29 August 2022

**DECISION**

**RACING VICTORIA**

**and**

**RUSSELL CLUNING**

**Date of hearing:** 17 August 2022

**Panel:** Judge John Bowman (Chairperson) and Ms Judy Bourke.

**Appearances:** Mr Marwan El-Asmar appeared on behalf of the Stewards.

Mr Russell Cluning represented himself.

**Charges and Particulars: Charge One: AR 245(1)**

Australian Rule of Racing (“AR”) 245(1) states:

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 licensed trainer bound by the Rules of Racing.

2. You are, and were at all relevant times, the trainer of Black Stream (the Horse).

3. On 26 January 2021, the Horse ran in Race 3 over 1450 metres at Kyneton Racecourse (the Race).

4. Prior to the Race, you administered or caused to be administered Cobalt to the Horse, which was detected to be present and above the relevant threshold in a pre-race urine sample taken from the Horse.

5. Cobalt is a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Rules of Racing (Prohibited List B), subject to the threshold in Item 11 of Division 3 of Part 2 of Schedule 1 of the Rules of Racing.

**Charge Two: AR 240 [Alternative to Charge One]**

AR 240(2) states:

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 licensed trainer bound by the Rules of Racing.

2. You are, and were at all relevant times, the trainer of Black Stream (the Horse).

3. On 26 January 2021, the Horse was brought to Kyneton Racecourse and ran in Race 3 over 1450 metres (the Race).

4. On 26 January 2021, prior to the Race, a urine sample was taken from the Horse, which detected the presence of Cobalt above the relevant threshold (the Sample).

5. Cobalt is a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Rules of Racing (Prohibited List B), subject to the threshold in Item 11 of Division 3 of Part 2 of Schedule 1 of the Rules of Racing.

**Charge Three: AR 104(1)**

AR104(1) states:

AR 104 Trainers must keep treatment records

(1) A trainer must record any medication or treatment administered to any horse in the trainer’s care by midnight on the day on which the administration was given.

(2) For the purpose of subrule (1), each record of administration must include the following information:

(a) the name of the horse;

(b) the date and time of administration of the treatment or medication;

(c) the name of the treatment or medication administered (brand name or active constituent);

(d) the route of administration including by injection, stomach tube, orally, topical application or inhalation;

(e) the amount of medication given (if applicable); (f) the duration of treatment (if applicable);

(g) the name and signature of the person/s administering and/or authorising the administration of the treatment or medication.

(3) For the purposes of this rule “treatment” includes:

(a) shock wave therapy;

(b) acupuncture (including laser treatment);

(c) chiropractic treatment;

(d) the use of any electrical stimulation device (including transcutaneous electrical nerve stimulation (TENS));

(e) magnetic field therapy;

(f) ultrasound;

(g) any form of oxygen therapy, including hyperbaric oxygen therapy;

(h) the taking of a blood sample.

(4) For the purposes of this rule “medication” includes:

(a) all Controlled Drugs (Schedule 8) administered by a veterinarian;

(b) all Prescription Animal Remedies (Schedule 4), including those listed in Schedule 1, Part 2, Division 2 to these Australian Rules;

(c) all Prescription Only Medicines (Schedule 4), prescribed and/or dispensed by a veterinarian for off-label use;

(d) all injectable veterinary medicines (intravenous, intramuscular, subcutaneous, intraarticular) not already referred to above;

(e) all Pharmacist Only (Schedule 3) and Pharmacy Only (Schedule 2) medicines;

(f) all veterinary and other medicines containing other scheduled and unscheduled prohibited substances;

(g) all alkalinising agents;

(h) all herbal preparations.

(5) All records required to be kept in accordance with this rule must be retained by the trainer for at least 2 years.

(6) When requested, a trainer must make available to the Stewards the record of any administration of a treatment and/or medication required under subrule (1).

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.

