17 January 2022

**RULING**

**RACING VICTORIA**

**and**

**MARK SUES**

**Date of hearing:** 10 October 2022

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

**Appearances:** Mr Albert Dinelli instructed by Mr Scott Hunter appeared on behalf of the Stewards.

Mr Mark Sues represented himself and appeared as a witness.

Mr Mark Stevens appeared as a witness.

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

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 Finally Free (the Horse).

3. On 5 May 2019, the Horse ran in the Farmers Friend BM58 Handicap over 1600 metres at the Bairnsdale 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 post-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(2) [Alternative to Charge One]**

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 were, at all relevant times, the trainer of Finally Free (the Horse).

3. On 5 May 2019, the Horse was brought to the Bairnsdale Racecourse and ran in the Farmers Friend BM58 Handicap over 1600 metres (the Race).

4. On 5 May 2019, following the running of 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.

**Pleas:** Guilty to both charges.

**RULING**

1. Mr Mark Sues has pleaded guilty to a breach of AR 245(1), which could be summarised as involving the administration of a prohibited substance detected in a sample taken from a horse prior to the running of a race. Accordingly, this Ruling concerns an issue or issues relating to the penalty, if any, to be imposed. Mr Sues is pleading guilty, but is endeavouring to establish factual circumstances which effectively remove the need for any penalty. This is contested by the Stewards. Accordingly, it seems to us to be more likely that the burden of proving the existence of such circumstances rests upon Mr Sues. That is so whether the test is one of discharge of the burden of proof on the balance of probabilities or one of comfortable satisfaction (“the Briginshaw test”).

2. The horse involved, and trained by him, was *Finally Free,* which competed at Bairnsdale on 5 May 2019. *Finally Free* was the winner of that race, having started a short priced favourite. The prohibited substance involved is cobalt.

3. This matter has been described as being a contested plea hearing. There was oral evidence and there were written submissions, all of which were directed primarily to the level and nature of guilt and responsibility. One central issue involves the identity of the substance, if any, which was administered and which allegedly caused the elevated reading.

4. Whilst his position arguably has changed over time, essentially the argument advanced by Mr Sues is that he was administering to the horse a product called Hygain Release. At the time he did not know that it contained cobalt in a sufficient quantity to cause the elevated reading. He alleges that there was nothing about the product or its packaging that alerted him to this possibility.

5. In this regard, Mr Sues referred to the facts and the outcome in the case of *Racing Victoria v Mitchell Freedman* (2016 December 2021). That case involved the acceptance by the Stewards that Hygain Release had been fed to the horse in question effectively on a daily basis and that there had been no warning on the packaging or generally as to its cobalt content. An integral part of the plea in that case rested on that absence of appropriate wording on the packaging or elsewhere, and on the fact that there had been no negligence on the part of Mr Freedman or his staff. Whilst he pleaded guilty to the charge, no penalty was imposed.

6. In the present case, the Stewards have argued that such mitigating factors have not been established. It is submitted that we should not be satisfied that, at the relevant time, Hygain Release was administered to *Finally Free* in sufficient quantities and at a time to produce the elevated cobalt reading, or, indeed, administered at all. It is further submitted that, even if we accept that there was an administration, there is no evidence that it contained cobalt to the required level. In addition, it was submitted that, on the evidence, it is not reasonably open to the Tribunal to find that the administration of Hygain Release caused the over-threshold cobalt reading.

7. The written submissions of Mr Sues were lengthy and more sweeping in nature. They include observations concerning his mental health, and particularly anxiety. He describes the difficulties that he faces in the presentation of arguments and the like. We accept that, at times, he did lose his train of thought when giving oral evidence. We accept that he continues to be on medication for anxiety. However, we have no difficulty in understanding the basic thrust of his evidence, which, in both the oral and written form, was clear.

8. Mr. Sues places responsibility for the elevated cobalt reading on Hygain Release. He states that, at the relevant time, it was administered by him or on his behalf without his having any knowledge of the level of cobalt contained in the product and without there having been any warning in relation to it on the label or otherwise. Thus, effectively he places himself as being in the same situation as Mr. Freedman.

9. We are of the view that there are significant differences between the present case and that of Mr. Freedman.

In Mr. Freedman’s case, there was no dispute but that his foreman fed to the horse in question Hygain Release every evening. This was accepted by Associate Professor Stuart Paine, reporting to the Stewards, as being the possible explanation for the horse’s elevated cobalt reading. There was no suggestion by or on behalf of the Stewards of any lack of care on the part of Mr. Freedman. As stated, there was clear and unchallenged evidence that Hygain Release, which contained cobalt and was not appropriately labelled, was fed to the horse at the relevant time. This, combined with the evidence of Associate Professor Paine, was the central plank of the decision.

10. In the present case, that is not the situation. There is not clear and unchallenged evidence that Mr Sues administered or caused to be administered Hygain Release at the relevant time and in a particular quantity so as to produce the relevant reading. Regardless of where the burden of proof rests, we are not of the view that we can be satisfied that any such administration has been proven.

