APPEAL NO.821

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR GARY ELSON

APPLICATION NO: A30/08/821

PANEL: MS KAREN FARLEY SC (CHAIRPERSON)
MR ROBERT NASH (MEMBER)
MS JOHANNA OVERMARS (MEMBER)

DATE OF HEARING: 6 DECEMBER 2018

DATE OF DETERMINATION: 29 JANUARY 2019

IN THE MATTER OF an appeal by GARY ELSON against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a 12 months total effective disqualification for two breaches of Rule 190 of Harness Rules of Racing.

Mr Gerald Yin represented Mr Gary Elson.

Mr Ron Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

By a unanimous decision of the members of the Tribunal, the appeal against penalty for the two breaches of Rule 190 of Harness Rule of Racing is dismissed.

KAREN FARLEY SC, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL NO.821

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT: MR GARY ELSON

APPLICATION NO: A30/08/821

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Mr Ron Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Summary

In my opinion, for the reasons which follow, the Appellant's appeal against penalty for the two breaches of Harness Rule of Racing 190 of the RWWA Rules of Harness Racing ("Rules") should be dismissed.

Reasons

1. Gary Elson ("Mr Elson" or "the Appellant") is a RWWA Licensed Trainer in the WA Harness Racing Industry.

2. Mr Elson was charged by the Racing and Wagering Western Australia Stewards of Harness Racing ("Stewards") with two breaches of Rule 190 of the Rules, the terms of which charges were as follows:

   Charge 1

   That Mr Elson, as the trainer, presented ARTURUS NZ to race at Gloucester Park on 3 November 2017, where it competed and finished 4th, not free of the prohibited substance cobalt, evidenced by a concentration of cobalt at a level in excess of 100 micrograms per litre in urine.

   Charge 2

   That Mr Elson, as the trainer, presented SCOOBYS DELIGHT to race at Gloucester Park on 4 August 2017 where it competed and won, not free of the prohibited substance cobalt, evidenced by a concentration of cobalt at a level in excess of 100 micrograms per litre in urine.

3. By written reasons dated 27 September 2018, the Stewards found Mr Elson guilty of both charges. For reasons which the Stewards published on 31 October 2018 they imposed a penalty of 9 months disqualification for each offence ordering that the second 9 months penalty be served partially concurrently to the extent of 6 months and partially cumulatively to the extent of 3 months with the first penalty, such that the total cumulative period of disqualification imposed was 12 months.

4. The Stewards backdated the commencement of the disqualification to 29 May 2018 to partially take into account the fact that Mr Elson had been suspended from training since 29 November 2017. The result is that Mr Elson's disqualification runs until 29 May 2019.

The relevant provisions

5. Rule 190 of the Rules provides:

' (1) A horse shall be presented for a race free of prohibited substances.

(2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.

(3)…

(4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.'

6. Rule 188A of the Rules contains the following provisions:

'(1) The following are prohibited substances:

(a) Substances capable at any time of causing either directly or indirectly an action or effect, or both action and effect, within one or more of the following mammalian body systems

…..

the blood system

(b) Substances falling within, but not limited to, the following categories

…

haematopoietic agents

(2) The following substances when present at or below the levels set out are excepted from the provisions of sub rule (1) …

….

(k) Cobalt at a concentration of 100 micrograms per litre of urine….'

The Appeal

7. The Appellant, by his Notice of Appeal dated 1 November 2018, contended that the total effective penalty was manifestly excessive in all the circumstances of the case. The Appellant's solicitors subsequently provided revised grounds of appeal which were in the following terms:

1. The total penalty imposed was manifestly excessive having regard to all the circumstances of the case including:

PARTICULARS

(i) the appellant's antecedents;

(ii) the way the appellant conducted himself during the investigation and inquiry;

(iii) the circumstances of the offending;

(iv) the fact that the levels of cobalt in both presentation offences could not be said to be performance enhancing or a welfare risk for the horses in question;

(v) the fact the appellant had been subjected to an 11 month suspension prior to the Steward's determination on penalty;

(vi) decisions made in comparable cases.

2. *The learned Stewards erred in finding that the cobalt involved in the two elevated readings had the potential to affect performance or a horse's welfare.*

PARTICULARS

(i) the Stewards held that the elevated readings came as a result of over supplementation;

(ii) the Stewards held that cobalt at toxic levels can be a welfare risk;

(iii) the Stewards held that racing authorities throughout the world have considered cobalt to have the potential to positively affect performance;

(iv) Dr MacGregor's new evidence, which it is submitted should be accepted on appeal, proves that cobalt contained in the supplement B12 cannot have a performance enhancing or welfare effect on a horse.

8. The Appellant's written submissions make it clear that ground 2 is a ground in support of the appeal against penalty and is not a challenge to the Stewards finding that the Appellant had committed two breaches of Rule 190.

9. The Appellant does not in this appeal challenge the Stewards' finding that the cobalt found in the horses' pre-race urine samples in the levels found, constituted a prohibited substance in each case.

Background

10. Mr Elson is a licensed harness trainer and driver of long standing having initially been involved in Tasmania for about 15 years, and part of the WA Industry over the last 8 to 10 years. Although it is essentially a hobby of his and not his livelihood, it is clearly a passionate hobby to which he has made a substantial commitment in terms of the level of his racing operations and investment in training facilities at 495 Old Bunbury Road, Blythewood.

11. He was at all material times the trainer of the horses, ARTURUS NZ and SCOOBY'S DELIGHT.

12. On 4 August 2017 the Appellant presented SCOOBY'S DELIGHT to race at Gloucester Park. A pre-race urine sample was taken and subsequently produced a reading of 136 ug/l of cobalt.