2. You were, at all relevant times, responsible for the maintenance of the treatment records for any horse in your care.

3. On 27 February 2021, both you and registered Stable Employee, Eloise Cluning, were interviewed by Stewards from Racing Victoria’s Compliance Assurance Team with respect to a pre-race urine sample collected from your horse, Black Stream, on 26 January 2021 (the Interviews), and during the course of the day, the Stewards inspected your treatment records.

4. During the Interviews, when questioned about your treatment records, Ms Cluning conceded that Black Stream would have received further treatments after the last entry on 27 December 2020.

5. From 28 December 2020 to 27 February 2021, your treatment records did not contain any medications or treatments administered to Black Stream as required by AR 104(2).

**Pleas:** Guilty to Charges 1 and 3.

Charge 2 was withdrawn.

**DECISION**

Mr Russell Cluning, you have pleaded guilty to two charges. They are a breach of AR 245(1), which could be summarised as administration of a prohibited substance, namely cobalt, and a breach of AR 104, which could be summarised as being a failure to maintain appropriate treatment records. An alternative charge of breaching AR 240(2), being a presentation charge, was withdrawn.

The factual context of the breach of AR 245(1) is as follows. Black Stream, trained by you, raced at Kyneton on 26 January 2021, finishing seventh. A pre-race urine sample taken from the horse proved positive to cobalt in excess of 200 ug/L. The cobalt content was estimated to be in the vicinity 300 ug/L. There is no challenge to the manner in which the sample was obtained or to the fact that the reading was in excess of 200 ug/L.

Essentially the cause of the elevated sample remains unclear. The possible explanation provided by you included reference to the administration of the product Phar Lap and also to the fact that you may have inadvertently administered a higher dose of a product containing cobalt to Black Stream leading up to the race. In any event, you have taken responsibility for the reading by your plea of guilty.

Your situation is that you have been a trainer for in excess of twenty years and your love of and background with horses stretches back further. You and your wife have a 60 acre property with some 22 paddocks. At the moment, you have 20 horses on the property, of which 6 to 8 are in work. Essentially, the horses are owned by you and your wife, with only a very small percentage ownership being with other people. That has always been the situation. We accept that you take an active role in activities such as the re-homing of horses and in horse welfare.

You are essentially a hobby owner and trainer, with a great love of horses. You have a substantial involvement in the business of forestry and it is from that business that the family income is derived.

We also accept that you have a very good record, with no relevant or significant prior offences. Further, at the time that the charge arose, your wife was heavily pregnant and thus you were under considerable pressure.

We agree with Mr El-Asmar that specific deterrence may not be a great factor. However, those involved in the industry have been warned repeatedly about cobalt and about prohibited substances generally. The importance of the concept of a level, drug free playing field has been emphasised time and time again. Trainers have to be extra-vigilant in this regard. Thus, general deterrence is a very significant factor.

We also take into account your plea of guilty and the other matters in your favour which you have advanced.

In all the circumstances, our penalty in relation to the breach of AR 245(1) is an immediate period of suspension of three months.

In relation to the breach of AR 240(2) – the failure to maintain proper records – we accept that this was normally done by your wife, but was not so done at the time due to her advanced pregnancy. That is not really an adequate excuse for your failure to record treatments.

As we have said repeatedly, the work of the Stewards is difficult enough without having to deal with inadequate recording systems. On this charge, you are fined $500.

In this regard, we would make the following general statement, not specifically directed at yourself. This Tribunal has emphasised, time and time again, the importance of proper record keeping. The Tribunal acknowledges that record keeping can be something of a pain or a nuisance for trainers. However, it is a most important requirement. The penalty for a breach is frequently in the vicinity of $500. That does not seem to be getting the message through. Of course, each case will be considered on its merits, but participants are put on notice that a higher range or level of penalties may be imposed for future breaches. We repeat that this is a message to the industry generally, and not specifically directed at you, Mr Cluning.

Finally, Black Stream is disqualified from Race 3 at Kyneton on 26 January 2021 and the finishing order is amended accordingly.

Mark Howard  
Registrar, Victorian Racing Tribunal