11 October 2022

**DECISION**

**RACING VICTORIA**

**and**

**SHAWN MATHRICK**

**and**

**KIM MATHRICK**

**Dates of hearings:** 17 January 2022, 18 January 2022, 19 January 2022, 22 August 2022, 23 August 2022 and 24 August 2022.

**Panel:** Judge John Bowman (Chairperson), Judge Graeme Hicks (Deputy Chairperson) and Mr Des Gleeson.

**Appearances:** Mr Jack Rush QC instructed by Mr Scott Hunter appeared on behalf of the Stewards.

Mr Damian Sheales represented Mr Shawn Mathrick and Ms Kim Mathrick.

Mr Dion Villella appeared as a witness.

Ms Stella Stevenson appeared as a witness.

Mr Joshua McGaw appeared as a witness.

Dr Grace Forbes appeared as a witness.

Dr Holly Cathels appeared as a witness.

Dr Tim Roberts appeared as a witness.

Mr Raymond Borg appeared as a witness.

Mr Shawn Mathrick appeared as a witness.

Ms Kim Mathrick appeared as a witness.

**Charges and Particulars:**

**Shawn Mathrick**

**Charge One: AR 255 Stomach-tubing prohibited at certain times**

1. *A person must not, without the permission of the Stewards:*
2. *stomach-tube;*
3. *cause the stomach-tubing of;*
4. *attempt to stomach-tube; or*
5. *be a party to the stomach-tubing or attempted stomach-tubing of,*

*a horse engaged to run in a race, official trial or jump-out:*

* 1. *at any time on the day of the race, official trial or jump-out and prior to the start of that event; and/or*
	2. *at any time during the 1 clear day prior to 12.00am on the day of the scheduled race, official trial or jump-out.*
1. *Provided that the stomach-tubing or attempted stomach-tubing occurred on race day or during the 1 clear day prior to 12.00am on race day for a horse engaged to run in a race on that race day, if a person breaches subrule (1) a disqualification of not less than 12 months must be imposed (other than where the person is not, in the opinion of a PRA (or a person employed or engaged by a PRA) or the Stewards, the principal offender), unless there is a finding that a special circumstance exists, in which case that penalty may be reduced.*
2. *If the Stewards are satisfied that a horse:*
	1. *has, or is likely to have, been stomach-tubed in breach of subrule (1), they may prevent it from starting in any race, official trial or jump-out;*
	2. *has been stomach-tubed in breach of subrule (1), it may be disqualified from the race that it started in.*

**Particulars of charge**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria.
2. You are, and were at all relevant times, the trainer of *Ayers Rock*.
3. You train from licensed premises at 13/15 Homewood Road, Cranbourne South (the **Premises**).
4. On 17 April 2019, *Ayers Rock* was entered to run in Race 6 at 3.20pm, in the Prestige Jayco BM64 Handicap over 2400 metres at Geelong Racecourse (the **Race**).
5. You stomach-tubed, caused, and/or attempted to stomach tube *Ayers Rock* at the Premises on the morning of the Race.
6. You did not hold any permission from the Stewards to stomach-tube, cause, or attempt the stomach tubing of *Ayers Rock*.

