20 October 2021

**DECISION**

**RACING VICTORIA**

**and**

**PAUL BANKS**

**Date of hearings:** Tuesday, 9 February 2021 and Wednesday, 10 February 2021

**Panel:** Judge John Bowman (Chairperson), Judge Julie Nicholson and Ms Amanda Dickens.

**Appearances:** Mr Justin Hooper instructed by Mr Daniel Bolkunowicz appeared on behalf of the Stewards.

Mr Paul Banks represented himself.

**Charges & Particulars:**

**Charge One: 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.

If a person breaches subrule (1), a disqualification for a period of not less than 3 years must be imposed, unless there is a finding that a special circumstance exists, in which case that penalty may be reduced.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.
2. At all relevant times, you were the trainer of *Coastal Chic.*
3. On 15 September 2018*, Coastal Chic* ran in the Bourke Builders 0-58 Handicap over 2800 metres at the Echuca racecourse (the race).
4. Prior to the race you administered, or caused to be administered, to *Coastal Chic* a prohibited substance, being alkalinising agents as evidenced by total carbon dioxide (TC02) at a concentration in excess of 36.0 millimoles per litre in plasma, for the purpose of affecting the performance or behaviour of *Coastal Chic* in the race.
5. Alkalinising agents are a prohibited substance pursuant to Item 2(g) of Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing, subject to the threshold in Item 1 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing.

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

The Stewards charge you with breaching AR 245 which reads as follows:

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

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.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.
2. At all relevant times, you were the trainer of *Coastal Chic.*
3. On 15 September 2018*, Coastal Chic* ran in the Bourke Builders 0-58 Handicap over 2800 metres at the Echuca racecourse (the race).
4. Prior to the race you administered, or caused to be administered, to *Coastal Chic* a prohibited substance, being alkalinising agents as evidenced by total carbon dioxide (TC02) at a concentration in excess of 36.0 millimoles per litre in plasma, which was detected in a blood sample taken from *Coastal Chic* prior to the running of the race.
5. Alkalinising agents are a prohibited substance pursuant to Item 2(g) of Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing, subject to the threshold in Item 1 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing.

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

The Stewards charge you with breaching AR 240 (2) which reads as follows:

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

1. 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 licensed by Racing Victoria.
2. At all relevant times, you were the trainer of *Coastal Chic.*
3. On 15 September 2018*, Coastal Chic* ran in the Bourke Builders 0-58 Handicap over 2800 metres at the Echuca racecourse (the race).
4. A prohibited substance, being alkalinising agents as evidenced by a total carbon dioxide (TC02) concentration in excess of 36.0 millimoles per litre in plasma, was detected in a blood sample taken from *Coastal Chic* prior to the running of the race.
5. Alkalinising agents are a prohibited substance pursuant to Item 2(g) of Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing, subject to the threshold in Item 1 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing.

**Pleas:** Not Guilty charge 1

Guilty charge 2

**DECISION**

**GENERAL BACKGROUND**

Mr. Paul Banks, you are facing three alternative charges.

Charge 1 is a breach of AR 244, which could be summarised as administering a prohibited substance for the purpose of affecting its performance in a race.

Charge 2, the first alternative, is a breach of AR 245, which could be summarised as administering a prohibited substance. The element of performing such administration for the purpose of affecting a horse’s performance in a race is absent.

Charge 3, the second alternative, is what is referred to as “a presentation case”. It involves the bringing of a horse to a racecourse for the purpose of participating in a race and a prohibited substance is detected in a sample taken from that horse. The requirement of administration is absent.

You have pleaded not guilty to Charge 1, but guilty to Charge 2. In those circumstances, Charge 3 drops away. The case was contested in relation to Charge 1 – administration for the purpose of affecting performance. Thus, the issue of whether you deliberately administered a prohibited substance is at the centre of the contest.

**FACTUAL BACKGROUND**

The factual background to the charges is as follows.

You train a very small number of horses – usually about three. Otherwise, you have business interests, including publishing and in a publication that has some links to the racing industry. You impressed us as an intelligent man who is quite devoted to his horses and takes a keen interest in various facets of the industry. We accept your evidence.

