



INTERNAL REVIEW DECISION

(Internal Review Decision Notice in response to an Application for Internal Review)

PART 1: Details of Internal Review

Internal Review Number: Internal Review 0073-18

Applicant's Name: Darryl Gardiner

PART 2: Decision History

Original Decision: Breach of Rule 178 of the Australian Rules of Racing

Original Decision Makers: J Williamson, D Aurisch, L Hicks

Date of Original Decision: 2 August 2018

Internal Review Decision: Original decision confirmed - Twelve (12) month disqualification

Internal Adjudicator: Mr Kane Ashby, Queensland Racing Integrity Commission

Date of Internal Review Decision: 29 August 2018

PART 3: Summary of Internal Review Application

The Applicant, Mr Darryl Gardiner, trainer of TIME OUT which presented to race at the Monto Race Club on 7 April 2018, was charged under Australian Rule of Racing 178 and was subsequently found guilty of the charge at a stewards' inquiry conducted on 2 August 2018 when a urine sample taken from TIME OUT was found to contain a prohibited substance, namely Cobalt in excess of the permissible threshold as prescribed under Australian Rule of Racing 178C(1)(l).

Australian Rule of Racing 178 states:

"Subject to AR178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised."

The specifics of the charge being that the Applicant, as the trainer of TIME OUT, did present that horse to race in the Class 3 1200 metres at the Monto Race Club on 7 April 2018 when a urine sample taken from TIME OUT was found, upon analysis, to contain a prohibited substance, namely Cobalt above the permissible threshold as prescribed under Australian Rule of Racing 178C(1)(l). The stewards subsequently found the Applicant guilty of the charge.

When considering penalty, the stewards took into account the Applicant' disciplinary history noting three (3) prior convictions, the Applicant's forty-four (44) year career as a trainer, previous penalty precedents relating to Cobalt, that the findings indicated the Cobalt reading was more than double the permitted threshold, the need for penalties to act as a deterrent for racing participants and the detrimental effect the positive samples have on the image of racing.



Stewards subsequently disqualified the Applicant for a period of twelve (12) months commencing on 9 August 2018 and expiring at midnight on 9 August 2019.

The Applicant sought a review on charge and penalty and provided the following submissions in support of his Application:

"The horse has had no injections for 60 days prior to racing at Monto on 7 April 2018. Horse received oral supplementations only. Taken to races drug free. Presented horse on 7 April 2018 at Monto races clear of any illegal substances. Horse could only obtain Cobalt through feed - pre-mixed or supplements. Dehydration due to extended travel.

- 1. The decision to find me guilty was not fair nor reasonable based on the evidence that was presented at the Stewards Enquiry.*
- 2. The decision to find me guilty was such that I provided an explanation to the Stewards which ought to have been accepted and ought not to have been charged with the offence.*
- 3. The taking of the sample for analysis was not in accordance with any published procedure and even if it was in accordance with a procedure the sample was contaminated.*
- 4. The decision was not lawfully made as the decision is to be made by Authorised officers and the imposition of any penalty is to be imposed by Authorised Officers under the Racing Integrity Act.*
- 5. The Stewards have not been appointed in accordance with the Act and Regulations and therefore the decision ought to be set aside.*
- 6. The Racing Queensland website has published the following:*
 - (a) Information previously related to Stewarding and Integrity such as Vet Guidelines, the Racing Disciplinary Board, banned substances, Stewards Reports, first level appeals, horse movement, sample collection, betting and approved racing gear etc can be found on the QRIC website.*

A review of the QRIC website does not make those policies available to the public but more importantly to licensees. Licensees must have complete access to these procedures so they can be clear about the procedures that are applicable.

8. Section 100 of the Racing Act provides as follows:-

- (1) The main purpose of this chapter is to provide for the way a control body may perform its functions of managing its code of racing.*
- (2) Generally, the control body performs its function by -*
 - (a) making policies about the management of its code of racing...*
 - (b) making rules of racing; and*
 - (c) giving directions.*



(3) A control body's policies ensure there is guidance for persons involved in the code of racing and transparent decision-making relating to matters dealt with by the policies.

101 Policies and rules of racing are statutory instruments

The policies and rules of racing made by a control body for its code of racing are statutory instruments within the meaning of the Statutory Instruments Act 1992.

Part 2 Policies

Policy for code of racing

(1) A control body may make a policy for a code of racing because -

(a)

(b) The control body believes it is good management to have the policy.

103 Form of each policy

(2) A control body makes a policy when the policy is entered into the control body's minutes as having been made by it.