**Charge Two: 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:*
3. *the name of the horse;*
4. *the date and time of administration of the treatment or medication;*
5. *the name of the treatment or medication administered (brand name or active constituent);*
6. *the route of administration including by injection, stomach tube, paste, topical application or inhalation;*
7. *the amount of medication given (if applicable);*
8. *the duration of treatment (if applicable);*
9. *the name and signature of the person/s administering and/or authorising the administration of the treatment or medication.*
10. *For the purposes of this rule “treatment” includes:*
11. *shock wave therapy;*
12. *acupuncture (including laser treatment);*
13. *chiropractic treatment;*
14. *the use of any electrical stimulation device (including transcutaneous electrical nerve stimulation (TENS));*
15. *magnetic field therapy;*
16. *ultrasound;*
17. *any form of oxygen therapy, including hyperbaric oxygen therapy;*
18. *the taking of a blood sample.*
19. *For the purposes of this rule “medication” includes:*
20. *all Controlled Drugs (Schedule 8) administered by a veterinarian;*
21. *all Prescription Animal Remedies (Schedule 4), including those listed in Schedule 1, Part 2, Division 2 to these Australian Rules;*
22. *all Prescription Only Medicines (Schedule 4), prescribed and/or dispensed by a veterinarian for off-label use;*
23. *all injectable veterinary medicines (intravenous, intramuscular, subcutaneous, intra-articular) not already referred to above;*
24. *all Pharmacist Only (Schedule 3) and Pharmacy Only (Schedule 2) medicines;*
25. *all veterinary and other medicines containing other scheduled and unscheduled prohibited substances;*
26. *all alkalinising agents;*
27. *all herbal preparations.*
28. *All records required to be kept in accordance with this rule must be retained by the trainer for at least 2 years.*
29. *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 have breached AR 104, when:
	1. you failed to keep a treatment diary that allowed you to retain the treatment records for the horses in your care, for the minimum required period of two years, on the basis that you stated that you recorded your administered treatments on the white board within your feed room; and/or
	2. you stated to the Stewards that you had stomach tubed your horse *Rich Itch* in the period preceding the Stewards’ visit to your stables on 17 April 2019 and that this said treatment was not recorded.

**Kim Mathrick**

**Charge One: AR 255 Stomach-tubing prohibited at certain times**

1. *A person must not, without the permission of the Stewards:*
2. *stomach-tube;*
3. *cause the stomach-tubing of;*
4. *attempt to stomach-tube; or*
5. *be a party to the stomach-tubing or attempted stomach-tubing of,*

*a horse engaged to run in a race, official trial or jump-out:*

* 1. *at any time on the day of the race, official trial or jump-out and prior to the start of that event; and/or*
	2. *at any time during the 1 clear day prior to 12.00am on the day of the scheduled race, official trial or jump-out.*
1. *Provided that the stomach-tubing or attempted stomach-tubing occurred on race day or during the 1 clear day prior to 12.00am on race day for a horse engaged to run in a race on that race day, if a person breaches subrule (1) a disqualification of not less than 12 months must be imposed (other than where the person is not, in the opinion of a PRA (or a person employed or engaged by a PRA) or the Stewards, the principal offender), unless there is a finding that a special circumstance exists, in which case that penalty may be reduced.*
2. *If the Stewards are satisfied that a horse:*
3. *has, or is likely to have, been stomach-tubed in breach of subrule (1), they may prevent it from starting in any race, official trial or jump-out;*
4. *has been stomach-tubed in breach of subrule (1), it may be disqualified from the race that it started in.*

**Particulars of charge**

1. You are, and were at all relevant times, a stable employee registered by Racing Victoria and employed by/working with licensed trainer, Mr Shawn Mathrick.
2. Mr Mathrick is, and was at all relevant times, the trainer of *Ayres Rock.*
3. On 17 April 2019, *Ayers Rock* was entered to run in Race 6 at 3.20pm, in the Prestige Jayco BM64 Handicap over 2400 metres at Geelong Racecourse (the **Race**).
4. On 17 April 2019, you were a party with Mr Mathrick to the stomach-tubing or attempted stomach-tubing of Ayres Rock on the morning of the Race.
5. You did not hold any permission from the Stewards to be a party to the stomach tubing or attempted stomach-tubing of, *Ayers Rock*.

**Pleas:** Shawn Mathrick – Not Guilty to Charges 1 and 2.

Kim Mathrick – Not Guilty to Charge 1.

**DECISION**

Mr Shawn Mathrick, a licensed trainer, is pleading “Not Guilty” to a breach of AR 255(1), which prohibits the stomach tubing or attempted stomach tubing of a horse engaged to run in a race at any time on the day of such race. We are paraphrasing AR 255(1) by summarising it and in the context of the breach alleged. The alleged offence occurred on 17 April 2019.

Mrs Kim Mathrick is pleading “Not Guilty” to a breach of AR 255(1), in that she was a registered stable employee working for her husband, Mr Shawn Mathrick, and, at the relevant time, was allegedly a party to stomach tubing or attempted stomach tubing.

