

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION
REASONS FOR THE DETERMINATION OF MS N SINTON (MEMBER)

APPELLANT: MR PETER ANDERSON

APPLICATION NO: 22/5509

PANEL: MR ROBERT NASH
(CHAIRPERSON)
MR ANDREW MONISSE
MS NATALIE SINTON

DATE OF HEARING: 30 MARCH 2023

DATE OF DETERMINATION: 12 JUNE 2023

IN THE MATTER OF an appeal by PETER ANDERSON against the determination made by Racing and Wagering Western Australia Stewards of Harness Racing on 25 October 2022 imposing a \$3000 fine, with \$1000 of this amount to be suspended for a 12 month period, on the condition that the detection of prohibited substance rules, in relation to the detection of arsenic are not breached in that period. The fine is imposed for the breach of HAR 190 (1), (2) and (4) of the Rules of Harness Racing.

Mr Peter Anderson self-represented.

Mr Denis Borovica represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Introduction

1. The appellant is a licenced Racing and Wagering Western Australia (RWWA) trainer. On 14 August 2022, the appellant presented SIMPLY SHAZ NZ at the Central Wheatbelt race meeting.

2. SIMPLY SHAZ NZ competed in and won Race 6. A urine sample was subsequently taken and arsenic, a prohibited substance, detected at a concentration of 0.52 micrograms per millilitre, above the cut off of 0.30 micrograms per millilitre provided by Rules of Harness Racing (HR) 188A(2)(b)g.
3. By HR 190, a horse must be presented for a race free of prohibited substances and if a horse is presented for a race not free of prohibited substances, the trainer of the horse is guilty of an offence, regardless of the circumstances in which the substance came to be present in or on the horse.
4. On 25 October 2022, following an inquiry by RWWA Stewards held on 20 October 2022, the appellant was fined \$3000, with \$1000 of it to be suspended for 12 months on the condition that the appellant 'not breach any of the detection of prohibited substance Rules, in relation to the detection of arsenic in that period'.
5. SIMPLY SHAZ NZ was also disqualified as the winner of Race 6.
6. The appellant appeals against the fine imposed. As clarified at the hearing of the appeal on 30 March 2023, and acknowledging that the appellant represented himself and cannot be expected to be familiar with legal terminology, the appellant's complaint is that the fine is manifestly excessive.
7. The appeal cannot be allowed simply because, had this Tribunal been in the place of the Stewards, it would have imposed a different penalty. In order to succeed, the appellant must establish that the Stewards expressly or impliedly made a material error of fact or law: *House v The King* (1936) 55 CLR 499 at [505].

The Facts

8. The facts of the appellant's offending conduct are not in dispute.
9. SIMPLY SHAZ NZ is a 5-year-old mare. She has no veterinary issues.
10. Arsenic has been a contentious issue, and it became apparent several years ago that horses had been ingesting arsenic treated pine, leading to positive results.
11. Since the issue became apparent, RWWA issued extensive warnings and advice about this issue in the form of circulars, articles and official notices. One

such notice remains on the RWWA website. That notice includes the following warning:

RWWA provides notice to trainers and industry participants that future action taken by RWWA Stewards, in matters relating to the presentation of horses with Arsenic levels which exceed the threshold, may result in penalties being imposed, regardless of any evidence relating to ingestion of CCA treated timber products or any other source.

12. The appellant does not use arsenic containing products at his stable, however all 18 yards at his property have arsenic treated pine posts.
13. Having had a previous swab test positive to arsenic, for which he received no penalty, the appellant is aware that arsenic treated pine posts are an issue and has taken steps to prevent a further occurrence by covering all the poles on his property with cloth and PVC shields, and has employed someone to check the state of these posts daily.
14. Despite these safeguards, SIMPLY SHAZ NZ managed to gain access to and chew two posts in her yard, resulting in the positive swab. I accept the Stewards observation at paragraph 12 of their Reasons that photographs of the two posts clearly show that both posts had been chewed by the horse.
15. The level of arsenic detected was in the low range, and a RWWA veterinarian gave evidence before the Stewards that the level was consistent with ingestion of treated pine.
16. The veterinarian further gave evidence that at low levels, arsenic is a tonic, improving coat condition and acting as an appetite stimulant, and is not performance enhancing.

