22 December 2021

**DECISION**

**RACING VICTORIA**

**and**

**ARCHIE ALEXANDER**

**Date of hearing:** 29 November 2021

**Panel:** Judge John Bowman (Chairperson), Justice Shane Marshall (Deputy Chairperson) and Mr Des Gleeson.

**Appearances:** Mr Andrew Bell, instructed by Mr Daniel Bolkunowicz, appeared on behalf of the Stewards.

Mr Rahman de Kretser, instructed by Mr Jack O’Connor appeared on behalf of Mr Archie Alexander.

Dr Grace Forbes appeared as a witness.

Mr Archie Alexander appeared as a witness.

Mr John Vanden Nieuwboer appeared as a witness.

Mr Terry Henderson appeared as a witness.

Mr Lachlan McKenzie appeared as a witness.

**Charges:** Australian Rule of Racing (“AR”) 245 states:

(1) A person must not:

1. administer; or
2. cause to be administered,

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of a race.

AR 240(2) states:

Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.

**Particulars of charges: Charge 1: AR 245**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.
2. You were at all relevant times, the trainer of Tom’s Knight.
3. On 2 November 2018, Tom’s Knight ran in the Bet365 Protest Promise Maiden Plate over 1200 metres at Kilmore Racecourse (the race).
4. Prior to the race, you administered or caused to be administered, to Tom’s Knight cobalt, which was detected in a post-race urine sample (above the threshold level) taken from Tom’s Knight following the running of the race.
5. Cobalt is a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing (Prohibited List B) (subject to the threshold in Item 11 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing).

**Charge 2: AR 240(2) (Alternative to Charge 1)**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.
2. You were at all relevant times, the trainer of Tom’s Knight.
3. On 2 November 2018, Tom’s Knight was brought to the Kilmore racecourse and ran in the Bet365 Protest Promise Maiden Plate over 1200 metres (the race).
4. A prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine, was detected in a post-race urine sample taken from Tom’s Knight following the running of the race.
5. Cobalt is a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing (Prohibited List B) (subject to the threshold in Item 11 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing).

