11 October 2024

**DECISION**

**RACING VICTORIA**

**and**

**KANE HARRIS**

**Date of hearing:** 19 June 2024

**Date of decision:** 11 October 2024

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

**Appearances:** Mr Marwan El-Asmar instructed by Mr Scott Hunter appeared on behalf of the Stewards.

Mr Rob Harris represented Mr Kane Harris.

 Dr Adam Cawley appeared as a witness.

 Karley Thomas appeared as a witness.

 Colin Chapman appeared as a witness.

**Charge:** **AR 240(2)**

AR 240(2) 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.*

**The particulars of the charge**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria and a person bound by the Rules of Racing.

2. You were, at all relevant times, the trainer of Dawn County (the Horse).

3. On 17 February 2023, the Horse was brought to the Wodonga Racecourse to run in Race 3, the Yackandandah Park Maiden Plate, over 1300 metres (the Race).

4. On 17 February 2023, a post-race urine sample (V792374) was taken from the Horse (the Sample).

5. An analysis of the Sample detected the presence of Dexamethasone. 6. Dexamethasone is a prohibited substances pursuant to Division 1 of Part 2 of Schedule 1 (Prohibited list B) of the Australian Rules of Racing.

**Plea:** Not Guilty

**DECISION**

Mr Kane Harris, you are pleading Not Guilty to a Charge pursuant to AR 240(2). This relates to a post-race urine sample taken from Dawn County, trained by you, following the running of Race 3 at Wodonga on 17 February 2023. Dawn County in fact won that race.

The sample proved positive to the prohibited substance Dexamethasone, commonly referred to as “Dex”. It is alleged that the concentration of Dex was approximately five times greater than the screening limit. A pre-race blood sample had been taken for the purpose of testing for TC02 only. This sample tested negative, and, as the purpose of it was for testing solely for TC02, it was destroyed prior to the detection of Dex. Dex is a powerful analgesic capable of masking injury.

When interviewed by Stewards on 30 March 2023 at your stables, you stated that Dawn County had been treated with a product called Dexafort, which contained Dex. This had been administered by a veterinary surgeon. The last time that this had been done was in approximately late December 2022. Given the treatment regime at your stables, you could offer no explanation for the positive swab.

A bottle of Dexofort was found in the stable medication room. It had a prescription label date of 4 January 2023 and was for the horse Offshore Bandit.

Dex is used to manage inflammation or conditions relating to the immune system, allergic reactions and the like.

In the opinion of Dr Jamie Wearn, Regulatory Veterinarian with Racing Victoria, Dex is a potent analgesic which is able to mask an injury. It can mask the signs of pain in a horse. This can lead to a serious or fatal injury to horses and jockeys. It is used particularly for the treatment of inflammatory conditions that give rise to lameness.

As stated by Dr Wearn, “Catastrophic limb injuries are the most common cause of horse fatalities during racing and a common cause of severe rider injury”.

In his report, Dr Wearn expressed the opinion that the most likely cause of the positive swab was the erroneous administration of the medication intended for another horse.

Oral evidence was obtained from Dr Adam Cawley, who was called by the Stewards at your request. Dr Cawley is the scientific manager of Racing Analytical Services Limited (“RASL”). He gave evidence concerning the procedures relating to the receipt and analysis of the relevant sample. There was no indication of contamination or interference with it. RASL does not test for metabolites of Dex for a variety of reasons, one relating to instability and unpredictability. Dr Cawley was not aware of any laboratory, either in this country or internationally, that would do such testing.

Further, there was no evidence of contamination at the point of collection of the sample.

The attention of Dr Cawley was directed by the Stewards to material compiled by Professor Colin Chapman, who had prepared such statements and was to give evidence on your behalf. Dr Cawley disagreed with the opinion of Professor Chapman, particularly in relation to the detection and testing for Dex, as compared to that for Ketamine. He also pointed out that urine-specific gravity was not measured, because there was no valid measurement in relation to equine urine. Dr Cawley also rejected the proposition that a contamination event was responsible for the presence of Dex in the sample. In addition, two or three of the references mentioned by Professor Chapman were out of date and did not have the benefit of modern mass spectrometry.