104 Availability of policies

(1) A control body must ensure that its policies are publicly available.

(2) Without limiting subsection (1), for each of its policies, the control body must -

(a) give a copy of the policy to the chief executive within 14 days after it makes the policy; and

(b) make the policy available for inspection, free of charge, at its business address during its ordinary office hours and on its website; and

(c) give a copy of the policy to a person if the person asks for a copy.

9. To suggest that the Standard Operating Procedures are intended for internal use only shows quite clearly that the Policies and Procedures and in particular the Standard Operating Procedure are being kept secretive by QRIC. That is a complete contradiction of the Act.

10. The Applicant has not been provided with the Transcript of Stewards Hearing and reserves the right to add to these grounds for review when the Transcript is in fact provided."

PART 4: Reasons for Internal Review Decision

The Applicant, Mr Darryl Gardiner, was the trainer of TIME OUT which presented to race at the Monto Race Club on 7 April 2018. A urine sample collected from TIME OUT was subsequently analysed by the Racing Science Centre and Racing Analytical Services Limited which reported the sample was shown to contain Cobalt in excess of the regulatory threshold pursuant to Australian Rule of Racing 178C(1)(l) at 100 micrograms per litre in urine. The aforementioned Accredited Racing Laboratories reported Cobalt in excess of 200mcg/L respectively.¹

¹ Exhibit 4 and 12



TIME OUT was placed first in the aforementioned race. The betting data on the race noted TIME OUT started at \$2.20 favourite.

During the stewards' inquiry conducted on 2 August 2018, the Applicant in evidence stated *"I plead not guilty and the reason why is the horse had no injections for 60 days prior to that race. He came from South Australia to me on the 24/10/17 and he raced in Rockhampton. He was - I don't know about pre-raced up there but I know he ran second there one day and he was swabbed. I don't know what his Cobalt levels were that day. He was fed the same - exactly the same diet from 24/10/17 to 07/04/18. No changes. Every horse in the stable gets the same diet. Numerous horses have won and I've never had a problem. I have never been notified of a high Cobalt, which other trainers have been. I never was. It went to Monto. It won a race and threw a positive swab to Cobalt."* The Applicant added *"There's an odd horse that gets treated pre-race but I get a blood test done and whatever the vet tells me to do I do, but any Hemoplex or Folic B12, Coforta for a Saturday race is (inaudible) no later than 10 o'clock on a Wednesday. But that's - well, it's never - it's never shown up with a Cobalt before so I don't know - but that horse, yeah, he was a little bay horse. He wasn't a real big horse, but you know, they just get Iron Cycle, Feramo H, Tracktorque and a bit of Livermol here and there - yeah. I do - I do give an odd drip like with the travelling."*²

The chairman of the inquiry questioned *"By the sounds of it, you can't table anything in your view that explains it?"* to which the Applicant replied *"No. He's never - I've never - like he's never had a shot of Cobalt. I've never used it. I've never seen it."* The Applicant was then questioned *"Do you use Vam or anything like that?"* to which the Applicant replied *"Occasionally if I can't buy Hemoplex there and they've got Vam I will."* The Applicant was further questioned *"But all the IV drips and that, do you do them yourself?"* to which the Applicant replied *"Yes. But not a lot. I'm normally a Hemoplex user if I can get it."*³

The Applicant's treatment records demonstrate the last record of any administration of substances to TIME OUT was on 6 February 2018 consisting of 10mls of Hemoplex, Folic B12 and Coforta in a drip and half an electrolyte paste.⁴ The inquiry heard TIME OUT's sample history demonstrated one (1) previous urine sample when under the care of the Applicant at Rockhampton on 8 February 2018 which returned a Cobalt level of 25.6mcg/L. The inquiry further heard the indicative level of Cobalt in the sample the subject of review was 550.8mcg/L.⁵

The Applicant's complete submissions in defence of the charge are outlined in Part 3 of this decision.

The Applicant's legal representative submitted *"The taking of the sample for analysis was not in accordance with any published procedure and even if it was in accordance with a procedure the sample was contaminated. The decision was not lawfully made as the decision is to be made by Authorised officers and the imposition of any penalty is to be imposed by Authorised Officers under the Racing Integrity Act. The Stewards have not been appointed in accordance with the Act and Regulations and therefore the decision ought to be set aside."*⁶

² Transcript of Stewards' Inquiry dated 2 August 2018, page 3, 4 and 5

³ Transcript of Stewards' Inquiry dated 2 August 2018, page 7

⁴ Exhibit 13

⁵ Transcript of Stewards' Inquiry dated 2 August 2018, page 10

⁶ Application for an Internal Review dated 15 August 2018



The reviewer notes the Applicant failed to raise any concerns during the stewards' inquiry with the sample collection procedures or that the sample was contaminated as submitted by the Applicant's legal representative.

