15 May 2020

**RULING – APPLICATION FOR TESTING**

**RACING VICTORIA**

**and**

**MR RICHARD LAMING**

**Date of hearing:** 21 April 2020

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

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

Mr Adrian Anderson appeared on behalf of Mr Laming.

**Charges & Particulars:**

**Charge One: Australian Rule (AR) 245**

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 *Iam Ekstraordinary.*
3. On 23 May 2018*, Iam Ekstraordinary* ran in the City of Ballarat Maiden Plate over 1200 metres at the Ballarat racecourse (the race).
4. Prior to the race you administered, or caused to be administered, to *Iam Ekstraordinary* a prohibited substance, being cobalt at a mass concentration in excess of 100 micrograms per litre in urine, which was detected in a pre-race urine sample taken from *Iam Ekstraordinary* 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 Australian 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 Two: AR 240 [Alternative to Charge One]**

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 *Iam Ekstraordinary.*
3. On 23 May 2018*, Iam Ekstraordinary* was brought to the Ballarat racecourse and ran in the City of Ballarat Maiden Plate over 1200 metres (the race).
4. A prohibited substance, being cobalt at a mass concentration in excess of 100 micrograms per litre in urine, was detected in a pre-race urine sample taken from *Iam Ekstraordinary* 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 Australian Rules of Racing.
6. At the time of the relevant conduct described, it was an offence under AR 178 (as then in force) to engage in the conduct described 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 Three: AR 104(1)**

The Stewards charge you with breaching AR 104(1) which reads as follows:

*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. On 20 June 2018, Racing Victoria Stewards (Stewards) attended your stables at Clyde to complete an inspection (Inspection).
3. During the Inspection, Mr Marnu Potgieter, a stable hand employed by you, provided a treatment diary to the Stewards (Treatment Diary).
4. On the evening of 20 June 2018, after completion of the Inspection that day, Mr Potgieter provided the Stewards with a revised version of the Treatment Diary via email (Revised Treatment Diary).
5. The Revised Treatment Diary included treatments that had been administered to *Iam Ekstraordinary* in May 2018 that had not been recorded in the Treatment Diary when the Stewards undertook their Inspection.
6. Your conduct, as described above, was in breach of AR 104(1).
7. At the time of the relevant conduct described, it was an offence under AR 178F(5) (as then in force) to engage in the conduct described in particular 5.
8. 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.

**Plea:** Reserved

**RULING – APPLICATION FOR TESTING**

This matter involves an alleged breach of AR 245. It relates to a swab positive to a prohibited substance, namely cobalt, returned by ‘Iam Ekstraordinary’ on 23 May 2018. The horse is trained by Mr Richard Laming. The positive return exceeded the threshold by a considerable margin. Testing was carried out by Racing Analytical services Limited (RASL) and Racing Science Centre (RSC).

Mr Laming via his counsel, Mr Adrian Anderson, now seeks that the urine sample taken from ‘Iam Ekstraordinary’ be released and forwarded to the Royal North Shore Hospital in Sydney. The senior hospital scientist there is Mr Ross Wenzel.

There is a problem in this regard. AR 258 (2) provides that a sample shall be analysed only by an Official Racing Laboratory. These are listed in AR 2. RASL, for example, is so listed. RSC is listed. Royal North Shore Hospital is not. Nor is Mr Wenzel or others associated with him or with Royal North Shore Hospital. That is no criticism of that institution or those individuals. The institution and the individuals are simply not listed in AR 2 as being an Official Racing Laboratory. AR 258 (2) is applicable. They have no right to analyse samples and indeed are prohibited from so doing, given the terminology of AR 258 (2).

I would refer to two Rulings of the Racing Appeals and Disciplinary Board. The earlier of these is Ruling No.2 in the case of *Racing Victoria Stewards v Matthew Leek and Trevor Matthews,* delivered10 October 2018*.* The more recent is the Ruling of the same Board in *Racing Victoria Stewards v Steven Pateman and Jessica Barton,* delivered 29 March 2019. In each instance, the argument that there should be a referral of the same nature as the one before me was unsuccessful. Indeed, each involved a proposed referral to Royal North Shore Hospital and Mr Wenzel. Whilst these Rulings were pursuant to what was then AR 178 (i), in each Ruling, reference was made to what was said by Garde P. in *Hope v Racing Victoria Limited (3)* [2019] VCAT 82, as follows:

“on the face of things, I would very much prefer an accredited laboratory, with the equipment, processes and inherent expertise that it has, to undertake a test of this character”.

Garde P was also dealing with a proposed referral to Royal North Shore Hospital.

Whilst this is not an absolute statement that the referral sought would not comply with the Rule, it shows a decided reluctance to make such an order, a reluctance which I share. His Honour did not have to go further. As I understand it, the proposal was not pursued.

In my opinion, as stated in *Leek* and *Pateman,* the Rules simply do not permit such a referral.

Further, as stated in those cases, that does not preclude Mr Wenzel or any other person associated with Royal North Shore Hospital from being called as a witness. However, that does not mean that the *prima facie* and clear wording of the provision, along with the list of laboratories set out in AR 2, can simply be ignored and an order made for the sending of samples to an unauthorised laboratory or person.

I am conscious of the importance of procedural fairness. It is a further step, and a very sizeable one, to order that a sample be sent to an individual or organisation not included in AR 2 and where there would be a failure to comply with what is set out in AR 258 (2). Indeed, it would be sailing directly in the face of AR 258 (2), in addition to being inconsistent with the approach adopted by Garde P in *Hope.*

Without setting out what is contained in them in any greater detail, I adopt what has been said in the Rulings in the Racing Appeals and Disciplinary Board decisions mentioned above.

I am not persuaded by the arguments advanced by Mr Anderson in relation to the operation of the *Racing Act 1958*, procedural fairness and the like. AR 258 (2) could hardly be clearer. Whilst the number of the Rule altered, there was no alteration to its content in the transitional provisions associated with the establishment of the Victorian Racing Tribunal.

Integrity is of vital importance to the well-being and success of racing. It is also very much in the public eye. It has been determined that the analysis of samples must be undertaken by an Official Racing Laboratory. That determination has been expressed consistently in the mandatory Rule concerning such laboratories and the listing of them.

I repeat that nothing prevents Mr Laming from calling expert evidence that is relevant to the charge. That is a different proposition from making an Order that sails in the face of a Rule. Accordingly, I am not prepared to make it. The application is dismissed.

Mark Howard
Registrar, Victorian Racing Tribunal