The charges against the Mathricks were heard together. Oral evidence on behalf of the Stewards was taken from Mr Dion Villella, stipendiary Steward; Ms Stella Stevenson, stipendiary Steward; Mr Joshua McGaw, employed at the time in the Compliance Assurance Team; Dr Grace Forbes, General Manager of Veterinary Services with Racing Victoria; and Dr Holly Cartels, registered veterinarian.

Both Mr and Mrs Mathrick gave oral evidence. Other witnesses on their behalf were Dr Timothy Roberts, veterinary surgeon, and Mr Raymond Borg, a now retired trainer who was present at Mr Mathrick’s stables at the relevant time.

In addition, two views were conducted at Mr Mathrick’s Cranbourne stables. Further, a very considerable number of documents was tendered, including diagrams and photographs. The case was a lengthy one by Tribunal standards, being conducted over a period of six sitting days, being two allocation of three days each. The availability of counsel and witnesses unfortunately resulted in those groups of sitting days being separated by a lengthy period. That is no criticism of anyone. It was simply the way matters eventuated. Indeed, we are grateful for the assistance of counsel and witnesses during the conduct of the case.

It was said more than once by both counsel that this case was essentially a factual dispute. We agree. Indeed, the closing submission of counsel underlined this proposition – see, for example, Transcript (T) 330 and 363 amongst other such references.

We shall turn now to our summary of the factual background, followed by a summary of the issues that appear to have remained by the time that the evidence had been concluded.

On 17 April 2019, Ms Stevenson and Mr McGaw twice attended the stables of Mr Mathrick at Cranbourne. The first visit was at approximately 8.20am and was allegedly for the purpose of a race day stable inspection. The horse Ayers Rock, trained by Mr Mathrick, was engaged to race at Geelong in Race 9 on that day. Ayers Rock is at the centre of the charges. Nothing of great significance occurred during this visit, save that Ayers Rock was noted to be wearing a white cotton combo rug. Its general appearance was also noted.

The Stewards returned at approximately 10.20am or marginally later, confronting Mr Mathrick at approximately 10.25am. This was intended to be a surprise return inspection, co-ordinated by Mr Villella. Mr Villella had been and was concealed in some rough and wooded land at the rear of the Mathricks’ property. We visited this location on each of our two visits. Initially there was some dispute as to exactly where Mr Villella had been located and what range of vision, if any, he would have had. This dispute resolved after our second visit. It was conceded by Mr Sheales that, with his binoculars, Mr Villella would have been able to see persons and horses leaving and entering the relevant yard and stable. We would estimate the distance of Mr Villella’s viewing point as being in the order of 250 metres from that yard and stable.

Mr Villella described Ayers Rock as being a bay horse with a white star, and wearing a white cotton sheet and neck rug. This is important, because of the assertion of the Mathricks, virtually from the outset, that the horse observed by Mr Villella was in fact Rich Itch, also a bay with a white star. Rich Itch was in a yard, which, from Mr Villella’s vantage point, was immediately behind that of Ayers Rock. Rich Itch was not racing that day. As we understand it, Rich Itch was wearing a similar sheet, but not a neck rug. The case advanced by Mr Sheales relied to an extent upon the assertion that Mr Villella, and the other Stewards, who moved in quickly on his instructions, simply made a mistake as to the identity of the horse in question. The Mathricks deny that any race day administration or attempt was made in relation to Ayers Rock. There was treatment of Rich Itch. That was stated by Mr Mathrick from the outset.

In any event, Ms Stevenson and Mr McGaw carried out the “raid” at about 10.25am. There is no dispute but that when they arrived, Mr Mathrick was hosing down the stable area. A milk container containing a small amount of a white foamy liquid was sitting on some tubs. Mr Mathrick stated that he had just stomach tubed Rich Itch. Stomach tubing equipment was located in a stable box in another area. This equipment included a wet funnel which contained a white liquid. Swabs were taken from the right nostril of Ayers Rock. The Stewards took possession of the funnel and the nasogastric tube, having poured the remaining liquid from the tube, which liquid was then taken for analysis. A swab was also taken from Ayers Rock and from Rich Itch.