**Plea:** Guilty to Charge 1

**DECISION**

1. In this matter, written submissions have been received from the parties. This was pursuant to an arrangement agreed upon at the conclusion of the evidence. The case itself involves what could be described as a contested plea. There may have been some misunderstanding as to what was to then take place. The written submissions of the Stewards deal virtually solely with the findings of fact which should be made in relation to the commission of the offence and the culpability of Mr Alexander. The submissions do not move on to questions of the appropriate penalty. The submissions on behalf of Mr Alexander, which were scheduled to be received later and which were so received, embrace both the factual circumstances and the penalty to be imposed, should our findings of fact be along the lines urged on his behalf.
2. We had not intended that written submissions in relation to penalty be put before us until after findings of fact had been made. Mr Alexander is pleading guilty to the relevant charge. However, the factual findings have the potential to impact upon submissions in relation to penalty. Due to the misunderstanding that seems to have occurred, we are not in a position to deal with the question of penalty. The Stewards will have the opportunity to address penalty in the light of the factual findings. Whilst Mr Alexander has already addressed that issue, he will be given the opportunity to provide a brief response to the submissions on penalty of the Stewards and have the opportunity to make any adjustments to his submissions on penalty in light of our findings of fact. We now move on to our findings of fact.
3. A racehorse called “Tom’s Knight” competed in a maiden race at Kilmore on 2 November 2018. The horse was trained by registered trainer, Mr Archie Alexander, and won the event. A post-race sample of urine taken from the horse after the race showed the presence of cobalt in excess of the allowable threshold of 100 micrograms per litre. Cobalt in a sample in excess of that amount is a prohibited substance under the Rules of Racing.
4. Stewards of Racing Victoria (“RV”) have charged Mr Alexander with breaching Australian Rule of Racing (“AR”) 245 by administering a prohibited substance to a horse which is detected in a sample taken form the horse after the running of an event. Mr Alexander has pleaded guilty to the charge. He contends that the cause of the positive swab was adherence to his usual feeding regime. Racing Victoria Stewards contend that the disclosed feeding regime is most unlikely to be the cause of the positive swab. They submit that the source of the administration of cobalt was other than in accordance with the disclosed feeding regime employed at Mr Alexander’s stables.
5. The Stewards referred in their submissions to the modelling evidence of Dr Stuart Paine, an Associate Professor of Veterinary Pharmacology at the University of Nottingham in the United Kingdom, where he said that there was a 2.91% chance that the positive swab was caused solely by the disclosed feeding regime, this being on the reading of the modelling evidence most favourable Mr Alexander. The Stewards also relied on the evidence of Dr Grace Forbes, the Chief Veterinarian for Racing Victoria. Dr Forbes contended that it was most unlikely that the positive swab was caused by the disclosed feeding regime.
6. The Tribunal had before it evidence from Mr John Vanden Nieuwboer, who is in charge of the company “Robank”, which manfactures the feed given to Tom’s Knight. He considered that a horse would need to eat 50 kilograms of dry Robank for there to be a problem with exceeding the cobalt threshold. He was unaware of any other horse that has consumed Robank and returned a positive swab to cobalt at a prohibited level.
7. The Stewards also drew attention to the fact that, in a swab taken on 28 November 2018 from Tom’s Knight and when using the same feed as before the race on 2 November 2018, the cobalt concentration was 22 micrograms per litre of urine, well below the threshold.
8. The Stewards submit that accidental feeding of the wrong amount of cobalt by someone at the Alexander stables was unlikely to be the cause, as the cobalt level revealed would have required more than a double dose of the usual feed given to the horse at the time. In his oral evidence before the Tribunal, Mr Alexander concluded that an accidental over-feeding of the horse was unlikely to be the cause of the positive swab.
9. Given the remote possibility that the positive swab arose from the usual feeding regime or an accidental slip in feeding, the Stewards contend that there might have been some product available in the stable, which, even if mistakenly given, could have caused the race day positive swab. No such products were disclosed by the Alexander stable.
10. Notwithstanding his knowledge about Robank feed allegedly causing a positive swab in another horse, Mr Alexander continued to use Robank after being notified of his positive swab, although the cobalt ingredient in the feed was reduced by 50% after Mr Alexander made inquiries of Robank.
11. Counsel for Mr Alexander referred the Tribunal to evidence of Dr Paine that the trials referred to in his evidence and that of Dr Forbes involve doses of feed taken at different times to the feeding time of Tom’s Knight leading up to the race and therefore have little relevance to the present controversy. However, even if that is so, there remains the evidence of Mr John Vanden Nieuwboer that a horse would need to be fed with 50 kilograms of Robank to throw a positive swab at the level of cobalt found in the relevant swab.
12. Counsel for Mr Alexander also referred to their client’s history in the racing industry and his extensive work experience with some of the world’s top trainers. Mr Alexander gave evidence about being told of a horse in Sydney that exhibited suspicious levels of cobalt after being fed with Robank.
13. Mr Alexander did not tip Tom’s Knight to the owners, nor did he have a bet on the horse, which started at $8.50. Mr Alexander was shocked by the cobalt level and was fully cooperative with the Stewards. He denied giving the horse any additional cobalt containing substance apart from Robank and said that he did not direct anyone else to do so.
14. We are not comfortably satisfied that the positive swab was due to the horse’s usual feeding regime. We are also not comfortably satisfied that Mr Alexander administered an extra cobalt containing substance to the horse. The source of the administration of a cobalt containing substance remains a mystery.
15. Some assistance can be gained from the practices adopted in relation to criminal law, although, of course, we are in no way bound to follow such practices. Often in criminal matters after a trial, it will be necessary for a trial Judge to find facts when the facts are not clearly found based on the jury’s verdict. For example, a guilty finding on an assault charge when three different assaults are referred to in the indictment may have meant that one, two or three of the alleged events are made out and the trial Judge finds the relevant facts for the purpose of sentencing.
16. In this case, the Tribunal finds as follows:
* The disclosed feeding regime given to Tom’s Knight was not responsible for the high cobalt reading.
* Mr Alexander did not administer an extra cobalt containing substance, other than Robank, to Tom’s Knight and did not instruct anyone else to do so.
* Cobalt was administered to Tom’s Knight in a form over and above the disclosed feeding regime by a person or persons unknown.
1. Having regard to the foregoing, this is not a case in which the trainer can be regarded as having deliberately administered a prohibited amount of cobalt to a horse. A prohibited amount was administered other than through the daily feeding process by a person or persons not instructed at the direction of Mr Alexander. Having set out our findings of fact, we will deal with the question of penalty after the receipt of the further written submissions on that issue. We would expect to receive such submissions on or before 5.00pm on Monday, 17 January 2022.

Mark Howard
Registrar, Victorian Racing Tribunal