The horse at the centre of these charges was *Coastal Chic*, a five year old mare. The race involved was a 2,800 metre maiden at a Saturday meeting at Echuca on 15 September 2018. It would appear to have been her ninth start and the fifth run of her campaign. At one time she had another trainer. As at the time of the race, you and a family member owned 60% of *Coastal Chic*.

As indicated by you in your evidence, it perhaps says something of *Coastal Chic’s* form that, in a 2,800 metre maiden at Echuca on a Saturday, she started at 100/1. In her previous four starts, the closest that she had got to the winner was 13.6 lengths. She was stepping up in distance from her previous start by 676 metres. On this occasion, she finished ninth of twelve. We accept that she ran on a little in the closing stages and that it was much to your surprise that she passed a few tired horses. Indeed, you had despaired of watching her and had to be told by a friend that she had overtaken some stragglers. As we understand it, this was her last run for you.

Prior to the race, a blood sample had been taken. Upon analysis, this proved positive to alkalinising agents. This was evidenced by a TCO2 reading in excess of 36.0 millimoles per litre. The reading was 38.8.

When interviewed by the Stewards on 19 September 2018, effectively the only explanation you could offer was that, on the morning of the race, you had fed *Coastal Chic* a mixture of bran and molasses. You had noticed in the bottom of her bowl “a lot of powder which would have been bicarb, Salkavite”, which had been administered on a previous day or days – see, for example, page 3 of the interview. You had thrown the bran in on top of it. *Coastal Chic* licked it all up. Briefly you were concerned about the presence of the Salkavite, but thought that there would not have been enough to cause a problem. You thought no more about it until contacted by the Stewards in relation to the positive return.

Basically, that has continued to be your explanation. You readily accept that the positive return resulted from an error on your part, but deny that the administration was for the purpose of affecting the performance of *Coastal Chic* in the race.

Being mindful of your reputation and your dealings with the industry, you issued a press release on 21 September 2018, six days after the race. In it, you took full responsibility for the presentation of the horse, explaining about the bran and molasses being put on top of the waste “Bicarb”. You had since sought veterinary advice and was told that bran would act as an absorbing agent.

An issue of importance is the amount of Salkavite that is alleged to have been in the bottom of the bowl before the addition of the bran and molasses. When first interviewed by Mr Villella on behalf of the Stewards on 19 September 2018, you referred to “what could have been a pile of bloody bicarb in the bottom of it”. However, you also made mention of 120 and 125 grams being put in the bowl. You denied stomach tubing the horse or having stomach tubing equipment, stating that you had not stomach tubed a horse for ten years. We accept that. We also note that, in your oral evidence before us, your estimate of the range of amount of Salkavite that could have been in the bottom of the bowl was 120 – 250 grams.

You had a telephone conversation with Mr Villella on 20 September 2018. By this time, Mr Villella had received an email from Racing Analytical Services, setting out the analysis result of 38.2 millimoles, with the best result being 37.2. Further, you had spoken to your veterinarian, Dr Michael Whitford, who believed that the cause of the elevated reading was the addition of the bran mash on top of the bicarbonate powder.

In this telephone conversation, you stated that you had poured the Salkavite from its actual container, which holds 350 grams. There was discussion of half a box being used. You also raised the possibility of you and your son effectively using two lots of the Salkavite powder.

Your son, Jack, when interviewed did not believe that he had given the horse any Salkavite, but mentioned the practice of adding bran mash to what was left over in the tub and that *Coastal Chic* would lick it all up. He had gone to the Echuca races on the day. There had been no concern about the horse having to undergo a blood test. He referred to the horse’s run as “horrible”.

Ultimately, your estimate of the amount of Salkavite put into the feeding bucket was somewhere in the range of 120 to 250 grams, perhaps over a couple of days, with the bran ultimately being poured on top of it on the morning of the races. *Coastal Chic* ate the lot that morning.

