

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MS CHRISTINE O'DRISCOLL

APPLICATION NO: 21/2385

PANEL: MS K FARLEY SC (CHAIRPERSON)
MS B ROBBINS (MEMBER)
MS J OVERMARS (MEMBER)

DATE OF HEARING: 9 AUGUST 2021

DATE OF DETERMINATION: 12 OCTOBER 2021

IN THE MATTER OF an appeal by CHRISTINE O'DRISCOLL against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing disqualification for a total period of 18 months served concurrently for a breach of Harness Rule of Racing 196A(1)(ii), HR190(1)(2) and (4), and HR196B(1).

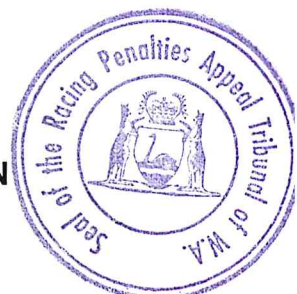
The appellant Mrs Christine O'Driscoll appeared in person

Mr Denis Borovica represented the Racing and Wagering Western Australia ("RWAA") Stewards of Harness Racing

1. The appeal against penalty is allowed.
2. The penalty is varied from 18 months disqualification to 12 months disqualification.

Karen Farley

KAREN FARLEY SC, CHAIRPERSON



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Introduction

1. Ms Christine O'Driscoll ("Mrs O'Driscoll" or "the Appellant") has been a RWVA licensed harness racing trainer for over 40 years. She is passionate about the industry and is involved as a "hobby" trainer. She does not rely upon training for an income.
2. She has never before breached the rules of Harness Racing. She has an unblemished record in the industry.
3. On 16 April 2021 Mrs O'Driscoll's horse MISTER RIGGERS was made the subject of a post-race urine sample test after he had raced and won Race 4 at Northam Harness Racetrack.

4. That sample returned a positive reading to cobalt, which is a substance that, over a prescribed level, is deemed to be a prohibited substance. The Rule of Harness Racing HR188A(2)(k) states that any level over 100ug/L is considered unacceptable.
5. A cobalt threshold was introduced in Harness Racing in 2014. It was initially 200ug/L, but in 2016 the threshold was lowered to 100ug/L to be consistent with the international threshold.
6. MISTER RIGGERS' cobalt reading was 190ug/L in plasma. The referee testing was 164 ug/L.
7. Higher physiological levels of cobalt are capable of indirectly increasing the production of endogenous erythropoietin (EPO) in the body and can increase the production of red blood cells. More red blood cells can produce more oxygen which can potentially improve aerobic exercise capacity. As such, cobalt could be viewed as performance enhancing.
8. Mrs O'Driscoll's premises were inspected by RWWA Senior Investigator, Mr. Johnson and RWWA Compliance Officer, Mrs Bennett on 13 May 2021. Mrs O'Driscoll advised that she had injected MISTER RIGGERS with VAM (a product containing cobalt) intramuscularly on either the 15th or 16th of April 2021. (Her Treatment Book entry indicated April 16th which was race day).
9. Regulatory Veterinarian with RWWA since 2002, Dr Judith Medd advised the Stewards' inquiry that VAM was "the most likely culprit" for the high cobalt reading.
10. Mrs O'Driscoll also admitted to investigators that she administered 20ml VAM, rather than the 10ml recommended in the directions for use. In addition, she administered Red Cell (a vitamin supplement also known to contain cobalt).
11. There was, therefore, before the Stewards, an explanation for high cobalt reading in the horse.

The Charges

12. At the conclusion of the inquiry, Mrs O'Driscoll was charged with three breaches of the Rules of Harness Racing.
 - HR196A(1)(ii) - "the Administration Charge" which alleged that Mrs O'Driscoll administered, prior to the race on 16 of April 2021, 20ml of VAM with a concentration of cobalt in excess of (the threshold) being detected post-race;
 - HR190(1)(2) and (4) "the Presentation Charge" the particulars of which were not clear from the Stewards' reasons, but presumably involved the presentation of the horse for racing on 16 April 2021 with the elevated cobalt level; and
 - HR196B(1) "the Lack of Permission Charge" which alleged that Mrs O'Driscoll caused to be administered an injection to a horse nominated for a race without permission of the Stewards within one clear day of that race's commencement.
13. All three charges related to Mrs O'Driscoll's admitted injection of MISTER RIGGERS on either the 15th or 16th of April 2021.

