the question of conviction.

There can be no innocent explanation in any allegation of an offence against Rule 190. Intent is not an element, and mistake of fact is no excuse. There is no defence available. Rule 190 creates an absolute offence.

In ***Harper v Racing Penalties Appeal Tribunal of Australia (1995) 12 WAR 337***, Anderson and Owen JJ (Kennedy and Franklyn JJ agreeing) said at 349:

"Counsel for the applicant made much of the fact that a literal construction of the Rules could conceivably result in a trainer guilty of no wrong conduct being disqualified. He tried to persuade the court that no such intention should be attributed to the committee of the Trotting Association which drew up the Rules. We do not see why. It may well be the case that those familiar with every aspect of the industry and with long experience in it have come to the conclusion that to ensure the integrity of racing and to maintain public confidence in its integrity, there is a need to impose very stringent controls and that those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so may well be taken from them if for any reason, even without actual fault on their part, they present a doped horse for racing."

In the case of ***Day v Sanders;Day v Harness Racing New South Wales [2015] NSWSCA 324,*** Basten JA (Leeming and Simpson JJA agreeing) said at paragraph 85:

A proper reading of r 190(2) is that it imposes on a trainer an absolute responsibility for the horse presented for a race being free of prohibited substances with the result that, if the trainer presents a horse that does not satisfy that condition, he or she is guilty of an offence.

The Stewards correctly dealt with the issue of feeding FABA beans at paragraph 78 to their reasons for decision, where it was said:

"When these principles are taken into account and properly applied, much of your argument in defence to the charge relating to FABA beans becomes irrelevant. How ENJOY A MALABU came to have the level of cobalt that it did, which we have already explained constitutes the presence of a prohibited substances, matters not to the question of conviction. Whether the levels found in ENJOY A MALABU were achieved through a prolonged exposure that caused build up, FABA beans or other methods is not, strictly speaking, relevant to deciding this charge."

Out of an excess of caution, the Stewards then went on to deal with that very issue in their reasons. The fact that they did so does not make the Appellant's innocent explanation any more relevant.

There is no merit in this particular of the Appeal grounds.

By Particular (1) – retrospective application of the Rule

It can be accepted that laws or rules imposing punishments normally do not have retrospective effect. The Appellant says that is what happened here in relation to Charge 1, the presentation on 7 November 2014. He says that cobalt was not a prohibited substance until

24 November 2014.

Prohibited substances are defined by Rule 188A:

"188A. Prohibited substances

(1) The following are prohibited substances:

(a) Substances capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, within one or more of the following mammalian body systems:-

the nervous system

the cardiovascular system

the respiratory system

the digestive system

the musculo-skeletal system

the endocrine system

the urinary system

the reproductive system

the blood system

the immune system"

Cobalt is a naturally occurring substance. It is present in a mammalian body. It affects the blood system. The RWWA veterinarian, said at **T44 to T45 of 15 April 2015**:

"Yes, so Cobalt is an essential mineral, commonly found in plant materials. Cobalt is considered essential in a mammalian body from normal physiological function, however, if given in insupra physiological levels or very high levels, Cobalt has been shown in scientific studies to enhance performance in models, using both humans and rats.

Primarily that is due to the stabilisation of hypoxia inducible factor 1 Alpha, and a subsequent increase in erythropoietin production and erythropoiesis. To try and explain that more simply, basically super physiological levels of Cobalt or very high levels of Cobalt have the potential to create a low oxygen environment in a mammals body, that's via the HIF stabilisation, and that will therefore increase the production of red blood cells, and in theory improve the oxygen carrying capacity of blood. So in the low oxygen environment stimulates erythropoietin levels to increase and erythropoietin will stimulate in turn red blood cell production."

By Rule 188A, naturally occurring substances are prohibited substances. In *Day v Harness Racing New South Wales [2014] NSWCA 423* (a different, but related decision to that

mentioned above), the same Rule was under consideration as is here. Leeming JA said at paragraph 51:

"However, it is unnecessary to express a concluded view, because it is plain that the extreme literalism for which the appellants contend, and on which their submission depends, is not the proper construction of AHRR 188A(1)."

