RACING APPEALS AND DISCIPLINARY BOARD

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DECISION

RACING VICTORIA STEWARDS

and

MATTHEW LEEK

Date of Hearing	11 June 2019
Date of Decision	20 June 2019
Date of Penalty	22 July 2019

Panel Judge Bowman (Chair), Mr B Forrest (Deputy Chair), Mr G Ellis (Member).

Appearances Mr J Rush QC and Mr J Hooper of Counsel, appeared on behalf of the Stewards.

Mr D Sheales of Counsel, appeared on behalf of Mr M Leek.

Charge 1 AR 175(h)(i) - Withdrawn

Charge 2 AR 175(h)(ii) – [Alternative to Charge 1]

The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:
(h) Any person who administers, or causes to be administered, to a horse any prohibited substance:
(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

Summary The Stewards allege that prior to the race on 3 March 2016, Mr Leek administered, or caused to be administered, to *Champagne Kisses* a prohibited substance being cobalt at a concentration in excess of 200 micrograms per litre in urine which was detected in a urine sample taken from *Champagne Kisses* prior to the running of the race.

Charge 3 AR 178 [Alternative to Charges 1 and 2]

Subject to AR 778G, *when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.*

Summary	The Stewards allege that on 3 March 2016, Mr Leek brought *Champagne Kisses* to the Pakenham Racecourse for the purpose of engaging in the Evergreen Turf F&M Maiden Plate (1400 metres) when a prohibited substance, being cobalt at a concentration in excess of 200 micrograms per litre in urine, was detected in a urine sample taken from *Champagne Kisses* prior to it running in the race.
Charge 4	AR 178F *(1) A Trainer must record treatment and medication administered to each horse in his or her care by midnight on the day on which the administration was given, and each record must include the following information:* ...
Summary	The Stewards allege that Mr Leek failed, in accordance with AR178F(1), to properly record all treatments and medications administered to *Champagne Kisses.*
Plea	Charge 1 - Withdrawn Charge 2 – Not Guilty [Alternative to Charge 1] Charge 3 – Guilty [Alternative to Charges 1 and 2] Charge 4 – Guilty
Decision	Charge 1 - Withdrawn Charge 2 - Charge proved, penalty imposed is a nine-month warning off period Charge 3 – Falls away Charge 4 – Charge proved, penalty imposed a two-month suspension to be served concurrently with the warning off period In accordance with AR 177, *Champagne Kisses* is disqualified from the race and finishing order amended accordingly.

Grace Gugliandolo
Registrar - Racing Appeals and Disciplinary Board

Victoria **20 June 2019**

RACING APPEALS AND DISCIPLINARY BOARD
(Original Jurisdiction)

Racing Victoria Stewards
v
Trevor Andrews
and
Racing Victoria Stewards
v
Matthew Leek

DECISIONS

Judge Bowman	Chair
Mr B Forrest	Deputy Chair
Mr G Ellis	Member

Appearances

Mr J Rush QC	With Mr J Hooper of Counsel, appeared on behalf of the Stewards.
Mr D Sheales of counsel	Appeared on behalf of behalf of Mr T Andrews. He also appeared on behalf of Mr M Leek.

Introduction

Whilst these are two quite distinct matters, effectively they were conducted in the one hearing. Each involves the alleged administration of a prohibited substance, namely cobalt. Each trainer charged was represented by Mr Damian Sheales of Counsel. Whilst each trainer gave evidence and was separately cross-examined, the two expert witnesses called by the Stewards in relation to both cases were each cross-examined by Mr Sheales only once.

Accordingly, the format of this decision is somewhat different than usual.

Each trainer pleaded "not guilty" to a charged pursuant to AR 175(h)(ii), but "guilty" to a charge pursuant to AR 178. In addition, Mr Leek pleaded "guilty" to a breach of

AR 178F. In summary form, each trainer contested the charge of administering or causing to be administered a prohibited substance (cobalt) detected on race day. Each admits that such prohibited substance was detected. In addition, Mr Leek admits that he did not keep adequate treatment records.

The charges to which the trainers have pleaded "guilty" will not receive a great deal of attention in this decision, other than as possible relevant background material to the contested charges. Further, for the sake of convenience, rule numbers and letters will be those in operation at the time charges were laid.

