

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR DENNIS CHARLES WYCH

APPLICATION NO: 20/4963

PANEL: MS K FARLEY
(PRESIDING MEMBER)
MR R NASH (MEMBER)
MS J OVERMARS (MEMBER)

DATE OF HEARING: 7 DECEMBER 2020

DATE OF DETERMINATION: 12 APRIL 2021

IN THE MATTER OF an appeal by DENNIS CHARLES WYCH against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a 15 month disqualification for one breach of Harness Rule of Racing 190(1), (2) and imposing a 12 month disqualification for a second breach of Harness Rule of Racing 190(1), (2) of which 7 months was to be served concurrently, resulting in a total disqualification of 20 months.

The appellant appeared in person.

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

Introduction

1. There are two appeals against penalty.
2. On 7 December 2020 the Tribunal heard the appeals and reserved its decision and on 12 April 2021 it determined that the appeals be dismissed.

3. Dennis Charles Wych ("Mr Wych" or "the Appellant") is a RWWA Licensed Trainer in the WA Harness Racing Industry.
4. Mr Wych has been a licenced driver for 40 years and a licenced trainer for 38 years.
5. Mr Wych is a hobby trainer. Racing is not his livelihood. He works for Alcoa, Pinjarra refinery.
6. Mr Wych is in fine health.
7. On 15 August 2020 he presented RICHIE REACTOR to race at Northam in Race 9 and the horse won.
8. A post-race swab was taken via a blood sample, as a urine sample could not be obtained.
9. On 26 August 2020 the WA Chemistry Centre Analysis ("Chem Centre") responsible for testing the sample reported an irregularity in relation to cobalt.
10. On 29 August 2020 RWWA advised Mr Wych of the irregularity and an inspection of Mr Wych's home and stables was carried out. The investigation team confiscated his medical journal and some medications located at the property.
11. On 30 August 2020 Mr Wych presented CLASSY SAVETTE to compete in Race 5 at Pinjarra. The horse ran ninth and a post-race urine sample was taken.
12. On 1 September 2020 Racing Analytical Services Limited (RASL) issued a report confirming the presence of cobalt above the threshold level in the sample taken from RICHIE REACTOR, and as a result Mr Wych's trainers' licence was suspended.
13. At the Stewards inquiry on 10 September 2020 Mr Wych pleaded guilty to charge one, being the only charge he faced at that time. On 15 September 2020, the Stewards imposed a disqualification of 15 months for the offence.
14. On 25 September 2020 Mr Wych lodged an appeal with RPAT in relation to the penalty imposed by way of the length of the disqualification on the basis that it was manifestly excessive ("appeal 839").
15. On 29 September 2020, the Chem Centre reported an irregularity in relation to the swab taken from Mr Wych's second horse, CLASSY SAVETTE.
16. On 6 October 2020 an investigation team attended Mr Wych's property for a second time to inspect his home and property.

17. On 13 October 2020 RASL issued a report confirming the presence of cobalt in the swab taken, above the threshold level.
18. Appeal 839 was put on hold, so that there could be a Stewards inquiry in relation to Mr Wych presenting CLASSY SAVETTE not free of a prohibited substance above the threshold level allowed.
19. At the Stewards inquiry on 29 October 2020 Mr Wych plead guilty to breach two. On 9 November 2020 the Stewards imposed a disqualification of 12 months with 7 months to be served concurrently with the first period, resulting in a total 20 month disqualification.
20. On 12 November 2020 Mr Wych appealed his second penalty and the overall total disqualification on the basis that it was manifestly excessive.