11. Mr Sues is a meticulous taker of records. In his written submissions, and referring to himself in the third person, he stated as follows:

“…every treatment is listed in Mr Sues’ treatment book and at no time in the 25 years since he was first licensed, has Mr Sues ever been caught or charged with race day treatment, nor found to not have maintained a treatment book in accordance with all relevant rules”.

12. Whilst there is this assertion in relation to record keeping, in the present matter there is effectively no clear and relevant record of treatment involving Hygain Release. That is in contrast to the situation in Mr Freedman’s case. Further, in that case there was effectively no challenge to the proposition that a stablehand had, in good faith and without the stable having any knowledge of any risk, administered Hygain Release on a daily basis and recorded same.

13. Turning to the present case, when interviewed by Stewards for the first time on 31 May 2019, Mr Sues listed the medications given to *Finally Free* on 3 May, two days before the race, as being Hartmann’s, Hippiron, vitamin C, and Tripart. When discussing the feeding regime leading up to the race, Mr Sues mentioned Hygain Powatorque. He also stated that all his horses received Barastoc Phar Lap, with breeding mares getting another Barastoc product. He also used Cophos B and Hemoplex. *Finally Free* was also on Farrier’s Formula. At the conclusion of this listing of the medications, he described it as being “spot on”. In addition, Mr Sues referred to the treatment on 3 May as including a saline drench or an injection. On 4 May, *Finally Free* was scoped. He had also had some Metacam on 2 May.

14. Mr Sues said that the feeding regime did not change on race days, except in relation to lucerne.

There was some discussion about the use of the product Phar Lap, which apparently had been queried in the past; whether Mr Sues still had any; and whether it would be advisable to cease using it. At the end of that discussion, and virtually at the end of the interview, Hygain Release received its only mention. This was as follows:

“Mr Sues: “…I’ve got to get some more Release and Powatorque as well”.

We would refer to page 194 of the Tribunal Book (p.19 of the transcript of the interview).

15. In the interview of 5 June 2019, the following exchange took place:

Mr Stevens: What other possible feed products would Finally Free

have been on at that time?

Mr Sues: As supplements or feed?

Mr Stevens: Feed, as instead of the Phar Lap, if you didn’t have that at the time?

Mr Sues: It would have been on Release or Powatorque, probably Release.

Mr Stevens: That’s Hygain Release isn’t it?

Mr Sues: Yes, correct.

Mr Stevens: I think that was up on your board.

Mr Sues: Yes. I think Microspeed was on the board as well but we haven’t used that for probably three or four months.”

These questions and answers are to be found on page 201 of the Tribunal Book (p.4 of an interview of a little over 11 pages). Thereafter the questions and answers concentrated on other products and the like.

16. There was a further interview on 17 July 2019. Much of the discussion was focussed on vitamin C and some on Vitamin B products. At page 18 of that interview, Mr Sues stated that he used Barastock Victory, Legend and Sustain. He went on to state that he regularly changed products and at page 20 the following was said:-

“Mr Sues: No, I chop and change all the time. The only probably product that stays is Hygain Release. That’s the only one that I use on all the fillies and mares.

Mr Newbery: Right.”

We would point out that *Finally Free* is a horse.

The following exchange then took place immediately:

“Mr Stevens: So around the time that the horse was racing, do you have a rough idea of what it would have been on?

Mr Sues: One and a half kilos of Legend and probably one and a half kilos of oats or oats and a bit of Breed N Grow and a bit of All Rounder mixed in just to soften it up a bit.”

There was then a further discussion of feed and products, but no reference to Hygain Release.

The above questions and answers are to be found at page 226 of the Tribunal Book and are on page 20 of a 23 page interview.

17. The next interview with Mr Sues took place on 27 August 2019 at his stables. It is apparent that, by this time, Mr Sues had become aware of investigations of Mr Archie Alexander and Mr Freedman concerning positive returns, and of their taking of soil samples. Such samples were then taken on 27 August by the Stewards. There was no discussion of medications or of Hygain Release. We would refer to pages 236 to 241 of the Tribunal Book.

18. The final interview took place on 9 June 2020 at Mr Sues’ stables. Apparently, Mr Sues had wanted the return of the vitamin C bottle that had been taken by the Stewards. He also reported suspicious behaviour in relation to a break-in at the stables, a poisoning of the water trough and of tampering with a motor vehicle. There was no reference to Hygain Release.

19. The above seems to us to include the totality of references to Hygain Release. It is in contrast to what is set out in the closing written submissions of Mr Sues. These include the following.

1. At paragraph 7 (a) of that part of his written submissions headed “Responses to RV Written Submissions” Mr Sues states as follows:

“Mr Sues informed Racing Victoria on the 5th of June 2019 that the horse Finally Free was fed Hygain Release at a rate of 3kg per day”.

That does not strike us as an accurate description of what Mr Sues told the Stewards on that day. We would refer to what is set out above.

