



## 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 0085-18
Applicant's Name:	Garry Smith
PART 2: Decision History	
Original Decision:	Breach of Rule 178 of the Australian Rules of Racing
Original Decision Makers:	D Aurisch, I Brown, C Albrecht
Date of Original Decision:	27 August 2018
Internal Review Decision:	Original decision on charge confirmed, penalty amended to a \$3,000.00 fine with \$1,000.00 being wholly suspended for a period of two (2) years
Internal Adjudicator:	Mr Kane Ashby, Queensland Racing Integrity Commission
Date of Internal Review Decision:	26 September 2018
PART 3: Summary of Internal Review Application	
<p>The Applicant, Mr Garry Smith, trainer of LEBRON which presented to race at the Sunshine Coast Turf Club on 25 February 2018, was charged under Australian Rule of Racing 178 and subsequently pleaded guilty to the charge at a stewards' inquiry conducted on 27 August 2018 as a result of a pre-race urine sample collected from LEBRON being found to contain a prohibited substance, namely Arsenic in excess of the permissible threshold as prescribed under Australian Rule of Racing 178C(1)(b).</p> <p>Australian Rule of Racing 178 states:</p> <p><i>"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."</i></p> <p>The specifics of the charge being that the Applicant, as the trainer of LEBRON, did present that horse to race at the Sunshine Coast Turf Club on 25 February 2018 for the purpose of engaging in Race 4 the Maiden Handicap 1600m when a pre-urine sample collected from LEBRON was found, upon analysis, to contain a prohibited substance, namely Arsenic above the permissible threshold as prescribed under Australian Rule of Racing 178C(1)(b). The Applicant pleaded guilty to the charge.</p> <p>When determining penalty, the stewards took into account the Applicant's guilty plea and his disciplinary history. However, the stewards were also mindful of similar penalty precedents, the negative impact such breaches have on the image of racing and the need for a penalty to serve as an appropriate deterrent to ensure racing is conducted free of prohibited substances. Stewards subsequently imposed a fine on the Applicant in the amount of \$3,000.00.</p>	



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

*"The penalty issued in this case is not commensurate to other penalty precedents for cases of this type especially after taking into account all the relevant factors in this case.*

*The decision makers in this matter have completely disregarded a relied upon study in arsenic cases namely "Melbourne University faculty of Veterinary Agricultural services examining the ingestion of wood containing arsenic and the elevated levels achieved".*

*That the expert consulted by Mr Aurisch in this case and whom I assumes opinion has been relied upon when reaching a decision as to penalty stated that it was "highly unlikely" that the horse could not have ingested enough of the timber fence posts/wood shavings to produce the reading he did. The words "highly unlikely" do not amount to 100% certainty that this could not have been the case.*

*The expert as mentioned above did not provide this evidence during the course of the enquiry - I assume it was garnered by Mr Aurisch prior to the proceeding.*

*The decision makers have paid no credence whatsoever to the horses eating habits that outlined in the enquiry. If the decision makers had actually paid this evidence any amount of credence or even have observed the way and manner in which the horse consumes his feed then I am certain that, in a fair proceeding, would have reached a different conclusion.*

*Arsenic was present in BOTH the timber fence posts and the wood shavings upon which he was stabled - the testing did not differentiate which.*

*No credence was paid to the treatment records of said horse and the fact that no product even containing a trace of arsenic has ever been used in the horses treatment regime.*

*The result achieved was 0.40 (threshold 0.30) - the testing indicates an uncertainty of 0.03 millilitres which would bring the sample down to 0.37 which is only a small amount over the allowable threshold.*

*That only two positive swabs to arsenic in the previous twelve months have attracted a penalty other than the horse being disqualified. The first was Jai Phillips whom was fined \$3000 however it was stated in the stewards' report concerning the matter that stewards had in fact considered the abovementioned study irrelevant in that matter. This fact was not stated in the stewards' report in this case. The second case was of Frank Phillips, whom was fined \$3000 for a second offence.*

*I don't believe enough (if any) weight was placed on my unblemished record as a licensed person which is free of any charge over a period of some nearly 50 years save for some careless riding suspension when a jockey in the 1970's.*

*All factors considered I find the penalty issued both to be harsh and unfair and that it be inconsistent with penalty precedents in the myriad of recent arsenic matters. I accept that the horse will be disqualified from the race in question and pleaded guilty to the charge as I accept the principles of strict liability even though I never intended for the horse to be presented at the races with a prohibited substance in his system. I respectfully only ask to be treated the same as everyone else."*

The outcome sought by the Applicant was that no penalty be imposed other than the disqualification of LEBRON from the subject race.