14. Mrs O'Driscoll pleaded guilty to all three charges.

The Penalties Imposed

15. Stewards took a "grave and serious" view of the offences to which Mrs O'Driscoll pleaded guilty.
16. The Stewards made all penalties concurrent. In fact, Mrs O'Driscoll could have argued (although she did not in this appeal) that the charges arose out of the same set of circumstances in any event. The decision to make all penalties concurrent was, in the circumstances correct.
17. The question for the Tribunal therefore becomes whether the global penalty of 18 months disqualification was, in effect, manifestly excessive (described by Mrs O'Driscoll in her notice of appeal as "too harsh").
18. In imposing penalties for the three charges, Stewards considered that the starting point for the "Administration charge" under HR196A(1)(ii), arguably the most serious charge, was a two year disqualification. They gave Mrs O'Driscoll a 25 per cent "discount" from this penalty in light of her guilty plea, her previously unblemished record and her status as a hobby trainer.
19. Both the "Presentation charge", HR190(1)(2) and (4) and the "Lack of Permission" charge HR196B(1) attracted periods of nine months disqualification.
20. At the hearing of the appeal, Mrs O'Driscoll tendered written submissions outlining why she believed the penalty imposed was "too harsh". In it she referred to several other penalties imposed as comparator examples.
21. It must be noted that most if not all those matters related to Presentation rather than Administration offences.
22. In response, Mr Borovica on behalf of the Stewards submitted that positive swab results, the likely cause of which are an administration by a trainer, are the most serious substance offences known to the Rules, particularly where the substance may act to enhance performance. In this case, MISTER RIGGERS won the race.
23. At paragraph 4 of the Stewards' reasons for penalty in this matter reference is made to a comment in a matter of Nicholson, reported in the 1994 Racing Appeal Reports @ 945.

"There is nothing more likely to bring down the integrity of the racing industry generally than the fact that horses perform at meetings when they have been administered, whether incorrectly or for some ulterior motive, a prohibited substance. It is our obligation to deter that practice..."
24. In considering this appeal, the Tribunal is mindful of the necessity to maintain the integrity of racing in this jurisdiction, and to ensure that it is perceived to be fair and honest by the betting community, and indeed by the broader community in general.
25. Likewise, the Tribunal is mindful that many previous decisions make it perfectly clear that the Tribunal should 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.

26. There is a strong presumption in favour of the correctness of the decision appealed from, and that decision should be affirmed unless it is palpably incorrect.
27. Some guidance can often be obtained from previous decisions of this Tribunal or from previous Stewards' decisions. In this case, the Stewards found several previous examples of presentation (HR190(1)), no previous examples of (HR196B(1)) race day treatment, and one prior administration at HR196A(1)(ii) involving cobalt.
28. The previous administration offence referred to by Stewards (the matter of Coulson) involved pleas of not guilty to four separate administrations of cobalt and four separate presentation charges. The cobalt levels were extremely high (1500, 720, 1400, 740). A total penalty of four and a half years disqualification was not appealed. This matter is of limited if any assistance in this matter as a comparator.
29. Likewise, there are no assistant comparators for race day administration (although the matter of Enright (2016) involving AR178E and administration of Folic B-12 in stabling area, resulting in nine month disqualification, may be of some limited assistance).
30. There were a number of HR190(1) presentation matters referred to by the Stewards (and also by Mrs O'Driscoll in Exhibit 1). In several of these, no explanation whatsoever was proffered or could be inferred for the high cobalt reading.
31. The matter of Prentice v RWWA (Harness) Appeal no 816 of 2018 involved a presentation of 150-163. mcg/L in horse Extradite NZ which won race 5 at Northam on 25 November 2017. Mr. Prentice was interviewed post-race and admitted that he injected VAM (which he believed contained iron, but not cobalt. Evidence suggested that the VAM as administered could not account for the cobalt reading. On appeal, for reasons including some not relevant to this appeal, a 12 month disqualification was reduced to nine months.
32. In that case, Member Nash (with whom Members Farley and Power agreed) referred to a case of Wayne Brown (see Prentice at [40(f)] and [51]. This matter also related to pre-race admission of administration of VAM with a resultant excess cobalt reading. Member Nash erroneously referred to Mr Brown's racer being a horse. In fact, it would seem from a reading of the Stewards' reports of Brown that Mr. Brown had administered the VAM to his greyhound "Tallulah".
33. In this matter (p32 Transcript) Steward Kemp received the "other cases.....to give us an idea of what other penalties have been issued to other people and balance it all out and come up with consistent penalties".
34. Mr Kemp concludes (p33 Transcript) that the presentation penalties have been "around the nine month disqualification mark".
35. Mr Kemp goes on to discuss the Coulson matter, explaining that the administration "may have been cobalt salts rather than cobalt supplements such as VAM". He concludes by referring to "a couple of thoroughbred trainers that have been disqualified for nine months for administering substances on the track on race days".
36. In referring to the examples of previous penalties, Mr. Kemp (p32 Transcript) refers to a "greyhound matter. I'm not sure how relevant they are".