AR 175(h)(ii) and the cobalt arguments

We shall now deal with what could be described as "the cobalt arguments", these being matters of principle common to the contested cases against each trainer.

The manner in which questioning and submissions unfolded seems to us to involve the following essential questions. Is cobalt in all its forms a prohibited substance pursuant to the rules? Should it be? (The relevance of this is debatable, but at times the cross-examination came at least close to entering this particular arena). Is the available testing of samples accurate or adequate? Is the distinction between organic and inorganic cobalt given adequate attention and testing? Can there be any confidence in testing results?

In addition to their evidence-in-chief and the tendering of reports, there was quite lengthy cross-examination of both expert witnesses called by the Stewards, those witnesses being Dr Grace Forbes, General Manager of Veterinary Services with Racing Victoria, and Associate Professor Stuart Paine, Associate Professor of Veterinary Pharmacology at the University of Nottingham, England (by telephone link-up).

The conclusions at which we have arrived are as follows.

Cobalt is a prohibited substance pursuant to the Rules of Racing. It falls within both AR 178B (i) and (ii). We refer to and accept the report or statement of Dr Forbes of 29 November 2017, particularly at paragraphs 50 and 51.

Were there any doubt (and we do not accept that there is), it is removed when AR 178C(1)(l) is considered. Cobalt is listed as a prohibited substance, but is excepted from the operation of AR 178B if the mass concentration is at or below 100 milligrams per litre in urine.

We accept that these Rules set out in a very complex and cumbersome fashion what should be a comparatively simple proposition, but the end result is that the amount of cobalt found in the present cases is, prima facie, sufficient to have it operate as a prohibited substance for the purposes of the Rules.

Arguments as to whether cobalt is in fact a substance that affects performance are not to the point. That is for the rule-makers to determine.

In addition, we are not of the view that arguments about testing, in the absence of cogent evidence that the tests relied upon are in fact flawed, take matters further. True it is that Associate Professor Paine suggested that, in the case of Mr Andrews, a urine specific gravity measurement might be carried out, given that the sample reading obtained was not far over the 100mg limit. This was not done. However, as ultimately stated by Associate Professor Paine in re-examination, based upon the supplementation regime as supplied by Mr Andrews, it is highly improbable that urine specific gravity would explain the reading being in excess of 100mg. There is no expert evidence to the contrary.

In short, we are of the view that the evidence establishes that the testing carried out was both adequate and accurate. We have no reason to lack confidence in the test results and we accept them.

In the light of those broader findings, we will now move on to the individual cases.

1. <u>Mr Trevor Andrews</u>

Mr Trevor Andrews, you have pleaded "not guilty" to a breach of AR 175(h)(ii) in that, being the licensed trainer of *Coppola*, prior to that horse running at Geelong on 4 December 2016, you administered or caused to be administered to it cobalt at a concentration in excess of 100 micrograms per litre in urine detected in a sample.

After testing, the level of cobalt was found to be 118 micrograms. The legal limit was 100 micrograms. A charge pursuant to AR 175(h)(i) was withdrawn.

You have no explanation for the elevated reading. When interviewed, you expressed surprise and could think of no reason for the presence of such a level of cobalt. Effectively that has remained the case. You gave evidence and were cross-examined. You called no other witness.

The standard to which we must be satisfied is that referred to in the well-known case of *Briginshaw*. We must be comfortably satisfied that the case against you has been made out.

We are so satisfied. We would point out the following.

There is no suggestion of any break-in or the like to your stables. It is not suggested that this was the deliberate work of a disgruntled employee or ex-employee or, for that matter, a stranger. There is no evidence that what occurred was due to a mistake, negligence or malfeasance on the part of a veterinary surgeon or of a vendor of preparations or medications for horses. In short, the responsibility rests squarely with you and the staff for whom you are responsible.

The only relevant staff member, in the sense of a person who looked after *Coppola* or gave that horse medications or preparations, was Ms Gemma Psaila. We accept that she took instructions from you and that she could and did administer oral medications. When interviewed by Stewards, you stated clearly and definitely that *Coppola* did not receive any medications on 3 December 2016, the day prior to racing. You had administered an injection to it on 28 November.