13. On 3 November 2017, the appellant presented ARTURUS NZ to race at Gloucester Park. A pre-race urine sample was taken and subsequently produced a reading of 320 ug/l of cobalt.

14. The cobalt levels in the urine samples were certified by the Chem Centre and confirmed by RASL. Accordingly, the two separate certifications of each sample constituted conclusive evidence that the cobalt levels in each case exceeded the threshold level of 100 ug/ litre of urine: Rule 191 (1), (2).

15. Mr Elson was suspended as a trainer on 29 November 2017 after the Stewards invoked the power to do so under Rule 183. At that time he had 19 horses at his training facility (of which about 12 were in work). All of the horses were owned by him or his daughter, Kirsty. Kirsty took over the training of some of the horses after Mr Elson was suspended although a number of others were either sold or retired from racing.

16. The Stewards Inquiry was initially scheduled to commence on 4 January 2018 but was adjourned at the request of Mr Elson. Proceedings were delayed in order to deal with requests by Mr Elson for data packs and other information relating to the sampling and testing of his horses. Mr Elson's lawyer, Damian Sheales, sent a letter to the Stewards

on about 1 February 2018 advising that he represented Mr Elson and seeking certain information.

17. The Stewards thereafter engaged in exchanges of correspondence with Mr Sheales, but experienced difficulties in their communications with him in that there were, at times, significant delays in his responses to their communications to him.

18. The Stewards relisted the Inquiry hearing for 20 March 2018. Just prior to that hearing on 19 March 2018, they received an email from Mr Sheales advising that he was not instructed to appear on 20 March 2018 but indicated that Mr Elson would appear and seek to have the hearing adjourned to a date after 27 April 2018 by which time the outcome of an appeal in a matter relating to Ms Kylie Hughes in the Racing Appeals Tribunal of NSW would be known, being a case which Mr Sheales submitted was "centrally relevant" to the issues before the Stewards in Mr Elson's matter.

19. At the hearing on 20 March 2018, Mr Elson confirmed that he was seeking to adjourn the hearing of the Inquiry. On 20 March 2018 the Stewards proceeded to receive evidence in relation to the matter in terms of receiving evidence of the urine sample test results, and oral testimony from Dr Kelly Wilson from the Chem Centre, Mr Geoff Johnson, RWWA Investigator, as to the investigations that had been undertaken, and Dr Judith Medd, RWWA Veterinarian. The evidence was received so that the Stewards could determine whether or not they would charge Mr Elson with any breach of the Rules. At the end of that hearing, the Stewards advised Mr Elson they would need to give that consideration and if he were to be charged he would have the opportunity at the hearing of the charges to have Mr Sheales represent him [T96, 20 March 2018].

20. After deliberating on the matter, the Stewards determined to charge Mr Elson with the two contraventions of Rule 190 by presenting the two horses with a prohibited substance. A letter to that effect dated 23 March 2018 was sent to Mr Elson and to his counsel, Mr Sheales. In the letter the Stewards indicated that although it was not clear to them what relevance the Hughes matter would have on their determination, they were willing to accede to the request to adjourn the hearing of the charges until that matter was determined. The Stewards followed the matter up by an email sent to Mr Sheales and Mr Elson on 8 June 2018.

21. On 25 June 2018 Mr Sheales advised that the Hughes decision was not expected until August 2018. The Stewards responded requesting Mr Sheales' available dates so the matter could be listed in August. The Stewards had to follow up Mr Sheales about his available dates for a hearing by sending further emails to him. On 24 August 2018, Mr Sheales advised that he would be available to appear on 11, 12, 13 and 21 September 2018 and also advised that the Hughes decision was expected in the near future. He attached written submissions and an application seeking that a portion of the original urine samples be made available for further testing in order to test for the origin of the cobalt found in the urine samples.

22. The hearing of the matter resumed on 21 September 2018 before the Stewards. By that time, Mr Elson had made the decision not to have Sheales appear for him at the hearing, albeit that fact was not known to the Stewards until the day of the hearing. The level of frustration that the Chairman of Stewards felt in respect of the difficulties of getting responses from Mr Sheales in order to progress the matter is apparent from what is said at pages 2 to 8 of the transcript of the proceedings of 21 September 2018.

23. Mr Elson was asked whether he was in a position to plead to the charges and he stated that he wasn't because he considered that having the urine samples 'retested' would vindicate him. He indicated that he was not prepared to enter a plea until the further testing was done.

24. The contention being advanced by Mr Elson, which was considered by the Stewards at the hearing on 21 September 2018, concerned the difference between cobalt found in its inorganic state, such as when it forms part of a Cobalt Sulphate [also spelled Cobalt Sulfate] or Cobalt Chloride molecule, and cobalt in the organic state as part of the cyanocobalamin molecule, better known as Vitamin B12, which is a complex molecule comprising 181 atoms of which the cobalt atom is one. The argument is that when cobalt is in the organic form of Vitamin B12, the cobalt atom in the tightly bound B12 molecule cannot have any affect on a horse's system, because it is not possible for there to be any biochemical activity from the free cobalt ion which occurs when the cobalt is found in the inorganic form.

25. It was apparent from the evidence before the Stewards that the feeding regime adopted by Mr Elson in respect of ARTURUS NZ and SCOOBYS DELIGHT involved a lot of products that contained Vitamin B12. One of the products used was VAM which

did contain cobalt both in the organic form as Vitamin B12 and in the inorganic form, in the form of Cobalt Sulphate.