37. We are of the view that it is the circumstances of the presentation or administration that is the relevant question to penalty across all three codes for the reasons outlined in paragraph [23] and [24] above. The necessity to preserve the integrity of racing is relevant to an equal degree across all three codes. Any variation in penalty would be due to variation in particular circumstances.
38. In a similar view, while it is true that in general terms an administration offence on its face is generally a more serious type of offending than a presentation offence, this may not necessarily follow.
39. In this matter, three charges were proffered against Mrs O'Driscoll - the Administration Offence, the Presentation Offence and the Administer without Permission offence.
40. All three charges followed free admissions made by Mrs O'Driscoll when visited by investigators following the finding by Chem Centre of 19 ug/L in the sample taken from MISTER RIGGERS.
41. Whilst Mrs O'Driscoll was of the belief she administered the VAM on 15 April 2021 she accepted that her treatment records showed the administration to be on race day 16 of April 2021. In addition, Mrs O'Driscoll accepted that she administered twice the product recommendation to MISTER RIGGERS. She acknowledged (p26 Transcript) that she should have made herself aware of regulations and warnings put out by the authorities regarding the use of VAM. She said she did not regularly use the product, but because of the hot conditions and the fact that MISTER RIGGERS was "doing a lot of racing" she gave it "just to try and help him, make him recover".

Mrs O'Driscoll's Circumstances

42. Mrs O'Driscoll is 70 years of age. She has held a trainer's licence for 40 years. She has no prior penalties imposed by Stewards. She had two horses in work at the time of the offences. She was a hobby trainer. It was her passion.
43. Disqualification is a serious penalty with serious consequences for the person charged. It prevents any participation in an industry that may be that person's life and livelihood. It is reserved for the most serious offences known to the rules.
44. There is no question in our minds that the offences to which Mrs O'Driscoll pleaded guilty were of such a serious nature as could only attract periods of disqualification. We are of the view however that the total penalty imposed of 18 months disqualification was of such a length as to be manifestly excessive in the circumstances of the case. In other words, it was so unreasonably and unjustifiably long as to manifest error on the part of the Stewards.
45. Mrs O'Driscoll's particular circumstances were unusual. She was a first offender with a 40 year unblemished record. She made full and frank admissions during the course of the inquiry. Had she not cooperated fully with investigators, in particular disclosing the fact that she had administered the VAM (according to the expert veterinarian as the "probable culprit" for the high cobalt reading), the Stewards would have been unlikely to have been able to bring against her any charge other than one of Presentation.

46. Full and frank cooperation with Stewards' Inquiries is to be encouraged, to the point that credit should be given in real terms for voluntary, appropriate admissions. This is such a case and having reviewed previous penalties we are of the view that the penalty of 18 months (reduced by the Stewards from two years) disqualification for the Administration offence should be reduced to 12 months disqualification.

47. Whilst our comments refer equally to the penalties imposed for the presentation and lack of permission charges, in general terms we would not interfere with those penalties and their concurrency as they have no overall practical effect on the ultimate length of the disqualification.



KAREN FARLEY SC, CHAIRPERSON



BRENDA ROBBINS, MEMBER



JOHANNA OVERMARS, MEMBER