Mr Anderson's circumstances

17. The appellant was at the time the Stewards imposed their penalty 64 years of age, and in good health.
18. He was also a professional and long-standing participant in harness racing, training a large number of horses.
19. Mortgages and loans had placed him in a position of some financial stress. His main owner was financing his replacing the arsenic treated posts with untreated

timber, but this is by way of a loan and he will be required to pay the money back by monthly instalments.

The Stewards' reasons for penalty

20. The Stewards provided the appellant with written reasons for penalty.
21. In those reasons, the Stewards noted that the occurrence of any positive swab in racing brings into question the integrity of the industry and raises concerns of animal welfare. The negative media coverage that follows the detection of a prohibited substance may result in the public, who ultimately fund the industry, losing confidence in the honesty and integrity of the industry.
22. The Stewards further acknowledged that the appellant had taken steps to prevent a recurrence of a positive arsenic result, covering the posts with a protective layer of cloth and/or PVC and designating an employee to check the posts daily. However SIMPLY SHAZ NZ still managed to chew the two posts in her yard.
23. The Stewards noted the appellant's plea of guilty, the respectful and professional manner with which he had dealt with this matter, and his acceptance of his responsibilities as a trainer.

Manifest excess

24. A penalty will only be manifestly excessive if it is shown to be plainly unreasonable or unjust. The range of penalties customarily imposed is of significance although each case turns on its own facts and circumstances. Sentencing ranges provide a general guide only and is merely one of the factors to be taken into account. The discretion conferred on the primary decision maker is of fundamental importance, and this Tribunal will not substitute its own opinion merely because it would have exercised the discretion differently: *Houghton v The State of Western Australia* [No 2] [2022] WASCA 7 at [224] to [228].

Penalties provided by the Rules

25. HR 190 does not provide for either a maximum or a minimum penalty.
26. The penalties available under the Rules are set out in HR 256, and are:
- a. A fine.
 - b. Suspension, with or without conditions.
 - c. Disqualification, for a fixed period or permanently.
 - d. Warning off, for a fixed period or permanently.
 - e. Exclusion from a racecourse, for a fixed period or permanently.
 - f. A bar from training or driving a horse on a racecourse, track or training ground, for a fixed period or permanently.
 - g. Suspension of registration, with or without conditions, for a fixed period, or cancellation of registration.
 - h. Suspension of a licence, with or without conditions, or cancellation of a licence.
 - i. A severe reprimand.
 - j. A reprimand or caution

The Penalty and its history

27. In their reasons, the Stewards referred to other matters in which they had imposed fines for arsenic related offences.
28. In 2019, Darryl Miller was fined \$1000 and had his licence suspended until such time as he had remedied the arsenic treated timber in his stable. Mr Miller was said to have been a hobby trainer with a limited number of horses, as opposed to the appellant who is a professional trainer with some 40 horses.
29. Like the appellant, Mr Miller's offence was his second in relation to arsenic.
30. Mr Miller had pleaded guilty to an arsenic related offence in May 2019. His second offence occurred on 10 June 2019.
31. The appellant contended that the short space of time between those offences made Mr Miller's offending more serious than his own, as at the time of the second offence the issue should have been fresh in Mr Miller's mind.
32. With respect, I do not accept that submission. The passage of time between Mr Miller's two offences was short, however he had also had significantly less time

to fully rectify the issue than the appellant, who has had nearly 4 years. Further, in addition to the imposition of a fine, Mr Miller received a suspension, though the duration of that suspension is not known.

33. In 2022, Grant Williams was fined \$2000 for a first offence with what were said to have been similar circumstances to the appellant. In that matter, it was said:

Despite warnings being issued, offences in relation to the detection of Arsenic were continuing to occur and there was now a need for penalties to be in place to further encourage all trainers to take the appropriate precautions to prevent horses exceeding the threshold for this substance. In this regard trainers are again reminded to take all necessary steps to avoid horses being exposed to ingestion of treated timber or other products which may contain Arsenic.