1. At paragraph 16, Mr Sues states that, in Mr Steven’s spreadsheet, there was no mention of Release “…even though it was established on the 5th of June 2019 that this is what the horse was fed”. In our opinion it was far from being so established.
2. In paragraph 31, Mr Sues claims that, on the day of the first interview (31 May 2019), he was exhausted and made one mistake on his “piece of paper”, “…substituting Release for Phar Lap”. Presumably he means the other way round, but, in any event, he continues: “…but this was corrected on the 5th of June 2019 to be 1.5g of Release and 1kg of Power torque twice daily plus additives”. In the transcript of the interview of 5 June 2019 the only reference to Release, and it is brief, is that set out in paragraph 15 of this Ruling.
3. In paragraph 33 (b), Mr Sues states that “…the feed regime given to RV on the 5th of June 2019 was the true and accurate regime”. Our comments in (c) above are again appropriate.
4. In paragraph 37, Mr Sues again asserts that, “… even though he stated this horse was fed 3 kgs per day of Hygain Release on the 5thJune 2019”. We again refer to the above comments.
5. In paragraph 46, he refers to the provision of evidence, “post 5th of June 2019”, that the horse was fed Hygain Release and Hygain Power Torque. Exactly what this evidence was and when it was provided is not spelt out, save that it was post the above date.
6. In paragraph 11 of the Summary (paragraph numbering is a little confusing), Mr Sues states as follows:

“…The only reason Mr Sues can be sure what Finally Free was being fed is that this has been Mr Sues evidence all along…”.

Given the extracts set out above, this could not be considered to be an accurate statement or one that assists him.

1. In his Conclusion, Mr Sues states that “…the tribunal should be satisfied that the cause of the over-threshold result was the horse feed namely Hygain Release and the feeding of 1.5kg in the morning feed and a further 1kg prior to loading on the horse float at 11.45am to Finally Free”.

Theoretically that amount of feeding of that product to that horse at those times may or may not have produced the reading in question. The problem we encounter is that this was simply not the evidence given by Mr Sues in his interviews at a time far closer to the events.

20. There is a marked contrast between the case of *Freedman* and the present case. In *Freedman* there was clear, unchallenged and consistent evidence as to the amount of Hygain Release fed to the horse, when it was fed and by whom. There was unchallenged and accepted evidence that the Hygain Release administered, on that timetable and in that manner and quantity, could be the source of the elevated cobalt reading.

In the present case, those evidentiary features are absent.

21. The case of *Alexander*, which also involves cobalt and to which reference has been made, is of limited assistance. As in *Freedman* and in the present case, there was a plea of Guilty. Unlike the situation in *Freedman*, the cause of the elevated reading was not known. There was a specific finding by the Tribunal that the disclosed feeding regime was not responsible for the high cobalt reading. Ultimately a penalty of a suspension, in turn suspended, and a fine were imposed.

22. In the present case Mr Sues has attempted to implicate Hygain Release. Essentially that is where the similarities with *Freedman* begin and end. In our opinion, *Alexander* does not advance Mr Sues’ case any great distance, if at all.

23. True it is that the whiteboard in Mr Sues’ stables shows that *Finally Free,* identified by its stable name, received “1/4” Release. This is of limited assistance. The date of the first visit by the Stewards is 31 May 2019, almost four weeks after the race in question. In the transcript of the interview on that day there is a reference to photos taken that morning. The regime of treatment at that time does not take matters much further.

24. There is little argument but that Mr Sues purchased some Hygain Release from Tully’s both before and after race day, being 5 May. The central question is whether this was administered to *Finally Free* at the relevant time.

Mr Sues’ treatment diary is interesting. On 2 May It records that *Finally Free* received treatment by way of Metacam. On 3 May there is reference to a saline drench. There is also listed 20 mils. of each of three medications, none of which is Hygain Release. On 4 May the only treatment recorded is “Scoped”, which is also mentioned by Mr Sues when interviewed. On 5 May, being race day, no treatment is recorded.

25. Overall, there the is a marked contrast between the evidence as to what occurred in *Freedman* and as to what occurred in the present case. Even leaving to one side the expert opinions of Associate Professor Paine and Doctor Forbes, we see little or no persuasive resemblance between the factual situation and evidence in *Freedman* and that in the present case.

26. Wherever the burden of proof may lie regarding this aspect of the matter, (and we are of the view that it rests on Mr Sues), and whether it be assessed on the balance of probabilities or by way of comfortable satisfaction (“the Briginshaw Test”), we prefer and accept the conclusion advanced on behalf of the Stewards. Whilst there has been a plea of guilty in both cases, we are not of the opinion that the approach and conclusion adopted in *Freedman* are appropriate in the case of Mr Sues.

27. In summary, in relation to this point or submission, we find against Mr Sues. Wherever the burden of proof may lie, we are not satisfied that the elevated cobalt reading obtained from *Finally Free* on 5 May 2019 was caused by the horse being fed Hygain Release at the relevant time.

28. We shall hear the parties as to the further conduct of the case.

Mark Howard
Registrar, Victorian Racing Tribunal