The reviewer finds the 'Collection Procedure's' SOP version 4.1 was superseded on 1 July 2016. This version was replaced with the SOP 'Collection of Samples and Things' Version 1. The current version states *"The purpose of this procedure is to describe the preferred process for collection of samples from registered/licensed racing animals and for the taking of other things for analysis."* The reviewer finds no direct evidence to support the collection procedure was not in total compliance with the preferred process outlined within the SOP or any direct evidence of contamination as submitted by the Applicant's legal representative

The reviewer accepts the Applicant's wife, Mrs Joanne Gardiner, signed the 'Sample Security Document For Taking A Sample For Analysis' acknowledging she witnessed the whole process of collecting TIME OUT's post-race urine sample (438668), placing it in one or more containers and sealing the container/s at the Monto Race Club on 7 April 2018. There is no evidence that Mrs Gardiner or the Applicant raised any concerns at any relevant time with the sample collection procedures.

The reviewer finds the subject samples chain of custody is documented and accounted for throughout the process from the time of collection to the analyst's findings by the aforementioned two Accredited Racing Laboratories.⁷ The reviewer finds no evidence to determine that the integrity of the sample's collection procedures or analysis of the sample was compromised in any way that would adversely affect the integrity of the sample.

The Applicant's legal representative submitted the decision was not lawful as the decision is to be made by authorised officers and the stewards have not been appointed in accordance with the Act and Regulations. The reviewer is satisfied the stewards were appropriately qualified to make the subject decision.

The Applicant's legal representative further referred to Sections 100 to 104 inclusive of the *Racing Act 2016 (Qld)*. The Applicant's legal representative submitted *"To suggest that the Standard Operating Procedures are intended for internal use only shows quite clearly that the Policies and Procedures and in particular the Standard Operating Procedure are being kept secretive by QRIC. That is a complete contradiction of the Act."*

The reviewer acknowledges such sections of the *Racing Act 2016 (Qld)* and submissions in the subject matter were debated in Internal Review Decision 0038-18. The Queensland Racing Integrity Commission responded by stating *"I note in your correspondence that you are relying upon the Racing Act (Qld), in particular Section 100 to Section 104, whereby you assert certain policies and procedures should be made publicly available. I have considered your submissions and I am of the opinion that your interpretation of the Racing Act 2002 (Qld) and its application to the Commissions internal policies and procedures is wrong at law. The Commission is not the control body as referred to in the Racing Act and therefore these sections have no application to the Commission."*

The reviewer accepts the evidence of the Queensland Racing Integrity Commission. Notwithstanding, the reviewer finds there is no direct evidence to support the collection process or analysis of the sample was not in total compliance with the preferred process outlined within the SOP.

⁷ Exhibit 1 to 12



The Racing Science Centre, in previous Cobalt review decisions, collated a spreadsheet of data following its analysis of testing Cobalt in equine race day urine samples. The data demonstrates 13,485.00 samples, including outliers, were tested between 26 May 2015 and 17 January 2018 which samples demonstrated a mean of 8.57mcg/L and a median of 4.69mcg/L. This data is inclusive of all the variables associated to the horse, including dehydration and weather conditions, and further indicates horses being fed registered commercial supplements containing Cobalt in accordance with manufacturers' guidelines are highly unlikely to exceed the Cobalt threshold. This is further supported by the thoroughbred and harness racing codes' decision to amend the Cobalt threshold from 200mcg/L to 100mcg/L in September and November 2016 respectively.

Racing Queensland issued a notice to industry participants in September 2013 advising it is accepted Cobalt is a substance detectable in most, if not all, horses due to dietary intake. Cobalt, in a variety of forms including Cobalt Chloride, is present in a variety of pre-mixed feeds and supplements, however if used according to the manufacturers guidelines, it will not typically elevate to a level which could be deemed a breach of the Australian Rules of Racing. A further industry notice was issued in October 2016 advising of the aforementioned reduction in the Cobalt threshold and further warned trainers, amongst others warnings, to only administer nutritional supplements that are manufactured and marketed by reputable companies and avoid the use of inadequately labelled and unregistered products.

Trainers were advised they should consult with their veterinarian to ensure that their feeding and supplementation practices are sufficient to meet the nutritional requirements of horses under their care and that their supplementation practices, particularly with products containing Cobalt and/or vitamin B12, are not excessive in light of those requirements.

