23 December 2020

**APPLICATION**

**RACING VICTORIA**

**and**

**MS JENNY GOW-WHYTE**

**Date of hearing:** 18 December 2020

**Panel:** Judge John Bowman (Chairperson).

**Appearances:** Mr Justin Hooper appeared on behalf of the Stewards.

Mr Trevor Monti appeared on behalf of Ms Gow-Whyte.

**Charges and particulars:** **Charge One: AR 244**

**AR 244 Administration of prohibited substance to affect race performance**

(1) A person must not:

(a) administer; or

(b) cause to be administered,

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse for the purpose of affecting the performance or behaviour of the horse in a race, or of preventing it starting in a race.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer bound by the Rules of Racing.
2. You were at all relevant times, the trainer of *Soul Fire.*
3. On 3 August 2018*, Soul Fire* ran in the Elephant & Castle Hotel BM70 Handicap over 1100 metres at the Geelong racecourse (**the race**).
4. Prior to the race you administered, or caused to be administered, to *Soul Fire* a prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine for the purpose of affecting the performance or behaviour of *Soul Fire* in the race.
5. Cobalt exceeding a mass concentration of 100 micrograms per litre in urine is a prohibited substance pursuant to Part 2 of Schedule 1 of the Rules of Racing.
6. At the time of the relevant conduct described, it was an offence under AR 175(h)(i) (as then in force) to engage in the conduct described in particular 4.
7. By reason of AR 8(2)(e) of the Rules of Racing, any offence committed under or in breach of the previous Australian Rules is deemed to be an offence committed under or in breach of these Australian Rules.

**Charge Two: AR 245(1) [Alternative to Charge One]**

**AR 245 Administration of prohibited substance in sample taken from horse before/after running in race**

(1) A person must not:

(a) administer; or

(b) 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.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer bound by the Rules of Racing.
2. You were at all relevant times, the trainer of *Soul Fire.*
3. On 3 August 2018*, Soul Fire* ran in the Elephant & Castle Hotel BM70 Handicap over 1100 metres at the Geelong racecourse (**the race**).
4. Prior to the race you administered, or caused to be administered, to *Soul Fire* a prohibited substance, being cobalt at a concentration in excess of 100 micrograms per litre in urine, which was detected in a pre-race urine sample taken from *Soul Fire* prior tothe running of the race.
5. Cobalt exceeding a mass concentration of 100 micrograms per litre in urine is a prohibited substance pursuant to Part 2 of Schedule 1 of the Rules of Racing.
6. At the time of the relevant conduct described, it was an offence under AR 175(h)(ii) (as then in force) to engage in the conduct described in particular 4.
7. By reason of AR 8(2)(e) of the Rules of Racing, any offence committed under or in breach of the previous Australian Rules is deemed to be an offence committed under or in breach of these Australian Rules.

**Charge Three: AR 240(2) [Alternative to Charges One and Two]**

**AR 240 Prohibited substance in sample taken from horse at race meeting**

…...

(2) 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 Charge**

1. You are, and were at all relevant times, a trainer bound by the Rules of Racing.
2. You are, and were at all relevant times, the trainer of *Soul Fire.*
3. On 3 August 2018*, Soul Fire* was brought to the Geelong racecourse for the purpose of engaging in the Elephant & Castle Hotel BM70 Handicap over 1100 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 pre-race urine sample taken from *Soul Fire* prior to the running of the race.
5. Cobalt exceeding a mass concentration of 100 micrograms per litre in urine is a prohibited substance pursuant to Part 2 of Schedule 1 of the Rules of Racing.
6. At the time of the relevant conduct described, it was an offence under AR 178 in particulars 3 and 4.
7. By reason of AR 8(2)(e) of the Rules of Racing, any offence committed under or in breach of the previous Australian Rules is deemed to be an offence committed under or in breach of these Australian Rules.

**Charge Four: AR 254**

**AR 254 Injections prohibited at certain times**

(1) A person must not, without the permission of the Stewards:

(a) inject;

(b) cause to be injected;

(c) attempt to inject; or

(d) be a party to the injection or attempted injection of,

a horse engaged to run in any race:

(i) at any time on the day of the scheduled race and prior to the start of that race; and/or

(ii) at any time during the 1 clear day prior to 12.00am on the day of the scheduled race.