RWWA Stewards Inquiry – RICHIE REACTOR

21. At the inquiry on 10 September 2020 the Stewards attempted to find out how the level of Cobalt came to be in RICHIE REACTOR's system.
22. The cut off for Cobalt in plasma is 25mg/L. RICHIE REACTOR's level was 200mg/L.
23. The Stewards were unfamiliar how plasma levels compared to that from a urine swab as this was the first time the Chem Centre had reported a cobalt reading in plasma. This was an important issue as the level is relevant to penalty.
24. Ms N Beckett from WA Chemistry Centre Analysis gave evidence that the level was high. At page 9 of the transcript she stated *"I suppose I would consider it to be high. However, this is the first time a cobalt, the Chem Centre has ever reported on plasma and just to provide some context behind that, since January 2018, so over 2 and a half years ago we tested 615 harness equine plasmas and this was the first positive result that we have obtained, so therefore greater than 27.5% and over 99% of all others that were tested were less than 10mg/L"*.
25. Dr Medd, RWWA Industry Veterinarian also gave evidence about the range in which the level fell. She agreed with Ms Beckett's assessment and stated that from the studies she is familiar with most of the levels seen were well below 10mg/L. She stated, at page 21 of the transcript, *"in fact most of the levels we see are well below 1 or 2mg/L so the level of 200 is extremely, extremely high."*

26. Dr Medd ruled out the possibility that dietary supplements would create such a level or even registered injectable supplements. She cited a Hong Kong study where a VAM injection was used. The peak plasma level that was seen was 3.6. She stated *"So, you know even after an injection of a known vitamin supplement containing cobalt and then sampling straight away, so that was an administration study as opposed to one of the population study race day horses but that, that only elevated the level to 3.6 in plasma."*
27. During the inquiry Mr Wych could offer no explanation for how RICHIE REACTOR came to have an elevated cobalt level. When pressed to give one, he cited a possible security issue could have been the cause. He also spoke about a horse of his who returned a high lead level reading from a hair test undertaken in 2014. These comments did nothing to assist his case. There was no direct evidence to support an explanation and Mr Wych was clear he could not give one.
28. In their judgment when considering penalty, the Stewards took into account:
- The nature of the substance detected;
 - The circumstances where able to be discerned as to how the substance came to be detected;
 - The level of blameworthiness of Mr Wych;
 - The degree of possible impact on the industry;
 - Mr Wych's personal circumstances;
 - Mr Wych's immediate plea of guilty and acceptance of responsibility;
 - That they were unable to determine why RICHIE REACTOR attained such an extreme level of cobalt;
 - The inquiry was conducted efficiently due to Mr Wych's approach;
 - Mr Wych was professional and respectful throughout;
 - Mr Wych did not challenge any of the expert evidence;
 - Mr Wych's unblemished record over many years of involvement;
 - Mr Wych did not rely on his licence for his livelihood;
 - Racing had been part of Mr Wych's life for a very long time;

- The level of cobalt detected was highly unlikely to be the result of the use of any routine supplements or dietary factors. This distinguished his case from others where there was some probability the level may have been as a result of the use of routine supplements at too high a dose or proximity to racing at the given rate of administration;
- As there was no explanation for how RICHIE REACTOR attained the reported level his case was closer in comparison with the case of 2016 L Coulson (Harness) than to others; and
- Mr Wych's case was akin to those where horses had been administered concentrated cobalt salts and was distinct to that of 2015 B Stanley (Harness), 2016 R Miller (Harness) and 2018 K Prentice (Harness) where levels were not extreme and were within the bounds of what potentially could be achieved through the use of routine supplements too close to racing.

RWWA Stewards Inquiry – CLASSY SAVETTE

29. At the second inquiry on 29 October 2020 the Stewards considered the chronology of events as to how Mr Wych presented a second horse with a cobalt level over the allowed threshold.
30. The level in his second horse, CLASSY SAVETTE was 240mg/L. This level was obtained from a post race urine swab.
31. Evidence was given by Ms Beckett about the level. In her view, the level was medium to high. She stated "it is the second highest level that we have reported in urine at Chem Centre and just to provide some context to that, since the beginning of January in 2017, so nearly 3 years almost, we tested 4,878 equine harness samples for cobalt and less than 1% or .1% have returned a positive value so greater than the 110mg/L."
32. Given the threshold is 100mg/L the level is more than twice the allowed level.
33. Mr Wych again could give no explanation for the presence of the Cobalt and stated that the horse had never had cobalt except for what was in her additives. It was established that the feeding regime of CLASSY SAVETTE could not have caused the elevated reading.