26. The testing of the urine samples by the Chem Centre and by RASL measured the total cobalt level and did not differentiate between cobalt which was in the organic form and that which was in the inorganic form.

27. Mr Elson sought to have the urine samples retested by a Queensland laboratory that, it was said, could through a testing process adopted by that laboratory make an assessment of the extent to which the cobalt contained within the sample was respectively in the organic and inorganic forms. Mr Elson's argument ran that if he could show the level of cobalt in the urine samples which was in the inorganic form was less than the prescribed threshold of 100ug/litre, then the level of cobalt that could give rise to any biochemical activity in the horse's system through the free cobalt ion, was less than the threshold amount. Mr Elson was confident that would prove to be the case given that the feeding regime he adopted involved a substantial amount of Vitamin B12.

28. Mr Elson put to the Stewards that Vitamin B12 was not cobalt. Dr Medd was asked about this at the hearing on 21 September 2018 and pointed out that Vitamin B12 contains approximately 4% cobalt in the trivalent state, whereas inorganic cobalt is found in the divalent state. Dr Medd noted that Mr Elson's horse feeding and supplements regime included giving the horses substances containing cobalt that were in both states (namely, the organic trivalent state and the inorganic divalent state).

29. It became apparent during the hearing on 21 September 2018, that the Queensland Laboratory's process for differentiating between organic and inorganic cobalt was not yet an accredited procedure with NATA and there was also an issue whether, given the amount of time since the urine samples were first taken, the bacteria in the samples would have acted to affect the actual levels of certain substances, including the level of Vitamin B12, through microbial manufacture and biofilm action.

30. Dr Medd also drew attention to the fact that the Advisory Council of the International Federation of Horseracing Authorities (IFHA) had published an advisory document in respect of cobalt levels as an equine prohibited substance [Exhibit 33], which noted that the threshold cobalt levels set were determined after an international survey of cobalt

concentrations in racehorses on race days which included cobalt found in the form of Vitamin B12. The advisory note specifically stated:

'Vitamin B12 contains cobalt; the simultaneous use of multiple supplements containing cobalt and vitamin B12 risks breaching the thresholds.'

31. The hearing was adjourned for a short period of time whilst the Stewards considered whether they would agree to Mr Elson's request to have the samples further tested. After a period of deliberation, the Stewards resumed the hearing and the Chairman informed Mr Elson that his application for the retesting of the samples was declined. The Chairman explained that the Rules do not differentiate between cobalt being in the organic and inorganic state when setting the threshold level of 100 ug/litre (in urine). The cobalt level is taken to be that certified by the laboratories after the samples are tested.

32. The Stewards indicated that they would proceed on the basis that Mr Elson had entered a not guilty plea and then adjourned to consider their decision as to whether there had been breaches of Rule 190 by Mr Elson as alleged by the two charges.

Reasons for conviction - 27 September 2018

33. On 27 September 2018 the Stewards published their reasons for finding Mr Elson guilty of each of the charges. In finding Mr Elson guilty they found [at para 7] that based on the evidence of Dr Medd:

> *'cobalt was a substance capable of causing either directly or indirectly an action or effect, or both an action and effect, within one or more of the listed mammalian body systems (Rule 188A(1)(a)). That the rules enshrine a prescribed level at which the presence of cobalt is excepted from being a prohibited substance cannot be ignored or set aside.*

34. The Stewards noted it was not necessary for there to be demonstrated that there was a performance benefit in order for a substance to be a prohibited substance. They referred to the evidence of Dr Medd that a population study of horses in racing that

would have been subject to a routine diet of supplementation which study had determined that the average level of cobalt in the sample group was 4.3 ug/l.

35. The Stewards acknowledged that there was ongoing debate amongst experts as to what effects cobalt has on a horse's body systems. It was noted that there are differences of opinion among experts as to whether cobalt enhances a horse's performance and that the only studies where it has been shown to do so in mammalian systems is in other mammals, not horses. It was noted that Rule 188A(1)(a) which defined prohibited substance referred to mammalian body systems and was not restricted to equine body systems. It was noted that one explanation for why more studies had not been carried out on horses, as opposed to some other mammals, may have been based on the ethics of carrying out such tests on horses by exposing them to high doses of cobalt.

36. The Stewards also noted that the Inquiry had been adjourned for a considerable time to await the decision of the NSW Racing Appeals Tribunal in the Hughes case, which ultimately proved not to have any significant bearing to Mr Elson's case, since that decision was primarily concerned with the prescribed classification scheme for prohibited substances which was relevant under the NSW rules but had no application under the WA Rules.

37. The Stewards also noted the point made by Dr Medd (referred to in paragraph 30 above in relation to the IFHA advisory note), that threshold cobalt levels set are not concerned with the increase in the cobalt level arising from the presence of cobalt in the inorganic form in contradistinction to that which is in the organic form, but included all forms by which the element of cobalt came to be in the horse's system regardless of the various molecular forms in which it might reside.

Penalty Hearing – 18 October 2018

38. On 18 October 2018, the Stewards reconvened to hear submissions in relation to penalty.

39. At the hearing on 18 October 2018, Mr Elson was ably represented by Mr Gerald Yin, a lawyer experienced in dealing with racing matters before the Stewards and before this Tribunal.