**Particulars of Charge**

1. You are, and were, at all relevant times a trainer bound by the Rules of Racing.
2. You were at all relevant times the trainer of *Soul Fire*.
3. On 5 June 2018, Soul Fire was entered to run in Race 7, the Garden Tyrepower BM64 Handicap over 1200 metres at Warrnambool (**the race**).
4. Without the permission of the Stewards, you injected *Soul Fire* or caused *Soul Fire* to be injected at some time:
	1. on 5 June 2018, prior to the race; or
	2. during the One Clear Day prior to 12:01am on 5 June 2018.
5. At the time of the relevant conduct described, it was an offence under AR 178 AB(1) to engage in the conduct described in particular 4.
6. By reason of AR 8(2)(e) of the Rules of Racing, any offence committed under or in breach of the previous Australian Rules is deemed to be an offence committed under or in breach of these Australian Rules.

**Pleas:** Guilty to charges 2 and 4.

 **Charges 1 and 3 were withdrawn by the Stewards**

**APPLICATION**

This application has its origins in my decision of 31 July 2020. On that occasion I dealt with Ms Gow-Whyte for quite separate breaches of AR 245 (1) and 254 (1). She had pleaded guilty to each.

The breach of AR 254(1) related to the winning performance of *Soul Fire* at Warrnambool on 5 June 2018. Ms Gow-Whyte admitted that she had given an injection to *Soul Fire* on the day before it was due to race. I would repeat and emphasise that there was no suggestion by the Stewards that there was anything sinister or quasi-criminal about the injection or the substance involved. Ms Gow-Whyte was suspended for 6 weeks, this in turn being suspended for 12 months.

In relation to the far more serious matter of the breach of AR 245(1), that involved the same horse, *Soul Fire,* but concerned its run at Geelong on 3 August 2018. It had tested positive to cobalt. Ms Gow-Whyte had taken full responsibility for giving it a “natural health product” recommended by a friend without properly researching it.

The cause of the ongoing complications was that, at the conclusion of my decision, which was read out on the day, I disqualified *Soul Fire* from both Race 7 at Geelong on 3 August 2018 and Race 7 at Warrnambool on 5 June 2018. I further ordered each finishing order to be amended and any prize money to be redistributed. This was mandatory in the case of the Geelong offence and effectively an automatic order. What was overlooked by me (and by counsel and all others involved) was that, pursuant to AR 254 (3), disqualification of a horse for a breach of AR 254(1) is discretionary.

Thus, I had bundled together the breaches of AR 245 (1) and 254(1) and made the disqualification and redistribution orders as if this was an automatic consequence of each offence. This had not been sought by the Stewards. They made no request that *Soul Fire* be disqualified from the Warrnambool race or that there be any redistribution of prize money. During the entire hearing, whether before or after the handing down of my Ruling, nothing was said by or on behalf of either party in relation to these matters. It was quite some time later that it was realised that, in the case of the AR 254 offence, disqualification of the horse was discretionary.

This led to an application on behalf of Ms Gow-Whyte to the effect that a discretionary order had been made against her without her having had the opportunity to be heard in relation to it. I was asked to apply the Slip Rule and to give her that opportunity.

Such application was opposed by the Stewards. A further hearing on this issue was conducted. Ultimately I gave quite a lengthy Ruling in which I found that the Slip Rule should be applied and that Ms Gow-Whyte should have the opportunity to be heard in relation to the disqualification of *Soul Fire* from the Warrnambool race and the redistribution of the prize money.

Such further hearing has now been conducted. The Stewards, via Mr Justin Hooper of Counsel, argued that *Soul Fire* should be disqualified, and the prize money redistributed accordingly. Mr Trevor Monti QC appeared on behalf of Ms Gow-Whyte and advanced the contrary proposition. Each had obviously gone to considerable trouble in preparing their very helpful submissions, to which I shall allude but not set out in full.

AR 254 (3) reads as follows:- “If a person breaches sub rule (1), but the horse competes in the race, the horse may be disqualified from the race”.

AR 224 deals with the repayment or return of prize money in the event of disqualification of a horse. There appears to be no discretion in this regard. Thus, in relation to AR 254, the discretion exists in relation to the actual disqualification. If the result of the exercise of that discretion is disqualification, the reimbursement of prize money flows automatically from that.

I say now that I am comfortably satisfied that my discretion concerning disqualification pursuant to AR 254 (3) should be exercised in Ms Gow-Whyte’s favour. I am not ordering that *Soul Fire* be disqualified from the Warrnambool race. Thus, the finishing order will stand.

I have come to that conclusion for the following reasons, which are not set out in order of importance or significance. I might add that there was no dispute concerning the factual content of the following.