34. The Stewards noted their concern that having already been aware his horse RICHIE REACTOR having reported a level over the threshold Mr Wych, despite having no explanation for the level, continued to race his other horse.
35. Mr Wych gave evidence that he was stunned RICHIE REACTOR returned the level it did and did not expect CLASSY SAVETTE to return an elevated reading. He said he could have easily scratched the horse had he done something untoward. He submitted that if he had been inappropriately administering Cobalt to his horses it would make no sense to race his other horse after receiving the first test result.
36. In their judgment when considering penalty, the Stewards took into account:
- Mr Wych had pleaded guilty;
 - There was no accepted explanation for how CLASSY SAVETTE came to return the reported reading and the evidence about this issue was in similar vein to that of RICHIE REACTOR;
 - It was a high level, over twice the threshold;
 - There is no evidence that Mr Wych used any routine supplements that impact cobalt in any way that might even begin to explain how this reading arose;
 - The complete lack of any explanation was of concern and was relevant to penalty when comparing his case to that of various others where there was evidence of the use of various cobalt impacting registered supplements at higher than average rates of frequency or dosage, albeit that many of those trainers explanations did not fully account for the reported readings;
 - Mr Wych had awareness of RICHIE REACTOR returning an elevated level before choosing to race CLASSY SAVETTE. There was the potential for him to have withdrawn the horse had he wished given he appeared to have no idea as to why his horse returned such levels yet he chose not to do so;
 - This was his second offence;
 - The time frame between the two races was 16 days;
 - Whatever had occurred to cause the reading must have occurred on two separate occasions (this was significant when considering concurrency);

- They could not apply the same level of mitigation as cases where the Stewards were satisfied that the source of the elevated cobalt level was in all probability the inappropriate use of routine supplements;
- They distinguished his case from that of 2018 K Prentice (Harness) due to a complete lack of evidence of the use of supplements that might have caused or contributed to the result and that a period of disqualification would not deprive him of his livelihood;
- The way a substance gets into a horse is relevant to penalty;
- Previous cases simply acted as a guide; and
- The principle of totality.

Penalties Imposed

37. Mr Wych has appealed against:

- a. the penalty imposed by the RWWA Stewards on 15 September 2020 in which they imposed a disqualification of his trainers licence for 15 months, after he pleaded guilty to one charge of breaching Harness Rule of Racing 190(1), (2) for presenting RICHIE REACTOR to race in Race 9 at Northam on 15 August 2020, where it finished first, not free of the prohibited substance Cobalt, evidenced by a concentration level in excess of 25 micrograms per litre in plasma ("Charge 1"); and
- b. the penalty imposed by the RWWA Stewards on 9 November 2020 in which they imposed a disqualification of his trainers licence for a period of 12 months of which 7 months was to be served concurrently with charge 1 after he pleaded guilty to a second charge of breaching Harness Rule of Racing 190(1), (2) for presenting CLASSY SAVETTE to race in Race 5 at Pinjarra on 31 August 2020, where it finished ninth, not free of the prohibited substance Cobalt, evidenced by a concentration level in excess of 100 ug per litre in urine ("Charge 2").

38. The total effective disqualification was therefore 20 months.

39. The disqualification for charge one was backdated to run from the date Mr Wych was suspended and the disqualification for breach two was backdated so that the total penalty expires on 30 April 2022.