40. Mr Yin emphasised a number of points to the Stewards that he submitted were relevant to penalty:

a. that on the evidence before the Stewards, the two cobalt readings in excess of the threshold 'çame as a result of over supplementation to each horse' and argued that it was relevant to penalty that the cause of the cobalt reading exceeding the threshold level was due to the organic source of cobalt in each horse's system;
b. that Mr Elson had conducted himself entirely appropriately at all levels of the Inquiry before the Stewards and that the delays were attributable to his legal advisers;
c. the Stewards could be comfortable that nothing nefarious had taken place giving rise to the cobalt levels detected;
d. he referred to the case of Rachel Scott v Queensland Racing Integrity Commission (No. 2) [2018] QCAT 301, where Member Gordon postulated that offences against Rule 190 can, for penalty purposes, fall into four separate categories:
    i. no blameworthiness at all;
    ii. carelessness;
    iii. no credible explanation, so no indication of blameworthiness either way; and
    iv. moral blameworthiness established.

    Mr Yin argued 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 in Prentice, Appeal No. 816, being a case in which the Stewards felt there was no satisfactory explanation for the cobalt level found;
e. that Mr Elson was a man of good character and high integrity, attested to by references from people in the industry;
f. that the Stewards could not be satisfied that the levels of cobalt found in each horse's system had any affect on either horse's performance either positively or negatively;
g. that for Mr Elson, training horses was a passionate hobby and that he was passionate about the industry; and
h. that there had been a substantial financial impact on Mr Elson as a result of the suspension since November 2017;
i. that the matter should be dealt with 'by way of time served because its been almost an eleven month suspension' and any disqualification imposed ought

be dated back to the start of the suspension consistently with what was said in the Tribunal's decision in Prentice, supra.

41. By written decision published on 31 October 2018, the Stewards determined that the appropriate penalty for each of the charges was 9 months disqualification in each case to operate concurrently for 6 months and cumulatively for 3 months, resulting in a total period of disqualification of 12 months. The Stewards determined that the 12 months disqualification would be backdated to 29 May 2018 to take into account the fact that Mr Elson had been suspended since 29 November 2017.

42. In their penalty reasons the Stewards, among other things, had regard to the following factors when reaching their decision on penalty:

    a. they noted that although Mr Elson had not pleaded guilty, he had conducted himself professionally and had cooperated with the Stewards in a respectful and proper manner for which he deserved some mitigation;
    b. they quite properly made the concession that Mr Elson should not be penalised for not pleading guilty, but that he did not receive credit for pleading guilty either;
    c. that Mr Elson had a good record in the sport over many years;
    d. that he was not totally dependent on racing for his livelihood which was a passionate hobby of his rather than his vocation;
    e. that he had made a substantial financial commitment to racing which was a big part of his life;
    f. that he had adduced references as to his good character and that he was justifiably concerned that the charges for presentation of a prohibited substance had a negative impact on his standing in the industry;
    g. in reaching their decision on penalty they had had regard to:
        i. the nature of the substance concerned;
        ii. the circumstances as to how it came to be detected;
        iii. the level of blameworthiness of Mr Elson;
        iv. the degree of possible impact on the industry;
        v. the intent and purposes of the rule; and
        vi. the personal circumstances of Mr Elson
    h. the Stewards noted that cobalt had a long and notorious reputation within the industry and had received widespread media attention with many prominent trainers having fallen foul of the rule;

i. there was a perception in the industry that high doses of cobalt can enhance the performance of race horses and by reason of that perception the use of the substance needed to be regulated by setting maximum thresholds;

j. there was a negative stigma in the industry about cobalt levels because of the perceived advantages obtained by horses racing with high cobalt levels despite the fact that scientific opinion is divided as to whether it can enhance a horse's performance;

k. the average level of cobalt found in a sampled pool of racing horses in Australia was 4.3ug/l of urine which is far below the threshold level of 100ug/l;

l. the threshold levels and the risks associated with the use of various substances in terms of producing high cobalt levels have been widely published to the industry including the risk that the excessive use of Vitamin B12 supplements can lead to higher cobalt levels being detected;

m. the rule is one of absolute and strict liability and there is, therefore, a heavy onus imposed on trainers to take all necessary precautions to prevent their horses presenting with levels that exceed the threshold level;

n. that Mr Elson had clearly not acted in a manner that paid heed to the various warnings and notices given the industry about cobalt or adjusted his feeding and supplements regime to ensure his horses' cobalt levels did not exceed the threshold levels;

o. where it is simply a case of negligence, ignorance, apathy or a lack of proper precaution, that will be of limited comfort and penalties of disqualification will remain an appropriate disposition unless there are truly unique or special circumstances involved;

p. the feeding and supplements regime adopted by Mr Elson exposed him to a high risk that his horses may exceed the threshold level;

q. it was accepted that there was no deliberate attempt by Mr Elson to exploit or transgress the threshold level;

r. the feeding and supplements regime adopted by Mr Elson provides some explanation for the source of the high levels, but the Stewards could not confidently state that the regime as described by Mr Elson with respect to timing and dosages of the various substances used "precisely" explained the reported levels of the two horses in question, especially when contrasted to the reported levels of other horses in the stable;

s. the Stewards noted that there is a view of racing authorities throughout the world that cobalt has the potential to positively affect performance and at toxic levels it is a recognised welfare risk, and although they also

acknowledged that there is debate amongst the experts about those matters, there remains a perception in the industry that elevated levels of cobalt can be performance enhancing; and

t. having regard to previous decisions relating to excess cobalt presentation cases, that it would be unprecedented in this State for the Stewards to allow the matter to be dealt with by way fine or suspension.