The reviewer finds ignorance to the fact that supplements containing Cobalt and Vitamin B12 administered close to race time may elevate Cobalt to unacceptable levels under the Australian Rules of Racing is not a form of defence, especially in light of the many published cases in recent years and industry notices pre-warning participants of such dangers. The Applicant is responsible to familiarise himself with the active constituents of all supplements administered to horses in his care, in particular products that contain Cobalt and Vitamin B12, to ensure horses are presented to race free of prohibited substances.

The reviewer accepts the Australian Rules of Racing places a strict obligation and responsibility on trainers, in this instance the Applicant, to present their horses to race free of any prohibited substances.

Australian Rule of Racing 178C(1), in part, provides:

"The following prohibited substances when present at or below the concentrations respectively set out are excepted from the provisions of AR.178B and AR.178H"

Sub-section (l) provides:

"Cobalt at a mass concentration of 100 micrograms per litre in urine or 25 micrograms per litre in plasma."

The reviewer finds the Applicant provided no plausible explanation for the analysts' findings. The Applicant submitted *"He was fed the same - exactly the same diet from 24/10/ 17 to 07/04/18. No changes. Every horse in the stable gets the same diet. Numerous horses have won and I've never had a problem."*



The Applicant stated his feeding and supplementation regime consisted of “*Iron Cycle, Feramo H, Tracktorque, and a bit of Livermol here and there - yeah. I do - I do give an odd drip like with the travelling.*”⁸ The reviewer acknowledges no other horse trained by the Applicant tested positive to Cobalt, which is important when considering every horse in the stable received the same diet as evidenced by the Applicant.

The reviewer finds the aforementioned Accredited Racing Laboratories reported Cobalt in excess of 200mcg/L and the indicative level was at 550.8mcg/L, which is in total contrast to the horse’s previous sample at Rockhampton on 8 February 2018 that returned a Cobalt level of 25.6mcg/L. The reviewer, in considering the evidence in totality and taking into account the aforementioned factors, finds it would be reasonable to conclude that such explanation provided by the Applicant was not the sole reason for the analysts’ findings. The reviewer therefore accepts the Applicant presented TIME OUT for racing when a prohibited substance was present and accordingly finds the charge proven.

The Applicant has been a licensed trainer for approximately forty-four (44) years. The Applicant’s disciplinary history during such period demonstrates three (3) prior offences pursuant to Australian Rule of Racing 178, the most recent in September 2016.

The Cobalt precedents for a ‘presentation’ offence within the Queensland racing industry previously incurred a minimum penalty of a twelve (12) month disqualification. Notwithstanding, in some recent matters penalties of a nine (9) month disqualification have been imposed, taking into account the relevant circumstances of individual cases and that of Queensland Civil Administration Tribunal decisions, with specific consideration to a guilty plea and unblemished disciplinary history on extended training careers.

In weighing up the matter of penalty, consideration was provided to the Applicant’s submissions, personal circumstances, not-guilty plea, totality of penalty precedents, the level of Cobalt (in excess of 200mcg/L) and the Applicant’s disciplinary history which demonstrates three (3) prior offences pursuant to Australian Rule of Racing 178. The reviewer finds Cobalt is a prohibited substance that provides participants with an unlevelled playing field and such matters have a detrimental effect on the integrity of the thoroughbred racing industry. A penalty not only needs to be fair and evidence based, it must also serve as a deterrent to any likeminded persons and, considering all factors relevant to penalty, in particular the level of Cobalt detected and the Applicant’s prior disciplinary history, the reviewer finds the penalty imposed is lenient in the circumstances and therefore is not satisfied a reduction in penalty is proven and accordingly confirms the original decision on charge and penalty.

PART 5: Review Rights following Internal Review Decision

In accordance with section 246 of the *Racing Integrity Act 2016*, as the applicant for an internal review of the original decision, you are able to apply to the Queensland Civil and Administrative Tribunal (QCAT) for an external review of the internal review decision.

An external review is commenced by lodging the appropriate forms with QCAT. In accordance with section 33 of the *Queensland Civil and Administrative Tribunal Act 2009*, an application for an external review of an internal review decision is to be made within 28 days from the day this internal review decision notice is provided to the applicant.

For further information regarding the processes for an external review of the decision, please contact QCAT:

⁸ Transcript of Stewards’ Inquiry dated 2 August 2018, page 3, 4 and 5



**QUEENSLAND RACING
INTEGRITY COMMISSION**

Queensland Civil and Administrative Tribunal

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