Firstly, the substance injected was Pentosan, an anti-inflammatory. Whether or not it enhances performance, and Mr Monti submitted that it does not, it is a medication readily available for equine use.

Secondly, its relevant use on *Soul Fire* was recorded quite openly in Ms Gow-Whyte’s treatment book. The entry in question was shown as being at 2.00pm on 4 June 2018, the day before the race. Accordingly, there was nothing surreptitious about the use of the medication.

Thirdly, the charge pursuant to AR 254 resulted from a Steward flicking through the treatment book and noticing the entry in question. Not only was the treatment not surreptitious, it was there, and the timing of it was there, for any inspecting Steward to see.

Next, Ms Gow-Whyte misunderstood the way in which the Stewards interpreted and applied the concept of “one clear day”. She understood it to be a 24-hour concept. *Soul Fire* was running at Warrnambool at approximately 4.00pm on 5 June 2018. She believed that administration of Pentosan at 2.00pm on 4 June 2018 – that is, in excess of 24 hours before the race – did not infringe the “one clear day” rule. Her whole behaviour was that of a person with nothing to hide.

Fifthly, *Soul Fire* was the subject of a post-race swab on 5 June 2018. The horse tested negative.

Sixthly, the Stewards made submissions concerning penalty in relation to the AR 254 (1) charge at the hearing on 31 July 2020. At that time, there was no suggestion on their behalf of disqualification of *Soul Fire* or redistribution of the prize money. Of course, that does not preclude them from seeking such orders now and the whole point of the current hearing was to address that issue. On 31 July 2020, the Stewards sought a suspension of Ms Gow-Whyte for 6 weeks. They did not seek or mention disqualification of *Soul Fire* or redistribution of the prize money. It may well be that they thought that disqualification of the horse was automatic, but nevertheless orders of that kind are usually specifically sought. There is probably a limit on how much can be read into their failure to seek, or even mention, such a disqualification or its consequences, but it is a point that was raised by Mr Monti and is certainly not devoid of merit.

Next, there is some force in the submission of Mr Hooper to the effect that, if the Stewards had been aware of the injection on 4 June 2018, *Soul Fire* would not have been permitted to run on 5 June. Therefore, the horse should be disqualified, and the prize money redistributed. However, to apply that approach universally is effectively to destroy the bulk, if not all, of the discretion contained in AR 254 (3). The Stewards are not going to permit to run any horse which, to their knowledge, has received a prohibited injection. If they possess that knowledge, either at the relevant time or retrospectively, every such horse is either disqualified or would have been had the knowledge been available.

Finally, Mr Hooper further argued that, if his submission concerning the discretion is correct, AR 254 (1) (c) would still have some work to do – for example, in the case of an attempted prohibited injection. In my opinion, that places a narrow and restricted interpretation on the provision and the discretion contained in it, an interpretation that is not warranted. The provision is expressed in broad and simple terms – if there is a breach but the horse competes in the race, it may be disqualified.

The result is that I am of the opinion that, even without consideration of the personal and financial circumstances of Ms Gow-Whyte, my discretion pursuant to AR254 (3) should be and is exercised in favour of not disqualifying *Soul Fire* from Race 7 at Warrnambool on 5 June 2018.

There was a dispute as to whether such personal circumstances can or should be taken into account. Mr Hooper maintained that they are irrelevant, and that, effectively, only the circumstances of the offending are relevant. Mr Monti argued to the contrary.

If personal circumstances can be taken into account, they would support the decision at which I have arrived. Ms Gow-Whyte is a 73 year-old widow who lives alone. She has a small team of horses and lives near Mount Gambier. She has been a licensed trainer for 48 years and has a very good record. I would refer to my remarks in the Ruling of 31 July 2020.

Furthermore, as outlined by Mr Monti, she is now in some financial difficulties. She has been forced to enter into a type of “interest only” mortgage with Centrelink and sell two of her horses. She owned 50% of *Soul Fire* at the time of its win at Warrnambool, now in excess of two and a half years ago, but would feel obliged to repay the full $12,000 prize money if disqualification was ordered. She appreciates, as do I, that the racing authorities are usually particularly helpful in making repayment arrangements in such a situation, but nevertheless it would be a substantial debt hanging over her head.

As stated, I have determined that I am exercising my discretion pursuant to AR 254 (3) so as to not disqualify *Soul Fire,* even without taking into account Ms Gow-Whyte’s personal circumstances. Accordingly, a definite ruling as to their relevance is not required. All I will say is that the discretion created by AR 254 (3) is expressed in very broad terms.

Mark Howard
Registrar, Victorian Racing Tribunal