43. After considering a number of recent decisions of the Stewards and this Tribunal relating to excess cobalt presentation offences under Rule 190, the Stewards considered that 9 months disqualification for each breach was consistent with those decisions.

44. Having regard to the principle of totality, the Stewards determined that 6 months of each of the disqualifications should be served concurrently and 3 months cumulatively.

45. The Stewards noted the argument put to them by Mr Elson's counsel that there should be a complete back dating of any disqualification imposed to 29 November 2017, the start of the suspension. The Stewards did not accept that submission for a number of reasons including the following:

a. that since his suspension, Mr Elson had been able to transfer a number of the horses for training to his daughter who continued to train them from the same facility; and
b. a complete back dating of the penalty, given the period of time that had elapsed under suspension, would mean that practically the entire penalty was effectively became one of suspension rather than disqualification.

46. The Stewards, accordingly determined that the penalty should be backdated to 29 May 2018, thus taking into account part of the suspension that had been served.

Evidence adduced before the Tribunal (Dr MacGregor)

47. The Appellant was given leave to call evidence from Dr Alan McGregor who swore an affidavit dated 3 December 2018 and also gave oral evidence before the Tribunal after which he was cross examined by Mr Davies QC, counsel for the Stewards.

48. Dr McGregor has been a veterinarian for 46 years. He has a Bachelor of Veterinary Science with Honours. He does not profess to have any particular expertise as an expert biochemist although he, no doubt, has a reasonable working knowledge in that area to the extent biochemistry intersects with the veterinary discipline. He has a special interest in cobalt and its affect on horses.

49. Dr McGregor's evidence was to the effect that in order for cobalt to have the speculated performance enhancing or negative welfare effects on a horse, it must be in the inorganic form so as to allow free cobalt ions to engage in chemical reactions, rather than be within the structure of a Vitamin B12 molecule, where the cobalt ion cannot be released from the complex and relatively large organic molecule in which it is contained. Dr McGregor expressed the opinion that based on the feeding and supplements regime that was adopted by the Appellant, it could be concluded the level of inorganic cobalt in each horse's system could not have been enough to result in the threshold levels being exceeded.

50. Dr McGregor stated that in measuring the level of cobalt in a horse's urine sample, the testing process destroys the Vitamin B12 molecule thus releasing the cobalt contained within the molecule and thus measuring it as part of the cobalt that was in the horse's system, even though that cobalt was not in a form within the horse's system that would have enabled it to engage in chemical reactions.

51. Although the Tribunal received Dr McGregor's evidence, Mr Davies QC, on behalf of the Stewards, said it should be received with some caution given that Dr McGregor did not have any specific qualifications or demonstrated reputational expertise in the area of biochemistry.

Tribunal's approach to appeals against penalty

52. The determination of penalties by the Stewards involves a multi factorial discretionary judgment which has regard to a range of factors and considerations.

53. Every case has its own unique characteristics. As was stated in the case of Prentice [at para 44]:

'The penalty outcome of any given case will be primarily informed by the facts and circumstances of the particular case and of the personal circumstances and antecedents of the offender, although there is no doubt that consistency in the imposition of penalties is also important.'

54. The approach that this Tribunal takes in reviewing discretionary judgments of the Stewards was the subject of analysis by Murray J in *Danagher v Racing Penalties Appeals Tribunal (1995) 13 WAR 531 at 554.* In that case, Murray J said that the Tribunal should approach the matter in the same way as an appellate court would review a discretionary judgment of a lower court where the appeal is by way of rehearing. In this respect he referred to the decision in *Australian Coal and Shale Employees Federation v Commonwealth (1953) 94 CLR 612 at 627,* where Kitto J said:

> *'the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance'*

55. As recently stated in Prentice, supra [at para 59]:

> *'The Tribunal will 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. The Stewards' deep understanding of the industry and how actions of its participants impact the industry and perceptions of the industry, are matters which are accorded considerable weight by this Tribunal. However, if it is demonstrated that a penalty imposed by the Stewards is manifestly excessive, or if the Stewards have misdirected themselves in some material way, or their decision has been the*

product of taking into account an irrelevant consideration or of a failure to take into account relevant consideration, then it is open for this Tribunal to reconsider the Stewards' determination of the penalty imposed. That is consistent with the approach that appeal courts take in reviewing criminal sentences on appeals: Dinsdale v R [2000] HCA 54 at 57 to 58, and reflects what has been said in numerous previous decisions of this Tribunal.'

56. To the extent that Dr McGregor's evidence added to the evidentiary material that was before the Stewards, this Tribunal can have regard to that evidence as an additional factor. In my view the approach of the Tribunal to that additional evidence is to consider whether it was sufficiently material to the determination of the penalty imposed as to warrant a different penalty being imposed.

Appeal Issues

57. The Appellant's grounds of appeal, which are referred to above at paragraph 7, agitate two issues:
    a. that the penalty imposed by the Stewards was manifestly excessive in all the circumstances; and
    b. the Stewards erred in finding that the cobalt involved in the two elevated readings had the potential to affect the horses' race performances or the horses' welfare.

58. The second ground is understood to be a contention that the Stewards should have imposed a less severe penalty on the basis that the two elevated readings of cobalt did not have the potential to be performance enhancing or give rise to a welfare risk to the horses concerned. The second ground raises two sub-issues:
    a. that cobalt in the levels found in the urine samples was not, regardless of its source, capable of being performance enhancing nor could it pose a risk to the horses' welfare; and
    b. that to the extent that the elevated levels of cobalt were derived from Vitamin B12, it was not capable in that form of potentially being performance enhancing even if it could be said that the inorganic form of cobalt had the potential to be performance enhancing.