The Appeal

40. Mr Wych has appealed on the basis that the disqualification is manifestly excessive. He was self represented when filing each of his notices of appeal and the grounds were not particularised.
41. At the hearing of the appeal on 7 December 2020 ("the hearing") in oral submissions Mr Wych sought the penalties for charge 1 and charge 2 both be set aside and his period of disqualification period be reduced to 9 months. His grounds of appeal appeared to be as follows:
 - a. Classing the plasma level as extremely high when there was no system of comparing it to cobalt levels measured in urine was unfair.
 - b. He should not receive a higher penalty because he is a hobby trainer and to do so was discriminatory. He paid the same fee for his licence and was required to follow the same rules as a trainer who relied on their licence for their livelihood, and therefore he should not be disadvantaged just because he did not rely on training for his primary income.
 - c. The total disqualification period, together with each individual period, were manifestly excessive.
42. In relation to ground 3, Mr Wych submitted that a period of disqualification should be in line with other similar cases including Appeal 821 G Elson (Harness) ("Elson"), Appeal 831 C Dagostino (Greyhounds) ("Dagostino") and Steward's Inquiry 2016 L Coulson (Harness) ("Coulson").
43. Whilst Mr Wych accepts that he knew about RICHIE REACTOR'S elevated Cobalt level prior to presenting CLASSY SAVETTE to race, this supports his evidence that he simply did not know how RICHIE REACTOR came to have an elevated Cobalt level and certainly did not expect another one of his horses to also have an elevated level. Had he done something untoward, such as administering his horses Cobalt injections, he could have simply scratched his mare from the race. He should therefore not be more harshly penalised than other trainers with multiple horses who returned positive swabs.
44. Counsel for the Stewards sought that the appeal be dismissed on the grounds that the penalties imposed for both charges were appropriate.

45. Stewards submitted that cases where no satisfactory explanation can be given for the elevated level cannot be afforded the same level of mitigation as those where the Stewards are satisfied the source of the Cobalt was in all probability via a routine supplement.
46. Stewards submitted the total lack of explanation did not act to aggravate but did affect the level of mitigation afforded.
47. Stewards distinguished the cases of 2015 S Taylor (Thoroughbreds) ("Taylor"), 2015 B Stanley (Harness) ("Stanley"), Coulson and Elson on the basis that the trainers in those cases did not know about the elevated levels prior to racing their other horses. Mr Wych however, could have chosen to act as he knew about RICHIE REACTORS level from the report issued prior to CLASSY SAVETTE racing.

Ground of appeal 1 – Classification of the level

48. The level of a prohibited substance in a horses' (or greyhounds) system is a factor which appropriately affects the level of mitigation afforded when deciding penalty.
49. When a level is high or extreme, the level of mitigation afforded cannot be the same as that afforded to a trainer, who's horses (or dog's) levels are close to the threshold. This is because the level effects a) the blameworthiness of the trainer and b) the welfare of the animal.
50. Even perceived animal welfare ramifications put into jeopardy the image of the industry.
51. Given the evidence of Dr Medd and Ms Beckett and the fact that RICHIE REACTOR'S reading was 9 times the threshold it is completely appropriate that the Stewards found RICHIE REACTOR'S level to be extreme.
52. We do not accept that just because the plasma sample level cannot be compared to a urine sample level, this makes the Stewards finding unfair. Such a comparison is not required.
53. The evidence of Dr Medd and Ms Becket is clear that the threshold level of 25mg/L is a generous one. Mr Wych did not challenge the expert evidence at the inquiry or the hearing. We fully accept the evidence of Dr Medd and Ms Becket.

54. We are of the view the Stewards considered the Cobalt levels of both of his horses appropriately when deciding penalty. This ground of appeal is therefore not made out.

Ground of appeal 2 – penalty for hobby trainers

55. Mr Wych submitted that just because he was a hobby trainer and did not rely on his licence for his income is not a reason for him to receive a greater period of disqualification than trainers that do. His evidence was that he paid the same amount for his trainers' licence as any other trainer and therefore all trainers should be treated the same when deciding penalty.
56. We do not agree with this submission. This mitigating factor is relevant for the overall financial and practical ramifications that a disqualification would have on a person. The flow on effects of a disqualification for a trainer who relies on his or her licence for their income is generally far greater to that of a hobby trainer.
57. The Stewards can consider any relevant personal, including financial circumstances when considering mitigating factors, and so each trainer is dealt with on a case by case basis.
58. There was no evidence put forward at either the inquiry or the hearing by Mr Wych as to any financial hardship or any welfare concerns for his horses which would be caused if a disqualification were imposed.
59. This ground of appeal is therefore not made out.