Dr Cawley disagreed with the statement of Professor Chapman that the only conclusion that could be made was that the detection was a result of environmental contamination. He explained that testing is done in accordance with the Rules. Dr Cawley agreed that the testing would not distinguish between a sample from contamination and one that has come from the administration of a legitimate therapeutic. What the Rules require is the detection of Dex to at least .2 nanograms per mil.

What Dr Cawley could state is that Dex was unequivocally detected in the relevant sample, but not as to how it got there. He explained that they do have a system for the detection of Dex that is fit for purpose and in accordance with the Rules. He also emphasised the use of a control sample. Dr Cawley was not aware of any endogenous nature of Dex. It is a synthetic compound. It has been used in racing stables for a long time.

In re-examination, Dr Cawley agreed that samples were received for the detection of prohibited substances, as occurred in the present case.

Continuing with the expert evidence, you called Professor Colin Chapman. He is a graduate in Pharmacy and Veterinary Science and has a PhD in immunology. Whilst he worked in pharmacy and veterinary science for many years, his principal career was as head of the relevant faculty at Monash University, this work involving his areas of expertise.

Professor Chapman expressed the view that there should also be tests for metabolites. Reference was made to a paper published in 1997. Proof of the metabolites is required. Otherwise, there is no proof positive that the drug went through the horse. It is possible to normalise a result. If the urine is concentrated unusually, the amount of the substance (Dex) is greatly elevated. A formula can be used. Such an adjustment could bring the reading below the level of prohibition. A measure of concentration is required in situations, such as the present, where there is a threshold.

If metabolites are not detected, there is no way of saying with any surety that the drug came from an administration. There is no such check in the present case. The urine concentration has a big impact on the amount of cobalt detected. The golden rule should be that metabolites seal any argument as to evidence of what has gone through the horse. Otherwise, the collection process is not foolproof and is liable to contamination. Contamination is always possible. Without the metabolites, the full story is not known. If a horse licked the float or otherwise picked up some chaff or the like and there was Dex on that, it would be metabolised. It would be inadvertent administration.

Contamination can come from the hands of the relevant staff doing the testing.

There are spots along the way of the testing process where contamination can occur.

It was put to Professor Chapman in cross-examination that there was no testing for metabolites of Dex in the urine sample because there are no reference standards available. Professor Chapman agreed that the 1997 paper to which reference had been made focused on humans and others, but not horses. Other papers went back to 1981. He also raised the possibility of contamination occurring in the collection process. It may not show in the control sample. The present testing and collection processes are not fit for purpose. He did not agree that no laboratory could test for metabolites of Dex. He conceded that, on a day when approximately 35 samples were taken, it would be reasonable to expect that some other such samples would be contaminated.

Professor Chapman was aware that Dawn County had been treated with Dexafort on more than one occasion in late 2022. He also agreed that what was involved was a screening limit, rather than a threshold. There is also a cumulative effect when there is more than one administration.

Contamination in the testing process cannot be ruled out, although it cannot be said when it happened.

In re-examination, it was put that, on the relevant day at Wodonga, only 18 samples were in fact taken and 12 of these were blood tests. His reply was that contamination was sporadic. He also stated that Dex is in our environment and is not a rare thing in our society.

We have spent a considerable amount of time summarising some aspects of the expert evidence. The only other oral evidence given was that of Ms Carly Thomas, who is a licensed trainer. As we understand it, she is also your partner. She was in charge of Dawn County at Wodonga on the relevant day. She agreed that she signed a form indicating that she was happy with the protocol associated with the taking of the pre-race blood test. The relevant bag had not been marked when she signed off that she was happy with the procedure. There was no indication that the pre-race test was restricted to TC02. She was not aware that the test had been destroyed until the later arrival of the Stewards.

There are times during the testing procedures when the stablehand loses sight of the horse. She was by herself with the horse. It is impossible to watch the horse and the steps taken in the testing at the same time.