At this stage, we would point out the following. Firstly, perhaps somewhat surprisingly, the Stewards do not appear to have taken possession of the milk container containing the liquid. It seems that no analysis was at any stage undertaken of the contents of it. There is no evidence in this regard to contradict the assertion of Mr Mathrick concerning it.

Secondly, the evidence of Dr Grace Forbes in relation to the swab taken from Ayers Rock is to be considered. In her initial report of 14 October 2019, Dr Forbes commented upon three blood samples taken from Ayers Rock on 17 April 2019. In paragraph 118 of that report, Dr Forbes commented as follows:

“In my opinion, the two most likely possible explanations for the modest variation in plasma TCO2 concentration for Ayers Rock recorded on 17 April 2019 include:

i. the administration of an alkalising agent(s) at some time prior to 10.24am on 17 April 2019, assuming that no alkalising agents were administered after that time…”.

Dr Forbes subsequently provided a supplementary statement of 6 August 2022 – that is, after the initial three days of evidence, but before the resumption of the hearing and before she gave evidence. In that supplementary report, she referred to a typographical error identified in her earlier report. The effect of that impacted upon the conclusions set out above. She stated that paragraph 118 should be amended to read as follows:

“In my opinion, there is no significant variation in plasma TCO2 concentration for Ayers Rock recorded on 17 April 2019, and therefore it is unlikely that this horse was stomach tubed with an alkalising agent at 10.25am on 17 April 2019”.

We have two observations to make about this.

Firstly, it is unfortunate that the earlier typographical error occurred, but it is very much to the credit of Dr Forbes that she had checked her lengthy report, identified the error and brought it to the attention of the Stewards and the Tribunal. In her initial report, she had also stated that it was unlikely that Rich Itch had been stomach tubed.

Secondly, the impact of this correction is to be considered. We appreciate that the offence is one of stomach tubing itself. No prohibited substance, alkalising agent or the like need be involved. Further, the offence created by the Rule includes an attempt to stomach tube. The actual carrying out of stomach tubing need not occur for an offence to be committed.

However, there is no denying that the amendment of the opinion of Dr Forbes has some impact. Actual administration of an alkalising agent to Ayers Rock at approximately 10.25am on 17 April 2019 would appear to be excluded.

Indeed, it is arguable that the highest that the case against the Mathricks can be put is an attempt at stomach tubing of Ayers Rock at the premises on the morning of the race. Arguably, the actual substance the subject of the attempt cannot be identified with any degree of certainty.

Bearing all of the above in mind, we move on to an assessment of the strength of the evidence against the Mathricks and their response to it.

As stated, the basic position of the Mathricks is that the horse that was stomach tubed at the stables at the relevant time was Rich Itch and that no stomach tubing was carried out or attempted on Ayers Rock. We turn now to the evidence directly bearing on this issue.

Mr Villella gave evidence that the horse which he saw being led into the relevant section of the stables at about 10.25am was wearing a white cotton sheet and neck rug. There seems to be no dispute concerning the proposition that Ayers Rock had on a neck rug as at the time in question and Ritch Itch did not. Therefore considerable importance attaches to the accuracy of the observation of Mr Villella. No attack is made upon the honesty of the belief that he has maintained. However, the accuracy of that belief is challenged.

Apart from Mr and Mrs Mathrick, another person who was present and gave evidence via an international telephone link up was Mr Ray Borg. Mr Borg has had a long career of some 56 years in the racing industry, essentially as a trainer, although he has now retired and lives overseas. He has an impeccable record. At the time of the alleged offences, he was at the stables of Mr Mathrick. He was employed on a part-time basis by Mr Mathrick and was familiar with the horses on the premises. He was well aware of Ayers Rock and Rich Itch. On 17 April 2019 he was on the premises in a truck and was assisting with the removal of some sheds. He was present and in the vicinity of the yards enclosing Ayers Rock and Rich Itch at the relevant time. He knew both horses and knew Rich Itch very well, which horse he took regularly to the track and to all its races.