His Honour went on to say at paragraph 56:

"It is not necessary in order to resolve this appeal to determine all aspects of the construction of AHRR 188A, which is not straightforward and far from clearly worded".

There are other naturally occurring substances which have become the subject of regulation under the Rules, most notably TCO2. When, over a period of time, it has become apparent that naturally occurring substances are being artificially increased to affect performance, the controlling bodies have taken action. The action is to deem the offending substance to be not a prohibited substance under a certain level. In short, what has always been a prohibited substance becomes not a prohibited substance under a certain level. By that circuitous path an offence is created in circumstances where there always was an offence in any event. I respectfully agree with the observation of Leeming JA that the Rule is far from clearly worded.

In the case of cobalt, the level has been set in the Rules at 200 µg/L. That occurred on 24 November 2014. Rule 188A (2)(k) now reads:

(2) The following substances when present at or below the levels set out are excepted from the provisions of sub rule (1) and Rule 190AA:

(k) Cobalt at a concentration at or below 200 micrograms per litre in urine

On one view, it could be said that the setting of the level on 24 November 2014 created the Rule 190 offence for cobalt by introducing the 200 µg/L threshold. Two possibilities flow from that, namely an offence with retrospective effect or an offence with no retrospective effect.

An alternative view is that the setting of the level did not create a Rule 190 offence for cobalt at all. The difficulty with that approach is that there is then nothing to categorise the setting of the threshold.

In my view, the setting of the level on 24 November 2014 amounted to creating the Rule 190 offence in this case by making cobalt under 200 µg/L not a prohibited substance. Although I immediately recognize the strained construction of that expression of opinion, it is the wording of Rule 188A which requires the expression.

I am further of the view that the offence created has retrospective effect.

Regard must be had to the Rules as a whole, in particular Rule 189. That Rule provides for retrospective testing, made possible by storing and freezing samples. The policy behind the Rule is to allow for advances in detection and testing possibly not available at the time of sampling. The matter was dealt with at paragraphs 51 to 53 of the Stewards' reasons.

In my opinion, the offence has retrospective effect. Otherwise Rule 189 would be rendered nugatory. It would be an odd situation if retrospective testing could not amount to anything because there was no retrospective application of the Rule 190 offence to go with it.

There is no merit in this particular of the appeal.

For all of the above reasons, I would dismiss the appeals against conviction.

APPEAL AGAINST PENALTY

After the Appellant had been convicted, the inquiry resumed on 24 May 2016 to deal with the question of penalty. By letter to the Appellant dated 2 June 2016, the Stewards imposed a penalty of 12 months disqualification on each offence, one cumulative on the other. For reasons of totality, the 24 months was reduced to 18 months. The penalty was backdated to commence on 25 March 2015, when the Appellant had first been suspended pending the outcome of the inquiry. At the time of hearing this appeal, the Appellant had approximately 2 months left to serve.

The Appellant, before the Stewards and on this appeal, had relied on the same "innocent explanation" which was not relevant to the matter of conviction. I accept that the manner in which the substance got in to the horse's system is relevant to penalty, so that an otherwise appropriate penalty could be reduced. However, it is apparent from the Stewards' reasons on penalty that they rejected the Appellant's explanation that it was because of the feeding of FABA beans which contained higher than expected levels of cobalt. The Stewards said at paragraph 29 of their reasons on penalty:

"Firstly, that the propensity for horses to exceed the threshold level is low. Indeed as Dr Medd indicated through the inquiry the average level found of 4.3 within the population study used to determine the threshold supports that any levels of the nature before us are not random events beyond a trainer's reasonable control. This is not achieved by routine supplementation at appropriate times in accordance with manufacturer recommendations or as we have found, by the feeding of beans. Whilst we may never determine what caused ENJOY A MALABU to achieve these levels both the science before us and the anecdotal evidence of over 2,000 tests indicates that levels such as those before us are serious."

It is not for the Tribunal on appeal to substitute a different finding of fact than that arrived at by the Stewards. Further, the Appellant has not demonstrated, and indeed did not allege, any error of fact or principle on the part of the Stewards in imposing the penalty.

In those circumstances, I would dismiss the appeal against penalty.

PATRICK HOGAN, MEMBER