In cross-examination, Ms Thomas agreed that she had signed the document confirming the details of the procedures as being correct. She confirmed that the relevant documentation indicated that the testing was for TC02. She also stated that, whilst the process was occurring, it was difficult to see what was happening because she was minding the horse. The carrying out of this process had improved.

In re-examination, Ms Thomas stated that, in the stables, only you, Mr Kane Harris, and herself administered medications. The bottle of Dex had been sitting there, the contents at the same level, for the whole time.

That concludes our summary of the oral evidence. A number of documents were also placed before us.

Closing submissions were made. They were of some length and were of assistance.

Dealing firstly with the submissions of Mr El-Asmar on behalf of the Stewards, he reminded us that this was a case of a breach of AR 240(2) – a presentation case and not a charge of administration. The basic facts of presentation have been made out. There are two certificates confirming the detection of a prohibited substance. Pursuant to AR 259(6), this is prima facie evidence that the sample taken contained a prohibited substance.

Arguments concerning metabolites are not to the point. Firstly, and according to the expert evidence of Dr Cawley, it is not appropriate to test for metabolites, bearing in mind the absence of proven reference standards. Secondly, the Rules do not require the establishment of metabolites. Tests for metabolites are simply not required.

There is no evidence of contamination of the samples. The evidence is to the contrary. The control sample did not contain Dex.

Mr Kane Harris presented the horse to race. The prohibited substance, Dex, was detected. The certificate of analysis confirms that detection. The control sample confirms the absence of contamination. The Tribunal should find the Charge proven.

In answer to a question, Mr El-Asmar asserted that AR 240(2) is a provision of strict liability. The Briginshaw standard is also relevant. Matters of outside interference or administration by a “stranger” would go to penalty, but strict liability would continue to apply.

The submissions on your behalf could be summarised as follows. Dr Cawley, Racing Victoria’s expert witness, was not able to identify how the Dex in the sample had entered Dawn County’s system. Also, the testing for Dex is not where it should be. There is no test for metabolites. Dr Cawley is unable to confirm that the sample was not contaminated or that Dex had passed through Dawn County.

The evidence of Ms Thomas establishes that the strapper is not able to watch all that is occurring during the testing of the sample. There is, or can be, contamination in the process. Contamination, whether deliberate or by accident, can occur. There is an element of doubt as to whether the Dex had come from the urine collected or from some form of contamination. As Professor Chapman stated, metabolites can be detected. RASL tests are inadequate. They have shortcomings, as outlined by Professor Chapman. Specific gravity has now been adopted in cobalt testing.

It was further submitted (by Mr Rob Harris) that the test involved is not fit for purpose. Thus, there is no evidence that the horse presented with a prohibited substance in its body. Reference is also made to the effect that dehydration had on the horse. The evidence before the Tribunal can displace a prima facie test. There is no evidence that can justify a conviction.

In a brief reply, Mr El-Asmar referred to the judgment of Cavanough J. in Laming v Racing Victoria [2002] VSC813 to the effect that circumstances surrounding the commission of a strict liability type offence will frequently be relevant to penalty. He also referred to the precise wording of AR 240(2).

In a further reply, Mr Rob Harris submitted that there had been no attempt made to verify that the Dex was in the horse’s system at or above the prohibited level. The deeming Rule is being used for an unintended purpose. There is no evidence that the requested levels have been found.

We accept that, in essence, this is a strict liability offence. We would also refer to the authorities provided by Mr El-Asmar.

We now turn to our decision.

It is to be remembered at the outset that there is a clear distinction in the Rules between administration of and presentation of prohibited substances. In general terms, administration is a considerably more serious offence and requires proof of various events or matters.

AR 240(2) does not involve proof of how, why or when a prohibited substance found its way into the horse. This was submitted by Mr El-Asmar at the outset, and in our opinion it is an accurate statement.

Insofar as a question of law may be involved, it is the opinion of the Chairperson that this submission of Mr El-Asmar essentially is correct. Administration could be said to involve a test of comfortable satisfaction that the wilful introduction of a prohibited substance into a horse’s system has been performed.

Presentation requires far less. The Stewards must prove that the horse in question was presented at the track in order to participate in a race. Secondly, they must prove that, when tested following such presentation, such test revealed the presence of a prohibited substance.

