28 September 2023

**DECISION**

**HARNESS RACING VICTORIA**

**and**

**BEN YOLE**

**and**

**ROBERT WALTERS**

**Date of hearing:** 25 September 2023

**Panel:** Justice Shane Marshall (Deputy Chairperson) and Mr Des Gleeson.

**Appearances:** Mr Andrew Cusumano appeared on behalf of the Stewards.

Mr Ben Yole represented himself.

Mr Robert Walters represented himself.

**Charge:** Australian Harness Racing Rule (“AHRR”) 190(1) states:

(1) A horse shall be presented for a race free of prohibited substances.

**Particulars of charges: Ben Yole**

**Charge 1**

1. At all relevant times, you were a licensed trainer with the Controlling Body in Tasmania and a person bound by the Australian Harness Racing Rules;
2. At the relevant time you were the trainer of the horse “Ideal Investment”;
3. On 16 August 2022, Ideal Investment was presented to race at the Kilmore harness racing meeting in Race 2, the “C&M Build Group Pace”;
4. Following Race 2, a urine sample was collected from Ideal Investment with subsequent analysis of that sample revealing an arsenic concentration in excess of the allowable threshold;
5. As the trainer of Ideal Investment on 16 August 2022, that horse has been presented to race in the C&M Build Group Pace at Kilmore not free of arsenic, a prohibited substance when present at a concentration in excess of 0.30 micrograms per millilitre in urine.

**Charge 2**

1. At all relevant times, you were a licensed trainer with the Controlling Body in Tasmania and a person bound by the Australian Harness Racing Rules;
2. At the relevant time you were the trainer of the horse “Baccarat”;
3. On 23 August 2022, Baccarat was presented to race at the Melton harness racing meeting in Race 2, the “Catanach’s Jewellers Pace”;
4. Following Race 2, a urine sample was collected from Baccarat with subsequent analysis of that sample revealing an arsenic concentration in excess of the allowable

threshold;

1. As the trainer of Baccarat on 23 August 2022, that horse has been presented to race in the Catanach’s Jewellers Pace at Melton not free of arsenic, a prohibited substance when present at a concentration in excess of 0.30 micrograms per millilitre in urine.

**Charge 3**

1. At all relevant times, you were a licensed trainer with the Controlling Body in Tasmania and a person bound by the Australian Harness Racing Rules;
2. At the relevant time you were the trainer of the horse “Baccarat”;
3. On 12 February 2023, Baccarat was presented to race at the Kilmore harness racing meeting in Race 9, the “Bendigo Bank Lancefield Pacing Cup Final”;
4. Following Race 9, a urine sample was collected from Baccarat with subsequent analysis of that sample revealing an arsenic concentration in excess of the allowable threshold;
5. As the trainer of Baccarat on 12 February 2023, that horse has been presented to race in the Bendigo Bank Lancefield Pacing Cup Final at Kilmore not free of arsenic, a prohibited substance when present at a concentration in excess of 0.30 micrograms per millilitre in urine.

**Robert Walters**

**Charge 1**

* + - 1. At all relevant times, you were a licensed trainer and driver with HRV and a person bound by the Australian Harness Racing Rules;
      2. At the relevant time you were left in charge of the horse “Ideal Investment”;
      3. On 16 August 2022, Ideal Investment was presented to race at the Kilmore harness racing meeting in Race 2, the “C&M Build Group Pace”;
      4. Following Race 2, a urine sample was collected from Ideal Investment with subsequent analysis of that sample revealing an arsenic concentration in excess of the allowable threshold;
      5. As the person left in charge of Ideal Investment on 16 August 2022, you presented that horse to race in the C&M Build Group Pace at Kilmore not free of arsenic, a prohibited substance when present at a concentration in excess of 0.30 micrograms per millilitre in urine.

**Charge 2**

* + - 1. At all relevant times, you were a licensed trainer and driver with HRV and a person bound by the Australian Harness Racing Rules;
      2. At the relevant time you were left in charge of the horse “Baccarat”;
      3. On 23 August 2022, Baccarat was presented to race at the Melton harness racing meeting in Race 2, the Catanach’s Jewellers Pace;
      4. Following Race 2, a urine sample was collected from Baccarat with subsequent analysis of that sample revealing an arsenic concentration in excess of the allowable threshold;
      5. As the person left in charge of Baccarat on 23 August 2022, you presented that horse to race in the Catanach’s Jewellers Pace at Melton not free of arsenic, a prohibited substance when present at a concentration in excess of 0.30 micrograms per millilitre in urine.