#### PART 4: Reasons for Internal Review Decision

The Applicant was the trainer of LEBRON when it presented to race at the Sunshine Coast Turf Club on 25 February 2018. A pre-race urine sample collected from LEBRON was analysed by the Racing Science Centre and Racing Analytical Services Limited, which reported the sample was shown to contain Arsenic at a mass concentration in excess of the 0.30 milligrams per litre in urine threshold under Australian Rule of Racing 178C(1)(b).<sup>1</sup>

LEBRON was placed third in the aforementioned race.

Dr Karen Caldwell, Acting Manager of Veterinary Services at the Racing Science Centre, stated *“Arsenic is a chemical element existing in organic and inorganic forms. Arsenical compounds have a wide variety of applications in various industries, including use in pesticides, herbicides and anti-parasitics. In sufficient levels, arsenic is also toxic to mammals, with inorganic arsenic generally more toxic than organic arsenic. Arsenic disrupts sulfhydryl enzyme systems, affecting tissues including those in the gastrointestinal tract, lung, kidney, liver and skin. Some arsenic-based compounds are marketed for use in horses as 'tonics' and 'stimulants', purportedly aiding in maintenance of healthy skin and coat, recovery from illness and other stressors, and stimulation of appetite and red blood cell production. Registered veterinary products containing arsenic-based compounds include Invigorate Injection® and Jurocyl Injection®. Depending on the formulation, arsenic may be classed as a Schedule 4 (Prescription Only Medicine or Prescription Animal Remedy), Schedule 6 (Poison) or Schedule 7 (Dangerous Poison) substance according to the Standard for the Uniform Scheduling of Medicines and Poisons No. 15 (the Standard).”*<sup>2</sup>

During the stewards' inquiry conducted on 27 August 2018, the Applicant in evidence stated *“If you know the horse you would know how he eats, which has subsequently been changed because he is on a different bedding now. He's on straw. He's had a throat operation. He gets fed off the ground off a big tin. But the horse is a pig and he will eat anything. So all I can say in my defence is the horse has never, ever been injected with arsenic. That is my only - that's why asked you when you came up there to have that (timber posts and bedding material) tested.”* The Applicant added *“All I can say is the horse was bought from the Inglis sales in Sydney. Came from Gai Waterhouse. We all know her father's record with arsenic. That's my only other defence. The horse - by the time he arrived here - when he left down there it could have been through the roof. I don't know. I don't know. I can categorically sit here and say it: the horse - I have never, ever used arsenic in my life. I don't have a horse that requires anything like that. If they did I wouldn't have the horse. Plain and simple.”*<sup>3</sup>

The inquiry heard LEBRON had a short break after exiting Ms Waterhouse's stable and was trained by the Applicant for a period of approximately eight to nine weeks prior to racing. The chairman of the inquiry questioned *“So you have never used Jurocyl or Invigorate?”* to which the Applicant replied *“No.”*<sup>4</sup>

The stewards of the Queensland Racing Integrity Commission conducted a stable inspection of the Applicant's licensed premises on 12 March 2018 to inform the Applicant of the analysts' findings.

<sup>1</sup> Exhibit 4 and 12

<sup>2</sup> Exhibit 5

<sup>3</sup> Transcript of Stewards' Inquiry dated 27 August 2018, page 3 and 4

<sup>4</sup> Transcript of Stewards' Inquiry dated 27 August 2018, page 4



During the inspection, samples of the wood timber shavings of the fence posts from outside LEBRON's yard and bedding material from inside the stable were obtained and sent to Symbio Laboratories for analysis. The laboratory reported the aforementioned samples contained Arsenic at  $<0.0005\text{m/m}$ .<sup>5</sup>

The inquiry heard the aforementioned Arsenic levels reported by the laboratory were minuscule. The chairman of the inquiry stated *"I have been in contact with Dr Caldwell at the Racing Science Centre, and the advice she gave me was that the levels in there are minuscule as compared to your level returned by the horse."*<sup>6</sup> This evidence was not challenged by the Applicant.

The Applicant's complete submissions for review are outlined in Part 3 of this decision.

The Applicant submitted *"The penalty issued in this case is not commensurate to other penalty precedents for cases of this type especially after taking into account all the relevant factors in this case. The decision makers in this matter have completely disregarded a relied upon study in arsenic cases namely "Melbourne University faculty of Veterinary Agricultural services examining the ingestion of wood containing arsenic and the elevated levels achieved. That the expert consulted by Mr Aurisch in this case and whom I assumes opinion has been relied upon when reaching a decision as to penalty stated that it was "highly unlikely" that the horse could not have ingested enough of the timber fence posts/wood shavings to produce the reading he did. The words "highly unlikely" do not amount to 100% certainty that this could not have been the case. The expert as mentioned above did not provide this evidence during the course of the enquiry - I assume it was garnered by Mr Aurisch prior to the preceding."*<sup>7</sup>

The reviewer sought advice from Dr Caldwell particular to the Arsenic levels reported in the aforementioned materials and what effect the ingestion of such material would have on Arsenic levels reported in the subject sample. Dr Caldwell stated *"Neither sample (12407 and 12486) has a CCA result consistent with CCA-treated timber. The Australian Standard for H2 timber is  $0.32\% \text{m/m}$  (and  $0.7\% \text{m/m}$  for H4 grade), so at  $<0.001\% \text{m/m}$  the amount of arsenic in these samples is negligible and unlikely to have any significant affect if consumed."*

The reviewer acknowledges each case is treated on its merits and set of circumstances.