59. Given that the resolution of the second ground of appeal will inform the extent and significance of it as a relevant circumstance to be taken into account in the assessment of the penalty imposed by the Stewards, I will consider it first.
60. The evidence of Dr McGregor before this Tribunal is relevant to this second ground of appeal.

Cobalt's effect on horse performance and as a welfare issue

61. There is no question in this case that each of the horses was presented with a prohibited substance in that they both had in excess of the threshold level of cobalt in the urine samples taken.

62. The Appellant argues, however, that despite the positive test results to a prohibited substance there is no evidence that the cobalt levels could have affected either horse's performance or presented a risk to the welfare of either horse. On that basis it is argued, although there is a breach of the Rules, this is not a case where a horse has been shown to have run with a performance advantage achieved through having a prohibited substance in its system, and the penalty imposed by the Stewards does not reflect that.

63. The background to this issue is that concerns were being raised in the racing industry some years ago, not just in Australia but internationally, about cobalt being found in race horses in concentrations markedly higher than naturally occurring levels in feeds and supplements. Cobalt is an essential trace element, present in soil and plants, and found in a number of equine products. There was a view in scientific and horseracing circles that cobalt was performance-enhancing, and capable of having an EPO-like effect. That is, it increased the oxygen carrying capacity of the blood by increasing the production of red blood cells and haemoglobin. Concerns had also been raised as to whether it was, if administered to a horse in quantities greater than its naturally occurring presence in feed and supplements, harmful to horses.

64. Those concerns led to the prohibition by Australian racing regulators on the presentation of horses for racing with cobalt exceeding the threshold level of 200ug/l originally, which threshold was later educed to 100ug/l.

65. In recent times there has been increasing disquiet, at least in some quarters within the industry, that trainers are returning positives to cobalt tests of pre-race urine samples and facing significant periods of disqualification, even though there is a significant body of scientific opinion that there is no sound scientific basis to show that cobalt found at the levels (such as those measured in this case) has the capacity to enhance a horse's performance or give rise to a welfare risk. Dr McGregor, in his evidence before the Tribunal, described the "whole cobalt issue" as 'silly' and one that 'has put a lot of people in a dreadful situation'.

66. It remains the case, despite the scientific controversy, that there is a view shared by many in the racing and harness industries and among its participants (rightly or wrongly) that high cobalt levels can enhance performance.

67. In considering this issue I am mindful that nature of the offence under Rule 190 is one of strict liability. It is not necessary to prove an administration nor an intention on the part of the trainer to enhance a horse's performance. It is not necessary to show that a performance advantage was actually obtained.

68. The purpose and object of the rule is to ensure as far as possible that the integrity of racing is protected, horses race without being administered prohibited drugs, racing is conducted safely, and racing is conducted fairly from the perspective of the betting public. It is well-established and accepted that:

> *'[to maintain] the integrity of racing and ... public confidence in its integrity, there is a need to impose very stringent controls and that those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so may well be taken away from them if for any reason, even without fault on their part, they present a horse [which is not free of a prohibited substance]' Harper v Racing Penalties Appeal Tribunal of Western Australia & Anor (1995) 12 WAR 337 at p. 349.*

69. The public interest in the integrity of racing cannot be understated. The level of public support for the industry affects the livelihood of all licensed persons, and even a perception of unfair or improper advantage is prone to damage public confidence in and support for the industry.

70. The regulating authorities, in order to preserve the integrity of racing, have reacted to industry and public concerns about horses racing with high levels of cobalt by promulgating rules that deem a horse presented for racing with excess of 100 ug/l of cobalt in urine, to have been presented with a prohibited substance.

71. It was argued by the Appellant that the Stewards in their penalty decision made findings to the effect that the cobalt found in each horse did have the potential to affect the performance of each horse or the horse's welfare. On my reading of the Stewards' reasons for penalty, they did not make a finding that the levels of cobalt found in each horse had an effect on either horse's race performance or was such as to be likely to risk the horses' welfare. What they found [at para 30 of their reasons] was that there is a view amongst racing authorities throughout the world that cobalt has the potential to positively affect performance and at toxic levels it is a recognised welfare risk. They acknowledged that there is debate amongst the experts about those matters, but there remains a perception in the industry that elevated levels of cobalt can be performance enhancing.

72. The focus of the decision was on the fact that cobalt in excessive levels was perceived in the industry to have a performance enhancing effect. That perception had led in some instances to cases where horses had been administered with dangerously high levels of cobalt with the belief that it would enhance the performance of the horse.

73. The fact that there is no evidence that the cobalt detected in each horse's system could be shown to be performance enhancing or present a welfare risk, does not mean the offences could be regarded as trifling or technical, and the Appellant did not contend as much. The presentations of the horses with the readings they had were serious contraventions of the Rules.

74. As the Stewards made clear in their reasons for conviction and penalty, the rule does not distinguish between the different sources of cobalt, whether it be of an organic or inorganic origin. The setting of the threshold level of 100ug/l was not based on an assumption that only inorganically sourced cobalt is to be measured. The levels are based on surveys of normal cobalt levels found in race horse populations and there is nothing to suggest those surveys were confined to the measurement of cobalt of an inorganic origin.