When interviewed, Ms Psaila had a different version of events. She stated that she normally fed horses on the night before races and had done so with *Coppola* on the night of 3 December. She stated that you directed the feeding regime. The feed would have included Hermabuild, an additive that contains cobalt – see the report of Dr Forbes. In cross-examination you effectively blamed Ms Psaila, stating that she did not do what she was told to do. Firstly, she was describing what seemed to be

part of a regular routine. Secondly, the responsibility was yours. If she, as your employee, was giving race-eve feeds, whether or not they contained Hermabuild and other substances, you should have known about it and remedied the situation.

We are also unhappy about the situation with your treatment diary. When the Stewards called for it on 30 December, you stated that it was with your book-keeper. The Stewards attempted to contact your book-keeper, in vain. You were contacted and arrangements made for you to bring your treatment diary to Flemington Racecourse on 1 January (you had runners). You failed to bring it. You were subsequently sent two text messages by the Stewards. Ultimately you provided the treatment diary on 4 January. It is a particularly neat and comprehensive document.

There are at least two surprising features of this aspect of things. One is that, when you did obtain it, you had not "gone back and had a look too closely" – see the interview of 22 February. We would have thought that the contents of your own treatment diary would have been of pressing importance to you. Secondly, Ms Psaila had said on 30 December that the keeping of the treatment records had been "pretty slack". She referred to a black folder and was unaware of a diary.

We are also aware of the pattern of results of raceday samples taken from *Coppola.* The cobalt readings were as follows.

15/11/16	51 mg. post-race
4/12/16	118 mg. pre-race (the subject of the charge and the second run for your stable)
30/12/16	5 mg. pre-race
1/1/17	9 mg pre-race
10/2/17	13 mg. pre-race

There appears to have been a sustained and substantial drop in the cobalt readings on the raceday subsequent to the race in question.

The bottom line is this. At the relevant time you operated a comparatively small stable. The responsibility for it was yours. Whether deliberately or as a result of your failure to oversee your employee adequately, *Coppola* returned a pre-race urine sample positive to cobalt above the prescribed limit and, on the available evidence, that resulted from your use of feed supplements. You administered or caused to be administered a prohibited substance.

1. <u>Mr Matthew Leek</u>

Mr Matthew Leek you have pleaded "not guilty" to a breach of AR 175(h)(ii) in that, being the licensed trainer of *Champagne Kisses*, prior to that horse running at Pakenham on 3 March 2016, you administered or caused to be administered to it cobalt at a concentration in excess of 200 micrograms per litre in urine detected in a sample. After testing, the level of cobalt was found to be 531 micrograms. The legal limit was 200 micrograms. A charge pursuant to AR 175(h)(i) was withdrawn.

You have no explanation for the elevated reading. When interviewed, you expressed surprise and could think of no reason for the presence of such a level of cobalt. Effectively that has remained the case. You gave evidence and were cross-examined. You called no other witness.

The standard to which we must be satisfied is that referred to in the well-known case of *Briginshaw.* We must be comfortably satisfied that the case against you has been made out.

We are so satisfied. We would point out the following.

There is no suggestion of any break-in or the like to your stables. It is not suggested that this was the deliberate work of a disgruntled employee or ex-employee or, for that matter, a stranger. There is no evidence that what occurred was due to a mistake, negligence or malfeasance on the part of a veterinary surgeon or of a vendor of preparations or medications for horses. In short, the responsibility rests squarely with you and the staff for whom you are responsible.

The only other person possibly involved at your stables is your partner, Ms Jenna Shanks, a registered stablehand at the relevant time. However, when interviewed by the Stewards, you made it clear that she administers no medications and that, in any event, you instruct her as to what to do. She does the normal feeding regularly.

We place particular emphasis upon the following matters. This is a very high reading. It is more than two and half times the then legal limit. This is suggestive of either a high level of carelessness or the deliberate use of a product with a high cobalt content.

Secondly, you freely admit that you were feeding your horses a product from Pakenham Produce, where Ms Shanks works, which product is specifically designated to be used for cattle. It may be that this is cheaper because it does not have a picture of a horse on the label and that you rang your veterinary surgeon, Dr David Shepherd, about it. When interviewed by the Stewards, Dr Shepherd thought that is was preferable if such a product was not used for horses, although not saying it would necessarily elevate cobalt readings.