The Queensland Racing Integrity Commission's Chief Stipendiary Steward (Thoroughbreds) issued a statement in June 2017 and August 2018 warning trainers to watch for horses chewing shavings and fences that contain arsenic treated timbers.

The reviewer acknowledges the report of a study by the Melbourne University faculty of Veterinary Agricultural Sciences examining the ingestion of wood containing Arsenic and elevated levels. The reviewer accepts that in previous Arsenic matters referred to by the Applicant it was determined that, subsequent to considering the aforementioned study of wood shavings containing Arsenic and the elevated levels achieved, stewards could not exclude to the requisite standard that the level of Arsenic detected in such matters was not the result of the subject horse consuming wood shavings from timber posts used in its stable.

<sup>5</sup> Exhibit 16

<sup>6</sup> Transcript of Stewards' Inquiry dated 27 August 2018, page 3

<sup>7</sup> Application for an Internal Review dated 30 August 2018



The reviewer, in weighing up the evidence in totality and taking into account the aforementioned factors, in particular the evidence of Dr Caldwell and reported levels of Arsenic in the subject sample at 0.40mg/L and 0.42mg/L and the analysis of the timber posts and shavings that reported Arsenic at <0.0005mg/L respectively, is not satisfied to the requisite standard that the Arsenic levels reported in the subject sample are attributed to LEBRON consuming the stable bedding or timber posts. The reviewer is satisfied the Applicant presented LEBRON for racing when a prohibited substance was present, namely Arsenic above the regulatory threshold and accordingly finds the charge proven.

The Applicant's submissions on penalty in part state "*That only two positive swabs to arsenic in the previous twelve months have attracted a penalty other than the horse being disqualified. The first was Jai Phillips whom was fined \$3000 however it was stated in the stewards report concerning the matter that stewards had in fact considered the above mentioned study irrelevant in that matter. This fact was not stated in the steward's report in this case. The second case was of Frank Phillips, whom was fined \$3000 for a second offence. Don't believe enough (if any) weight was placed on my unblemished record as a licensed person which is free of any charge over a period of some nearly 50 years save for some careless riding suspension when a jockey in the 1970's. All factors considered I find the penalty issued both to be harsh and unfair and that it be inconsistent with penalty precedents in the myriad of recent arsenic matters. I accept that the horse will be disqualified from the race in question and pleaded guilty to the charge as I accept the principles of strict liability even though I never intended for the horse to be presented at the races with a prohibited substance in his system. I respectfully only ask to be treated the same as everyone else.*"<sup>8</sup>

The Applicant's disciplinary history is exemplary over an extended period (being over 50 years) as a licensed person of which the last twelve (12) months as a licensed trainer and is clear of any prior offence pursuant to Australian Rule of Racing 178. The precedent penalty scale for a presentation Arsenic offence have incurred monetary fines between \$2,000.00 and \$5,000.00.

In weighing up the aforementioned factors on penalty, consideration was provided to the Applicant's submissions, cooperation, guilty plea, mitigating circumstances, disciplinary history, penalty precedents and analysis conducted by Symbio Laboratories of the timber posts and stable bedding which reported Arsenic at <0.0005m/m. The reviewer acknowledges the importance that each case is treated on its merits and set of circumstances and accepts that any penalty imposed is reflective of the evidence and serves as a deterrent to the Applicant and likeminded persons.

Taking into account the totality of evidence and aforementioned factors, the reviewer amends the original penalty to a \$3,000.00 fine with \$1,000.00 to be suspended for a period of two (2) years under the provisions of Australian Rule of Racing 196(4) on the condition the Applicant does not reoffend during that period.

For reference, Australian Rule of Racing 196(4) states:

*"Any person or body authorised by the Rules to penalise any person may in respect of any penalty imposed on a person in relation to the conduct of a person, other than a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period not exceeding two years upon such terms and conditions as they see fit."*

<sup>8</sup> Application for an Internal Review dated 30 August 2018



## 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:

### **Queensland Civil and Administrative Tribunal**

Registry Location: Level 9, 259 Queen Street, BRISBANE QLD 4001  
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