75. It may well be the case, as Dr McGregor states, that Vitamin B12 does not contain cobalt in a form that can possibly produce any performance enhancement in a horse. It may also well be the case that each of Mr Elson's horses would not have exceeded the threshold level if the measure of the cobalt levels had excluded that which had an organic origin, namely Vitamin B12. That is also likely to be the case with many of the other trainers who have in recent years been disqualified for presenting horses with cobalt levels that exceeded the threshold levels.

76. It is the perception and the preservation of the public interest in the integrity of racing that remains the critical consideration. The public interest in the preservation of the perception of racing as a drug free sport, makes the drawing of distinctions as to the source of prohibited substances found in a horses' system problematic. By allowing such distinctions to be drawn (despite the fact that there is no basis to do so under the Rules), especially whilst there remains no accredited and verifiable testing process that allows accurate measurements to be taken, is in my view likely to give rise to increased uncertainty in enforcement of the Rules and may act as an incentive to trainers facing cobalt related charges to seek to attribute positive test results to the over use of supplements containing Vitamin B12.

77. The industry has been given ample notice that supplements containing Vitamin B12 contain cobalt which can add to a horse's cobalt reading when subjected to pre-race testing and may lead to a horse's tested level of cobalt exceeding the threshold.

78. Until such time as the bodies regulating the industry determine that the Rules should be amended so as to exclude cobalt of an organic origin, which may depend on whether an accredited, accurate and verifiable system of measurement can be achieved, then nothing should turn on seeking to make the distinction between the different sources of cobalt in my view. This is especially the case given that the Appellant also contends that the levels of cobalt found in each of the horses could not have been performance enhancing in any event (i.e. even if the cobalt had been entirely from an inorganic source).

79. Based on the above, in my view:

    a. the Stewards did not find that the cobalt concentrations detected in the urine samples of either of the horses had the potential to affect the performance of either horse or constituted a welfare risk to either horse;

b. the Stewards did find that there is a view amongst racing authorities throughout the world that cobalt has the potential to positively affect performance and at toxic levels it is a recognised welfare risk. They acknowledged that there is debate amongst the experts about those matters, but there remains a perception in the industry that elevated levels of cobalt can be performance enhancing;

c. that there is no basis under the Rules to differentiate between cobalt which is in the organic state to that which is in the inorganic state;

d. the threshold level of 100ug/l has not been set on the assumption that the organic component of the cobalt measured in a urine sample ought not be taken into account;

e. allowing distinctions to be drawn between cobalt organically sourced from that which is inorganically sourced, especially whilst there remains no accredited and verifiable testing process that allows accurate measurements to be taken, is likely to give rise to increased uncertainty in enforcement of the Rules, and may act as an incentive to trainers facing such cobalt related charges to seek reduced culpability by attributing positive test results to the over use of supplements containing Vitamin B12; and

f. there has been ample notice to industry participants as to the risks posed by substances containing Vitamin B12 to affect the measured levels of cobalt in a horse's system.

80. On the basis of the above, I do not find that appeal ground 2 has been made out, and consider the question of whether the penalty imposed in this case was manifestly excessive in the context of that determination and the views I have expressed above. I would add that the views I have expressed in paragraph 79 above, are reached after having regard to the evidence of Dr McGregor.

Was the penalty imposed manifestly excessive?

81. The Appellant and the Stewards referred to the decision in Rachel Scott v QRIC (cited above), where Member Gordon put forward four separate categories of increasing culpability for cobalt presentation offences against Rule 190, namely:

i. no blameworthiness at all;
ii. carelessness;
iii. no credible explanation, so no indication of blameworthiness either way; and
iv. moral blameworthiness established.

82. Although the categories of culpability set out by Member Gordon may be helpful guides, they cannot fetter the scope of the considerations that are to be applied in setting penalties for breaches of Rule 190 and the need to have regard to all the circumstances of the individual case.

83. 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 measured. 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 cooperated with the Stewards and investigators and is a person of good character with a long-standing good record.

84. In any case, in Mr Elson's case the Stewards indicated that they were not entirely satisfied with his explanation for the levels of cobalt found in the pre-race samples although they accepted the feeding regime provided a substantial explanation for it.

85. Mr Elson received a disqualification of 9 months for each contravention.

86. The range of penalties imposed by the Stewards in cases of this type was recently reviewed and considered by this Tribunal in the case of Prentice. It is not necessary to go through the various decisions referred to in that case again. It is sufficient to say that for a breach of Rule 190 involving an elevated level of cobalt in excess of the threshold level, a nine (9) months disqualification for a trainer who has a good record and who has fully cooperated with the Stewards is entirely consistent with past decisions, and I do not think the Appellant sought to contend otherwise. If the level had been particularly high and strongly indicative of a pre-race administration, then one might expect an even greater penalty, but that was not the case here.

87. Rule 257 required that each of the penalties of disqualification be served cumulatively unless the Stewards determined otherwise.

88. The Stewards had to consider whether and to what extent the penalties imposed for each contravention should run concurrently. In doing so they had regard to the principle of totality. The Stewards were prepared to accept that the two breaches were likely a consequence of the same overall course of conduct, albeit they were separated by a period of 3 months. As the Stewards observed, two races at different race meetings were impacted on and the resulting impact on the image of the industry was likely greater than in the case of a single contravention.

89. In my view the Stewards decision to order that 6 months of each disqualification run concurrently and 3 months run cumulatively resulting in a total period of 12 months' disqualification cannot be criticised. In doing so, I consider that the Stewards fully and adequately took into account the Appellant's antecedents, the way he conducted himself during the investigation and inquiry, the circumstances of his offending, the nature of cobalt and its effect on horses, and the decisions in comparable cases.