That last statement has always been your position. You have always denied intentional feeding of Salkavite on the morning of the race or within the prohibited time frame.

**THE SCIENTIFIC EVIDENCE**

Evidence of a scientific nature was received from Dr Grace Forbes, Head of Equine Welfare and Equine Services at Racing Victoria, such evidence being contained in two reports and given orally.

The Stewards also placed in evidence two reports from Dr Stuart Paine, Associate Professor of Veterinary Pharmacology at the University of Nottingham in the United Kingdom. Associate Professor Paine did not give oral evidence.

The conclusions of Dr Forbes in her report of 28 February 2019 could be summarised as follows. The most probable explanation for the elevated plasma TCO2 concentration is the administration of an alkalising agent to *Coastal Chic* at some time during the race day restriction period – that is, from 12:01 a.m. on Saturday 15 September 2018 until the time of sampling – and the treatment had not been recorded. Dr Forbes would not accept the proposition that administration earlier in the week could have caused the result in question.

Having been forwarded the reports of Associated Professor Paine, Dr. Forbes provided a supplementary report of 7 April 2020. She stated that she had no cause to alter the opinions previously expressed by her.

In her oral evidence, Dr Forbes adopted the opinions expressed in her reports. In answer to questions from the Tribunal, she stated that a paper by Greenhaff and others in 1990 indicated that even if 300 grams of sodium bicarbonate had been administered in feed, the relevant level did not rise above 36 millimoles. She also said that a level of 38 millimoles was more consistent with administration by stomach tubing or injection.

Turning to the report of Associate Professor Paine of 15 August 2019, he was of the view that administration of 125 – 175 grams of bicarbonate on each of the days Monday to Thursday before sampling on a Saturday would not contribute to a finding of 38.8 millimoles.

However, he also opined that it would be plausible for *Coastal Chic* to return a measurement of 38.8 millimoles if 129-179 grams of bicarbonate was consumed from the feed bin four hours prior to the taking of the sample. Of course, that consumption is effectively what you have asserted from the beginning.

Associate Professor Paine commented further in his supplementary report of 24 November 2019. In it, he made further calculations, arriving at the conclusion that it would be possible for *Coastal Chic* to return a reading of 38.8 millimoles if the feed consumed containing sodium bicarbonate was nearer to 180.6 grams; if she consumed 80% of the feed; and if she consumed the feed near to 10.00am.

We would say that this is at least close to the scenario which you have been positing effectively from the outset.

**FINDING**

We are not comfortably satisfied that Charge 1 has been proven. We find you to be a reliable witness, who has maintained virtually the same version of events from the outset. Your attempts to calculate the amount of Salkavite given to *Coastal Chic* have not always produced an identical result, but that is hardly surprising. The figures referred to above by Associate Professor Paine are certainly within the range of calculations made by you.

On this point, we prefer and accept the opinion of Associate Professor Paine. That is no criticism of Dr Forbes. Put simply, we prefer the reports of associate Professor Paine, which seem to us to deal directly with the issues which we have to determine.

It is to be remembered that, as earlier stated, we accept your evidence. When that is combined with the opinion of Associate Professor Paine, we are a considerable distance from being comfortably satisfied that Charge 1 has been made out and the burden of proof discharged. We prefer and accept the proposition that administration for the purpose of affecting performance has not been made out. Administration has been established. Indeed, it is admitted. The essential ingredient of purpose is missing.

We might add that it seems to us that this finding is also in accordance with the background of the situation. *Cosmic Chic* was a horse with dreadful form. On this occasion, she started at 100/1in a distance maiden at Echuca on a Saturday. There is no challenge to the proposition that you did not back her. Her run, even if she passed a couple of stragglers, was described by your son, who was strapping her, as “horrible”. Of course these matters are not decisive, but they tend to fit with the picture of an accidental administration’

**CONCLUSION**

Charge 1 is dismissed. You have pleaded guilty to Charge 2. We shall deal with your plea at a time convenient to the parties. As stated, Charge 3 falls away.

Mark Howard
Registrar, Victorian Racing Tribunal