**Charge 3**

* + - 1. At all relevant times, you were a licensed trainer and driver with HRV and a person bound by the Australian Harness Racing Rules;
      2. At the relevant time you were left in charge of the horse “Baccarat”;
      3. On 12 February 2023, Baccarat was presented to race at the Kilmore harness racing meeting in Race 9, the “Bendigo Bank Lancefield Pacing Cup Final”;
      4. Following Race 9, a urine sample was collected from Baccarat with subsequent analysis of that sample revealing an arsenic concentration in excess of the allowable threshold;
      5. As the person left in charge of Baccarat on 12 February 2023, you presented that horse to race in the Bendigo Bank Lancefield Pacing Cup Final at Kilmore not free of arsenic, a prohibited substance when present at a concentration in excess of 0.30 micrograms per millilitre in urine.

**Charge 4**

* + - 1. At all relevant times, you were a licensed trainer and driver with HRV and a person bound by the Australian Harness Racing Rules;
      2. At the relevant time you were the trainer of “Paddy Mach”;
      3. On 9 April 2023, the horse Paddy Mach was presented to race at the Warragul harness racing meeting in Race 3, the “Total Span Pace”;
      4. Following Race 3, a urine sample was collected from Paddy Mach with subsequent analysis of that sample revealing an arsenic concentration in excess of the allowable threshold;
      5. As the trainer of Paddy Mach on 9 April 2023, you presented that horse to race in the Total Span Pace at Warragul not free of arsenic, a prohibited substance when present at a concentration in excess of 0.30 micrograms per millilitre in urine.

**Pleas:** **Ben Yole:** Guilty

**Robert Walters:** Guilty

**DECISION**

1. Mr Ben Yole is a Tasmanian based trainer of harness racing horses. He has several horses located in Victoria under the care of local registered harness racing trainer, Mr Robert Walters, but racing under Mr Yole’s name as registered trainer.
2. Those horses include “Ideal Investment” and “Baccarat”. Idea Investment competed in Race 2 at Kilmore on 16 August 2022. Baccarat competed in Race 2 at Melton on 23 August 2022 and Race 9 at Kilmore on 12 February 2023. On each occasion, the relevant horse tested positive to arsenic at a level above the allowable threshold.
3. In addition, a horse trained by Mr Walters called “Paddy Mach” tested positive to arsenic at a prohibited level in relation to Race 3 at Warragul on 9 April 2023.
4. Stewards of Harness Racing Victoria (“HRV”) have charged Mr Yole under Australian Harness Racing Rule (“AHRR”) 190(1) which proscribes the presentation of a horse for an event while not free of a prohibited substance. The charges concern Ideal Investment and Baccarat in the races referred to above at Kilmore and Melton.
5. Mr Walters has been charged with three offences under AHRR 190(1) in respect of the three events concerning Ideal Investment and Baccarat as referred to previously. AHRR 190(3) provides that: -

“If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub rule (1), the trainer of the horse and the person left in charge is each guilty of an offence”.