Ground of appeal 3 – excessive disqualification compared to other similar cases

60. Mr Wych submits his disqualification is manifestly excessive when comparing the length to that received by Mr Elson, Mr Dagostino, and Mr Coulson.
61. He pointed out the Cobalt level of Mr Elson's horse was high being 340ug/l, which is more than three times the allowed threshold; The level of Mr Dagostino's greyhound was 300 ug/l, three times the allowed threshold; and the levels in Mr Coulson's horses were extreme being between 750-1,500ug/l.

62. Mr Wych distinguished his case from Coulson on the basis that Mr Coulson had 4 presentation charges and he only had 2. He said it was unfair that he received a total of 20 months disqualification for the same offence when Mr Coulson was only disqualified for 18 months and his readings were far more extreme.
63. An explanation as to how an elevated reading of a prohibited substance came to be in horses (or greyhound's) system is a consideration relevant to penalty, as it is important to differentiate between cases where a clear mistake can be shown as opposed to a deliberate act.
64. The trainer bears the onus of proof to establish the source of the level if they wish to receive any benefit of this mitigating factor.
65. Mr Wych was unable to give any evidence as to the source and therefore the Stewards submit that he received no mitigation for this factor but was not given a loading for it.
66. When deciding the overall amount of mitigation to be afforded, this factor must also be balanced against the quality of the evidence given by the trainer, their genuineness and how they have conducted themselves during the investigation and inquiry.
67. In the case of Prentice the Tribunal considered the relevance of an explanation and how it impacts upon the level of mitigation. Mr Prentice appealed a 12 months disqualification imposed for presenting his horse with a Cobalt level of 150ug/L. Apart from the use of VAM, Mr Prentice could offer no other satisfactory reason for the horse having an elevated Cobalt level. The Stewards imposed a penalty different to that which they would have imposed had there been in their view a plausible explanation offered by Mr Prentice for the elevated cobalt level.
68. On appeal, the Tribunal set aside the original penalty of a 12 months disqualification and replaced it with a 9 months disqualification, as the members considered the penalty manifestly excessive.

69. In his reasons at paragraph 52 Member Nash stated:

“it is understandable that the Stewards may consider frank admissions made by a trainer about making administration prior to a race and thus providing a plausible explanation for an elevated cobalt level are mitigatory. However, the mere fact that a trainer has been unable to provide what the Stewards consider to be a satisfactory explanation ought not as a matter of course result in less mitigation being afforded. Such an approach has the potential to create perverse outcomes where someone who deliberately administers a substance such as cobalt immediately before a race...is better off than someone who genuinely cannot explain how their horse came to have an elevated level. I cannot see how being frank about the former case justifies a better penalty outcome than for someone who simply cannot explain an elevated level, provided the Stewards have no basis to consider the person in the latter case is not genuine. For example, if someone is a repeat offender or is found to be an unsatisfactory witness during the inquiry then that may provide a basis for not accepting their genuineness.”

70. In that case the Stewards did not make a finding that Mr. Prentice had not been honest or forthcoming in his evidence and praised Mr Prentice for his co-operation and professional dealing with respect to every aspect of the inquiry and the investigation. The same can be said for Mr. Wych.

71. In concluding in Prentice that the “established range” of penalties for a first offence was between 9 and 12 months disqualification, it must be emphasised that the range serves as a guide only and that each case must be decided individually. In the case of Richie Reactor, the level of Cobalt in the horse’s plasma was 8 times the threshold level. It was extremely high.

72. In the case of Elson, Mr Elson received 9 months disqualification for each of his presentation offences with the second period to be served partially concurrently to the extent of 6 months. The total period of disqualification imposed was therefore 12 months.