Questions as to how the prohibited substance found its way into the horse’s system and caused such a positive test result are not essential parts of the Charge.

To put this proposition again in simple steps, the relevant requirements of AR 240(2) could be summarised as follows:

1. The horse must be brought to the course.

2. It must be so brought for the purpose of participating in a race.

3. If tested for or by the Stewards, ultimately the test must prove positive to a prohibited substance to the required degree.

To this could be added:

4. The test must have been carried out in a proper fashion and without evidence of contamination or the like.

5. Any further testing or analysis must be carried out by an appropriate body and without evidence of any interference, illicit or accidental, with the sample.

That may seem to be an over-simplification, but, leaving to one side extreme cases such as on-course “nobbling” (and there is no suggestion of that in the present case), it seems to us to be accurate and consistent with the observations of Cavanough J. in Laming.

There is then the application of the basic principles or requirements of the present case.

1. Dawn County was presented to race at the track on the day in question.

2. It participated in a race.

3. A urine sample was taken for or by the Stewards and on later testing proved positive to a prohibited substance (Dex) to the required degree.

4. There is no evidence that the taking of any sample by the Stewards was carried out in an improper fashion or that there was contamination or the like of the sample product (Ms Thomas signed the appropriate documentation as to her satisfaction with the carrying out of the procedure).

5. The subsequent testing or analysis was carried out by an appropriate body. There is no evidence of any interference with the sample that may have impacted upon the result of such testing.

There is no requirement of intent, knowledge of the cause of the positive reading, failure to take sufficient precautions, knowledge of the content of medications or the like.

Some of these factors may have an impact, and sometimes a substantial impact, upon penalty.

However, for a breach of AR 240(2), the requirements in relation to establishing a case and securing a conviction are simple.

The horse was at the course to participate in a race. A post-race (as it was here) swab or sample was taken by the Stewards without controversy (as occurred here). The sample was sent for testing (as occurred here).

The procedure of testing was carried out and the presence of a prohibited substance was detected (as happened here).

Whilst it may not be a provision of strict liability, it could be described as being not far from it.

In any event, we find the Charge proven.

Given the amount of time that was devoted to the expert evidence issue, we would also make the following observations.

Both Dr Adam Cawley and Professor Colin Chapman were impressive witnesses. However, we prefer and accept the evidence of Dr Cawley. That evidence seems to us to have been directed more to the actual requirements and operation of the process involved in obtaining and verifying a sample than the evidence of Professor Chapman, which was directed more to any defects or inadequacies in the system generally.

As Dr Cawley put it:

“We have validated for the detection of Dex at least to .2 nanograms per mil, which is what’s required by the Rules of Racing” – see Transcript (“T”) 19.

He disagreed with the proposition that the test was not fit for purpose – T 18.

There was much discussion concerning metabolites, including an extract from a decision of His Honour Judge Nixon in a harness racing case. That extract, with which Dr Cawley effectively agreed, was as follows:

“Those Rules do not require the analyst to detect metabolites.”

“… the Rules of harness racing only required the detection of the parent drug” – see T 10-11

For present purposes, there is no relevant distinction between the Rules of Harness Racing then operating and the current Rules under consideration.

Dex is a prohibited substance under the Rules. The Certificates from both laboratories showed that the relevant sample contained Dex. Therefore, the sample contained a prohibited substance.

We have just selected only a few extracts from the evidence of Dr Cawley, but they seem to us to be directly on point. It is also to be remembered that, to put it simply, the Rules are what they are. If they have short-comings, and Professor Chapman seemed to be suggesting that they do, that is unfortunate. We do not necessarily agree with his proposition, but, even if some of his criticisms are accurate, we must deal with the Rules as they are.

As stated, we have found the Charge proven on the basis of the simple wording and operation of the principal current Rule. Even if we ventured into some aspects of the debate between the expert witnesses, we would come to the same conclusion.

We find the Charge proven.

We shall move on to the question of penalty at a time suitable to the parties.

Mark Howard

Registrar, Victorian Racing Tribunal