1. Mr Walters was left in charge of Ideal Investment and Baccarat for the purpose of the races in which they produced positive swabs to arsenic at prohibited levels.
2. Mr Walters has been separately charged as the trainer of Paddy Mach for presenting that horse for an event at Warragul on 9 April 2023 while not free of a prohibited substance, being arsenic at a level above the threshold permitted by the Rules of harness racing.
3. Mr Yole and Mr Walters have pleaded guilty to each charge laid against them. We accept those pleas and have taken them into account on the question of penalty. We are comfortably satisfied on the evidence that the charges are made out.
4. Arsenic is a naturally occurring trace element which is commonly found in the normal dietary intake of horses in low amounts. It has the capacity to affect the performance of a horse.
5. Tests conducted on ground water at Mr Walters’ then training establishment showed the presence of arsenic at a higher level than what would have been expected to occur. The property bordered a decommissioned railway line. Arsenic contamination can occur around old railway lines due to the historic use of arsenic compound herbicides around the railway lines. It is probable that that explains the contamination in respect of Ideal Investment and Baccarat. Mr Walters told Stewards that chewing of treated pine posts and other wooden substances, which are well known causes of positive swabs to arsenic, were the most likely cause of the positive swab for Paddy Mach.
6. Mr Walters has a prior offence in relation to arsenic concerning the same Paddy Mach. That related to an event at Maryborough on 8 July 2019. That matter, in which the Tribunal dealt with a presentation charge concerning that event, also dealt with three other charges at events in July and August 2019 and July 2020 concerning a horse called “Lady Flora”. Those charges also concerned arsenic. Mr Walters pleaded guilty to each charge.
7. In a decision dated 8 July 2021, the Tribunal noted that the arsenic samples for the 2019 events were not confirmed until 6 September 2019 and that prior to then, Mr Walters had not been aware of the risks involved in having a positive swab to arsenic being returned by one of his horses. As of September 2019, Mr Walters considered that the chewing of treated timber posts by his horses may have been the cause of the contamination. After another positive swab on 17 October 2019, Mr Walters considered that contamination by water beyond the borders of his property may have been the cause of the positive swab in October 2019. Another positive swab occurring in July 2019, may have proved a point about the water problem. Mr Walters informed the Tribunal in that matter, through his counsel, of the work undertaken to replace treated pine posts and the insertion of a new drainage system. He was fined a total amount of $12,000 with $9,250 being suspended for 12 months.
8. It is disappointing to see that the same causes for positive swabs to arsenic, water contamination and chewing of treated timber posts are raised again as the probable causes a couple of years later. We also note that the HRV Racing Appeals and Disciplinary Board (“RADB”) on 11 June 2019 fined Mr Walters $7,000 with $3,500 suspended for a positive swab for arsenic regarding Lady Flora in relation to an event at Warragul on 9 January 2019. The RADB referred to several efforts undertaken by Mr Walters to ensure that a repetition of the positive swab to arsenic would not occur again. It is apparent that these efforts have been unsuccessful at least up until recent times. This is especially so in light of the VRT decision of 8 July 2021.
9. As a repeat offender against the provisions of the Rules of prohibited substances and in each case involving the substance arsenic, general deterrence and specific deterrence demand that a significant penalty be imposed on Mr Walters. Nothing else would satisfy the need for reinforcement of the importance of having a drug free industry to ensure a level playing field. But for Mr Walters guilty plea and the significant evidence to avoid future transgressions and cooperation with the Stewards, the penalty would have been substantially higher. The suspension of parts of fines in the past has not worked to ensure a lack of repetition in offending.
10. In all the circumstances, in relation to Mr Walters, we impose a fine of $5,000 of Charge 1. On Charge 2, we impose the same penalty but make it wholly concurrent with the penalty imposed on Charge 1. On Charge 3, we impose a $5,000 fine but make it cumulative on the penalty imposed on Charge 1.
11. In relation to Charge 4, we impose a $5,000 fine and make it cumulative on the penalty imposed on the other fines imposed on Mr Walters. The total fine imposed on Mr Walters is $15,000 with no portion suspended. But for significant subsequent measures taken to ameliorate the arsenic issues, a suspension would have been appropriate given the several prior transgressions involving arsenic.
12. Mr Yole has two prior offences relation to arsenic in Tasmania dealt with at the same time in 2017. The cause was the chewing of treated pine by the two horses concerned. No penalty was imposed by the Stewards for those offences. Mr Yole has a relatively good record when it comes to prohibited substances generally and those involving arsenic.
13. The problems faced by Mr Yole stem from errors occurring at Mr Walters’ training establishment. Unfortunately for Mr Yole, as the registered trainer of Ideal Investment and Baccarat, he is guilty of a breach of the Rule and has been accepted by his guilty pleas.
14. While general deterrence and the importance of having drug free racing are important in Mr Yole’s matters, we consider that specific deterrence does not loom large in his case. In all the circumstances, we impose a fine on Mr Yole of $3,000 with $1,000 suspended in respect of each charge however, Charge 2 is made concurrent with the penalty imposed on Charge 1 for the same reasons as in Mr Walters’ matters. The portions suspended shall be subject to not further breach of the Rules concerning prohibited substances in the next 24 months. The total fine immediately payable by Mr Yole is $4,000.
15. Ideal Investment, Baccarat and Paddy Mach are disqualified from their respective events on 16 August 2022, 22 August 2022, 12 February 2023 and 9 April 2023.

Kathleen Scully

Assistant Registrar, Victorian Racing Tribunal