On 17 April 2019 he was not actually working for Mr Mathrick, it being a Wednesday and he usually did not work on Wednesdays. However, he needed to borrow and unload Mr Mathrick’s truck in order to pick up some fibreglass panelling. He parked his car near the house and walked along the side of the house to the back of it. He went past Rich Itch, which he noticed to be walking “very short”. When he found Mr Mathrick, he advised him to have a look at Rich Itch, because Mr Borg thought that it was tying up. He believes that Mr Mathrick then called to Mrs Mathrick to “grab the horse”, because he wanted to make sure that it was all right.

Mr Borg got in the truck and drove back up the driveways. As he did, he stopped to let Mrs Mathrick cross the driveway from the yards and into the feed room. She crossed with a horse, concerning which Mr Borg stated “I’m 100 nearly 100 per cent sure it was Rich Itch”. He was 100 per cent – sure that the horse that crossed into the feed room was not Ayers Rock, because it wore a neck rug and the horse that walked past him did not have a neck rug on. He had no doubt at all that Ritch Itch had been observed by him to be short in its action and that he had told Mr Mathrick this – see T 319 and following.

In cross examination, Mr Borg stated that he was not aware that the Stewards had the stables under observation or that they had made an earlier visit. He also stated that Ayers Rock wore a cotton sheet and a neck rug, particularly in the cold weather. He was “100 per cent” certain that it was wrong to suggest that the truck had gone by the time that Mrs Mathrick was putting the lead collar on the horse. He stopped the truck right in front of the feed rooms – see T 325. In the rear vision mirror, he saw Mr Mathrick driving up. Mrs Mathrick did not have a phone in her hand.

In re-examination, Mr Borg said the following in relation to the identity of the horse:

“I’m pretty sure it was Rich Itch, unless I’m blind” – see T328.

In answer to a question from the Tribunal, Mr Borg said that it would be “100 per cent wrong” to say that the truck become stationary and then moved off whilst Mrs Mathrick was still catching the horse – see T 332. He pulled up in order to allow her and the horse to cross. In answer to further questions from Mr Rush, he recalled that Mrs Mathrick had come out again to give him and his passenger some money. It is clear from the evidence of Mr Villella, who was observing what was occurring, that the relevant movement of Mr Borg’s truck occurred at approximately 10.21am to 10.23am.

Mr Borg was on the spot. He was well familiar with both horses. His credit as a witness has not been attacked. In his closing address, Mr Rush described Mr Borg as “a witness who was doing his best”, but his recollection is obviously mistaken – see T 338. Mr Borg was quite definite in his evidence that the horse which he saw with Mrs Mathrick and which she had removed from the yard and with which she had crossed in front of his truck to the feed room was not Ayers Rock. Obviously, he saw it at close range. He was “100 per cent sure” that it was not Ayers Rock. He was almost 100 per cent sure that it was Rich Itch. Of course, the ultimate opinion of Dr Forbes was that it was unlikely that either horse had been stomach tubed with an alkalising agent. We accept Mr Borg as a witness of truth. We do not accept that his recollection was “obviously mistaken”, as submitted. It was clear and definite evidence, from a person of truth well familiar with both horses, that the horse which passed the front of his truck and was being led from its yard to the feed room at the relevant time was not Ayers Rock.

We are comfortably satisfied that the evidence of Mr Borg is accurate. We are comfortably satisfied that the truck became stationary so that Mrs Mathrick could pass in front of it on the way from the yard to the feed room. She was leading a horse. During the relevant period, only one horse was seen being led into the stables. That horse was not Ayers Rock. All of this occurred at approximately 10.23am. The Stewards arrived at the relevant part of the stables at 10.25am.

On the above basis, Charge 1 against Mr Mathrick and the charge against Mrs Mathrick must fail.

Even if we left to one side the compelling evidence of Mr Borg, it seems to us that the Stewards have failed to discharge the burden of proof. In his closing address, Mr Rush made it clear that the case of the Stewards was that an actual administration had taken place (as opposed to an attempt) – see T 335. However, this does not sit comfortably with the evidence of the Stewards’ own witness, Dr Forbes, that it was unlikely that Ayers Rock was stomach tubed with an alkalising agent. Of course, as stated, the Rule is not limited to administration of an alkalising agent, but the second report of Dr Forbes does not sit comfortably with the case as presented by the Stewards.