73. Mr Elson was also a hobby trainer. He claimed that it was the over supplementation of vitamin B12 that led to the elevated readings. This explanation was not accepted by the Stewards. Whilst *"the feeding and supplements regime adopted by Mr Elson provided some explanation for the source of the high levels the Stewards could not confidently state that the regime as described by Mr Elson with respect to time and dosages of the various substances precisely explained the reported levels of the two horses in question especially when contrasted to the reported levels of other horses in the stable"* (paragraph 42R of the judgment).
74. *"It was argued before the Stewards that Mr Elson's case fell into the category of carelessness and was therefore at the lower end of the scale of seriousness, and sought to contrast the case from the decision of the Stewards in Prentice in which they found that there was no satisfactory explanation for the level of cobalt measures. As was noted in the Tribunal decision in Prentice, the apparent requirement for trainers to provide an explanation that is satisfactory to the Stewards can lead to penalty outcomes that are difficult to reconcile, especially where they have found the trainer in question has fully co-operated with the Stewards and Investigators and is a person of good character with a long standing record"*. (paragraph 83 of the judgment)
75. Unlike Mr Wych, Mr Elson did not receive credit for pleading guilty. One of his horses had a high level, being more than three times the threshold, however, we accept this level is still not as extreme as RICHIE REACTOR's level.
76. The other case to which Mr Wych referred was 2020 C Dagostino (Greyhounds. Mr Dagostino was found guilty of presenting his Greyhound with a Cobalt level of 300mg/L and was disqualified for 9 months. He appealed his penalty and the appeal was dismissed. When considering penalty, the Stewards took into account that Mr. Dagostino's behaviour significantly hampered the inquiry, so much so that he was found guilty of also giving misleading evidence. The fact that he did not plead guilty to the presentation charge also greatly reduced the level of mitigation afforded to him. Mr Dagostino was, however, a professional trainer and did rely on his licence for his income. He was also not in good health.
77. Whilst decision as to penalty will be primarily influenced by the facts and circumstances of the particular case and the personal circumstances and antecedents of the offender consistency in the imposition of penalties is also important.

78. After reviewing similar case law including all the cases referred to by the Stewards at page 7 and 8 of their judgment, and not just the cases to which Mr Wych has referred, we are of the view that, given the facts of his case, Mr Wych's penalty is severe, but not as can be shown to be manifestly excessive.
79. It is well settled that this Tribunal will not substitute its own opinion for that of the Stewards, unless the ultimate penalty is shown to be manifestly excessive or there is some demonstrated error on the part of the stewards in their reasoning that leads to a penalty being imposed that is demonstrably wrong.
80. In the circumstances, we do not consider the penalty of 15 months disqualification for the RICHIE REACTOR presentation offence was manifestly excessive, given the extremely high levels of Cobalt in the horse's system and the fact that it was not possible for the Stewards to find that the extremely high level was as a result of an innocent mistake or arose as a result of something that was beyond the control of Mr Wych. In our view that level of penalty does not reflect a view that the Stewards did not accept Mr Wych as genuine in his evidence that he could not explain the level, but it simply meant they could not make findings about the cause that could have been additionally mitigatory for Mr Wych.
81. In relation to the subsequently Cobalt presentation charge concerning the horse CLASSY SAVETTE, we agree that the Stewards correctly were entitled to take into account that Mr Wych ought to have scratched that horse until he had an explanation or understanding as to how RICHIE REACTOR had come to have such a high level. It cannot be said that the penalty of 12 months disqualification was, in the circumstances, demonstrably wrong.
82. In ordering that the penalty in relation to CLASSY SAVETTE was to be partially accumulated with that in relation to RICHIE REACTOR, it also cannot be said that the Stewards were in error. The Cobalt readings in both horses, raced just over two weeks apart, were extremely high and incapable of explanation in terms of otherwise comparable cases.
83. The Stewards otherwise appropriately commented upon all matters relevant to penalty.
84. There having been shown no demonstrable error, and given that we are of the view that the total disqualification period cannot be said to be manifestly excessive, the appeals must be dismissed

Karen Farley

KAREN FARLEY, PRESIDING MEMBER

Robert Nash

ROBERT NASH, MEMBER

J. Overmars

JOHANNA OVERMARS, MEMBER