Thirdly, you have no relevant treatment records whatsoever. This certainly does not assist you in any attempt to establish that the very high cobalt reading is not the result of any administration by you.

In short, the administration of substances to *Champagne Kisses* was your responsibility. That horse returned a cobalt reading a long way above the legal limit. We are of the view that this resulted from the substances which you administered to it or that you caused to be administered to it. We are comfortably satisfied that the charge against you has been proven.

The board will hear submissions on penalty at a date to be fixed.

Victoria **22 July 2019**

RACING APPEALS AND DISCIPLINARY BOARD
(Original Jurisdiction)

Racing Victoria Stewards
v
Matthew Leek

PENALTY

Judge Bowman	Chair
Mr B Forrest	Deputy Chair
Mr G Ellis	Member

Written Submissions

Mr J Hooper of Counsel	on behalf of the Stewards.
Mr D Sheales of counsel	on behalf of Mr M Leek

Mr Matthew Leek, you have been found "guilty" of a breach of AR 175(h)(ii), a charge which you contested and to which you pleaded "not guilty".

You have pleaded "guilty" to a breach of AR 178F – the failure to keep proper treatment records.

The substance of the breach of AR 175(h)(ii) is as follows. On 3 March 2016, the horse *Champagne Kisses*, trained by you, ran 11th in race 4 at Pakenham. A pre-race urine sample had been taken. It revealed a urinary cobalt concentration greater than the threshold of 200 micrograms per litre prescribed by the rule. The reading was 530 micrograms.

The only possible explanation that you seem to have advanced for this very high reading is to the effect that you purchased from a supplier a product containing cobalt, a B12 product designated to be used on cattle and sheep. You purchased this because it was cheaper than similar products specifically directed at horses.

Whether this was or was not the cause of the very high reading is not entirely to the point. To give to your horse a product containing cobalt and specifically to be used on cattle and sheep was asking for trouble.

We also accept the submission made on behalf of the Stewards that such a very high reading suggests administration shortly before *Champagne Kisses* raced.

Further, you have no treatment records at all, either for this horse or for other horses. Apart from being a breach of the rules, this shows an attitude of complete indifference to your obligations. Further, it creates the impression that you were either very careless or engaging in surreptitious activity. That does not help you.

There is no dispute but that you were the only person involved in injecting *Champagne Kisses*. There is no suggestion of intruders, disgruntled ex-employees, break-ins or the like. There is no suggestion of negligent or inexperienced staff. You did the injections and the responsibility was yours.

There is not a great deal that can be said in your favour. You have been a trainer for 12 years and have no history of trouble involving prohibited substances. However, you are currently serving a period of disqualification in relation to attempted race day treatment and destruction of evidence. That period of disqualification commenced on 17 May 2019. The actual offending occurred after the offending the subject of this case.

Thus, this is a case where both specific and general deterrence are important. The consequences of behaviour such as yours must be brought home to you.

In relation to general deterrence, as we say time and time again, the detection of prohibited substances and the publicity that follows damages racing's reputation. It gives an appearance of an industry that is crooked, where participants are trying to gain an unfair advantage and where animal welfare is put at risk. Trainers should be aware that, almost inevitably, the detection of unfair practices or stable negligence will occur. They shall be found out.

Our conclusion is this in relation to the breach of AR 175(h)(ii). Being already a disqualified person, you should be warned off. The period of warning off should not be concurrent with your present disqualification. It should be cumulative upon it. We

fix the period of warning off at 9 months. In other words, the 9 month period of being warned off will commence on approximately 10 March 2020.

There is also the breach of AR 178F, to which you have pleaded "guilty". This was a virtually complete failure to keep any records, a very bad breach of the rule. Proper record keeping in relation to the treatment of horses is important and assists the Stewards in the performance of their work. To keep none is a flagrant breach. As an indication of how seriously we view this breach, we impose a period of suspension of two months. However, given the circumstances in which you find yourself, and even though you brought the situation upon yourself, we order that such suspension will be concurrent with the warning off period.

Finally, *Champagne Kisses* is disqualified from the race and finishing order amended accordingly.