34. At the hearing of the appeal, further matters were referred to.

35. In 2020, Greg and Skye Bond received a fine of \$2000 for a second arsenic related offence. Mr and Mrs Bond were said to have undertaken extensive efforts and precautions to remove the majority of treated timber posts, at significant expense. Their first arsenic offence had occurred some three months prior. As noted above, the short time period between offences means they had had less time to fully rectify the issue than the appellant.

36. In 2019, Terry Fergusson was fined \$4800 for five offences, four of which related to arsenic. The main contributing factor in relation to three of those arsenic offences was administration of Jurocyl at a time less than that recommended for withdrawal prior to competition, a very different circumstance to the appellant's. Mr Fergusson was said to have had an otherwise unblemished record.

37. Reference was also made to three Victorian matters in which fines, partly suspended, were also imposed.

Was the penalty manifestly excessive

38. It is readily apparent from the previous decisions referred to above, that a fine is the usual or customary penalty for an offence involving arsenic, where the positive result arises from a horse chewing on a treated pine post.

39. It is also apparent from the comments made by the Stewards in Mr Miller's matter that the fact that positive results are still occurring several years after the issue of treated pine posts first arose is a cause for concern requiring the imposition of a deterrent penalty.
40. This is not the appellant's first offence arising from an arsenic treated post. The appellant had also clearly taken steps to avoid a further such offence. It can be readily accepted that such steps come at significant expense. The appellant has taken additional steps since SIMPLY SHAZ NZ tested positive to further reduce the risks of a positive result, including arranging to replace the remaining treated posts and increased inspections of the yards of horses that are currently racing or trialling, so as to check the posts for signs that the horse may have chewed on them.
41. However, it is also clear that however good his intentions, the steps the appellant had taken prior to SIMPLY SHAZ NZ's positive result fell short in that the PVC put over the treated posts was not quite long enough to cover them. Despite the safeguards put in place, SIMPLY SHAZ NZ was able to chew on the treated posts in question, resulting in her positive result for arsenic.
42. The fine imposed on the appellant is broadly consistent with penalties imposed in other matters. Previous fines imposed do not necessarily set the upper limit or what is open.
43. The fine the appellant received may have been higher than those imposed in previous matters, but in the circumstances, having regard to the harm to the integrity of the industry arising from SIMPLY SHAZ NZ having won the race in question and then being disqualified as a result of a positive result for a prohibited substance, it has not been established that the fine was manifestly excessive.

Other issues raised at the hearing of the appeal

44. The appellant raised two additional issues at the hearing of this matter that did not form separate grounds of appeal. For completeness, I will briefly address them.
45. These issues were the appropriateness of the 30 microgram per millilitre cut off for arsenic, and that he had not been given the opportunity to make

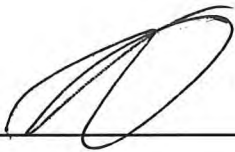
submissions to the Stewards about the penalty they imposed after they had imposed it.

46. In relation to the first issue, the 30 microgram per millilitre cut off is set out in the Rules. It is the Rules that must be applied by this Tribunal. Whether that cut off is appropriate is not a matter that this Tribunal can consider or otherwise take into account.

47. In relation to the second issue, the transcript of the Stewards inquiry on 20 October 2022, shows that the appellant was invited to address the Stewards on penalty and did so comprehensively. Once a determination on penalty has been made, further argument with the Stewards about it is futile as the opportunity to challenge a penalty comes from the right to appeal.

CONCLUSION

48. For these reasons it has not been established that the penalty imposed by the Stewards was manifestly excessive and I dismiss the appeal.



NATALIE SINTON, MEMBER



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Mr Peter Anderson self-represented.

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Background

1. I have read the draft reasons of Member, Ms Sinton.
2. I agree with those reasons and conclusions and have nothing further to add.



ROBERT NASH, CHAIRPERSON



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