90. The Appellant's written submissions conceded at [65]:

> *...no complaint can be made about the individual penalties of 9 months disqualification on each count. There is also no complaint about the decision to accumulate 3 months, which comes to a total of 12 months disqualification.*

91. The Stewards next had to consider whether and to what extent the disqualification should have been backdated having regard to the fact that Mr Elson had been suspended since 29 November 2017. After considering a number of factors and the impact that the suspension had had on Mr Elson, the Stewards concluded that there should be a partial backdating of the penalty to 29 May 2018.

92. It is this aspect of the Stewards decision that the Appellant is most critical of.

93. The Appellant contends that the Stewards should have backdated the disqualification to the time that Mr Elson was first suspended on 29 November 2017, and argue that by failing to do so, the resulting penalty is excessive.

94. In considering the backdating of the penalty, the Stewards made the following observations:

    a. That the adverse impact of the suspension on Mr Elson was mitigated because he was able to hand over the majority of the training operations to his daughter;
    b. The restrictions of a suspension are notably less than the impact of a disqualification;
    c. That a complete backdating of the penalty would have meant that almost the entire penalty would have been served as a suspension rather than as a disqualification given the time it took for Mr Elson's matter to be dealt with, namely about 11 months, thereby considerably emasculating the overall impact, purpose and intent of the disqualification.

95. Having regard to those various matters the Stewards concluded that it would be appropriate to backdate the penalty just over 5 months.

96. The Appellant submits that the reference to the case of Harvey (RPAT Appeal No. 773) by the Stewards revealed error. In the case of Harvey, the Stewards and the Tribunal concluded that Mr Harvey had acted to deceive the inquiry and the inquiring Stewards and accordingly he was not entitled to the benefit of having credit for the entire period he was stood down. The Appellant points out that in this case it could not be said that the Appellant had acted in a manner that could be equated to what occurred in the case of Harvey. I agree that is so, but it is quite clear that the Stewards also agreed that the Harvey case was quite different.

97. The significance of the Harvey decision was that it stood as an authority for the proposition that it is not always appropriate for the full period of standing down to be credited. The reasons why that might be so, in my view, do not require that there must have been some finding of deceitful or dishonest behaviour by the licensed person.

98. The chronology of events and the causes of the delay in this matter being are set out in paragraphs 16 to 23 above.

99. The extended delay could not be considered to be the fault of the Stewards. Although it is true that Mr Elson relied on legal advice in seeking to have the matter adjourned, that was a matter of his choice. The actions of his legal counsel are actions of his agent and he cannot divorce himself of responsibility for that. Every person is bound by the conduct of the legal counsel they engage.

100. The issues raised by Mr Elson's counsel and the lengthy delays in responding to the Stewards were actions which resulted in substantial delay to the inquiry process. The result was that the period of suspension ran much longer than is ordinarily the case.

101. The Appellant argued that those delays were based on his acting on legal advice in good faith. In his written submissions reference was made to the following passage in the Prentice decision:

> *'A review of the various decisions of the Stewards ..... suggests that the range of penalties that has been adopted by the Stewards in this jurisdiction has ordinarily been between 9 and 12 months disqualification for a cobalt presentation offence with the disqualifications usually being back dated to the date that the trainer was first suspended.'*

102. It needs to be borne in mind that in the Prentice case, it was the Stewards who determined that the penalty imposed should be backdated to the commencement of the suspension. The Tribunal's decision was only to reduce the period of disqualification from 12 months to 9 months. The Tribunal's decision in Prentice did not state that a disqualification must always be back dated for the full period of the stand down.

103. The personal circumstances of Mr Prentice were not the same as Mr Elson's circumstances, and the evidence of the level of personal hardship that Mr Prentice had endured were considerably greater than in Mr Elson's case. That is not to suggest that Mr Elson has not suffered considerable inconvenience and expense whilst under suspension.

104. After close consideration of the matters that have been raised by the Appellant, I am not persuaded that the Stewards have erred in their approach to the backdating of the penalty in this case.

105. It follows that I am not satisfied that the period of disqualification imposed in this case was in all the circumstances of the case manifestly excessive.

106. I would accordingly dismiss ground 1 of the Appeal.

107. Having reached the conclusion that grounds 1 and 2 of the Appeal should be dismissed, it follows that I would dismiss the Appellant's appeal against penalty in this case.

ROBERT NASH, MEMBER

APPEAL NO.821

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS K FARLEY (CHAIRPERSON)

APPELLANT: MR GARY ELSON

APPLICATION NO: A30/08/821

PANEL: MS KAREN FARLEY SC (CHAIRPERSON)
MR ROBERT NASH (MEMBER)
MS JOHANNA OVERMARS (MEMBER)

DATE OF HEARING: 6 DECEMBER 2018

DATE OF DETERMINATION: 29 JANUARY 2019

IN THE MATTER OF an appeal by GARY ELSON against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a 12 months total effective disqualification for two breaches of Rule 190 of Harness Rules of Racing.

Mr Gerald Yin represented Mr Gary Elson.

Mr Ron Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr R Nash, Member.

I agree with those reasons and conclusions and have nothing further to add.

KAREN FARLEY SC, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS J OVERMARS (MEMBER)

APPELLANT: MR GARY ELSON

APPLICATION NO: A30/08/821

PANEL: MS KAREN FARLEY SC (CHAIRPERSON)
MR ROBERT NASH (MEMBER)
MS JOHANNA OVERMARS (MEMBER)

DATE OF HEARING: 6 DECEMBER 2018

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JOHANNA OVERMARS, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.