In any event, the case put by the Stewards is that an administration occurred. We are not comfortably satisfied, or indeed satisfied at all, that the evidence establishes that an actual administration to Ayers Rock took place. None was observed. There is no reason why the Mathricks on race day would have administered to Ayers Rock a stomach tubing with a substance that would not affect its performance. There was a reason why such a tubing would have been administered to Rich Itch, namely that it had been seen by Mr Borg to be “very short” in its walking action and he had reported this to Mr Mathrick. Further, we are not satisfied that the presence of a smear of some substance on the right nostril of Ayers Rock takes matters further. What the substance was and how it got there are questions that remain unanswered.

Let us assume for the moment that the horse that crossed in front of Mr Borg’s truck was in fact Ayers Rock, despite his evidence to the contrary. Let us also assume that the purpose of the taking of Ayers Rock to the feed room was for the administration of stomach tubing, a somewhat courageous move on a day when the Stewards had already visited the stables. Even if these propositions are accepted, that still seems to us to leave the Stewards short of proving the case of administration, actual or attempted. The moving of the horse to the feed room does not seem to us to constitute the completed offence of an administration or of an attempt. The evidence of Dr Forbes, even without that of Dr Roberts, would not support the proposition that, as far as a prohibited substance is concerned, any administration took place. Mr Mathrick may have changed his mind and decided not to engage in stomach tubing of Ayers Rock. Even though it is not their case, the arrival of the Stewards may have prevented the stomach tubing before it could even be attempted.

These are all speculations. Bearing in mind the clear assertion on behalf of the Stewards that stomach tubing of Ayers Rock did in fact take place, such speculations are probably unnecessary, but they underline the fact that, even leaving to one side the evidence of Mr Borg, the Stewards would have fallen short of discharging the burden of proof. We appreciate that Mr Sheales is in essence asserting that a horse was stomach tubed, but that such horse was Rich Itch, which had been suffering from tying up – see T 175. However, even if it was not the case that Rich Itch was stomach tubed, the evidence still falls short of establishing that Ayers Rock was stomach tubed or that an attempt was made so to do. It seems it us that the Stewards potential case in relation to an attempt, at its highest, is that Ayers Rock was present in the feed room. That an attempt at stomach tubing Ayers Rock had actually commenced has not been established.

Of course, as set out above, we are far from satisfied that the fact that Ayers Rock was present in the feed room at the relevant time has been proven. In our opinion, the weight of the evidence has convinced us that it was not so present and we refer again to what was said by Mr Borg.

Suspicions are not evidence. Some aspects of the behaviour of the Mathricks may have alerted suspicions. We have considered the main points advanced by Mr Rush, including the identity of the horses, the behaviour of the Mathricks, the presence or absence of Mr Borgs truck, and the like. However, the bottom line is that we are not satisfied, comfortably or otherwise, that the Stewards have made out their case and have discharged the burden of proof.

We should also acknowledge the evidence of Dr Timothy Roberts, an experienced veterinary surgeon, who has worked in the racing industry since 1975. Dr Roberts was called by the Mathricks. Essentially, his relevant evidence was to disagree with the proposition advanced by Dr Forbes that lactic acid is wholly irrelevant to tying up. He referred to articles that support the proposition that it was relevant and related. He referred to the instances of some horses tying up during and after a race. If a horse was exhibiting signs of tying up, treatment would include an electrolyte drench. It is not essential that we rule upon the rights and wrongs of this dispute, given our other findings, but we appreciate the helpful submissions.

Our conclusion is that the relevant burden of proof has not been discharged by the Stewards. The charge against both Mr and Mrs Mathrick in relation to AR 255(1) is dismissed in each instance.

Mr Mathrick has also been charged with a breach of AR 104 – the failure to maintain proper records and the like. Not a great deal of attention was directed to this. We shall hear the parties further as to this charge.

The issue of the AR 104 charge is to be dealt with at a convenient time.

Mark Howard
Registrar, Victorian Racing Tribunal