**RACING APPEALS AND DISCIPLINARY BOARD**

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# HEARING RESULT

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**FROM:** Registrar – Racing Appeals and Disciplinary Board

**DATE:** 9 December 2013

**SUBJECT:** **HEARING RESULT – TRAINER: JARROD MCLEAN**

**Panel** Judge Russell Lewis (Chair), Mr Brian Forrest (Deputy), Dr June Smith.

**Appearances** Mr Patrick Wheelahan appeared as Counsel for Mr McLean.
Dr Cliff Pannam QC appeared as Counsel for the Stewards.

**Charge 1** Breach of AR 175(h)(i) – **withdrawn.**
**Charge 3** Breach of AR 178 **[alternative to Charges 1 & 2] – withdrawn.**

**Charge 2** Breach of AR 175(h)(ii) **[alternative to Charge 1]**

*The Committee of any Club or the Stewards may penalise: Any person who administers, or causes to be administered, to a horse any prohibited substance which is detected in any sample taken from such horse prior to or following the running of any race.*

**Charge 4** Breach of AR 178F

*(1) A trainer must keep, and retain for a period of twelve months, a record of any treatment administered to any horse in his care.*

The charge relates to a prohibited substance, being alkalinising agents as evidenced by total carbon dioxide (TCO2) at a concentration in excess of 36.0 millimoles per litre in plasma, being detected in a blood sample taken from the horse *Prymslea* subsequent to it running in Race 1 the *Betfair Power to the Punter 0-58 Handicap* (1800m) at Mildura on Friday, 30 August 2013.

**Plea** Charge 2 – guilty
Charge 4 – guilty.

**Decision** **Charge 2** – Mr McLean convicted and disqualified for a period of 6 months, commencing on Tuesday, 17 December 2013. In accordance with AR 196(6)(a) and AR 196(6)(b) Mr McLean is unable to start any horse from today.

*Application to VCAT for a review of the decision dismissed.*

**Decision (cont)**

**Charge 4** – Mr McLean convicted and fined $2,000 – due on or before 31 December 2013.

Pursuant to AR 177 *Prymslea* disqualified as fourth place-getter of Race 1 the *Betfair Power to the Punter 0-58 Handicap* (1800m) at Mildura on Friday, 30 August 2013 and the places amended accordingly:

*4th – Moon Aura.*

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**Georgie Gavin**
**Registrar - Racing Appeals and Disciplinary Board**

# TRANSCRIPT OF

# PROCEEDINGS

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**RACING APPEALS AND DISCIPLINARY BOARD**

**HIS HONOUR JUDGE R.P.L. LEWIS, Chairman**
**MR B. FORREST, Deputy Chairman**
**DR J. SMITH**

**EXTRACT OF PROCEEDINGS**

**DECISION**

**TRAINER: JARROD McLEAN**

**RE: PRYMSLEA**

**MELBOURNE**

**MONDAY, 9 DECEMBER 2013**

DR C. PANNAM QC appeared on behalf of the RVL Stewards

MR P. WHEELAHAN appeared on behalf of Mr J. McLean

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CHAIRMAN: Jarrod McLean, you have pleaded guilty to the charge of administering or causing to be administered a prohibited substance. The essential facts are as follows: on Friday, 30 August 2013, a horse trained by you, Prymslea, ran in an 1800-metre 0-58 race at Mildura. The horse ran 4th and ran below market expectations.

A post-race blood sample was taken from the horse and upon analysis by Racing Analytical Services Ltd, the sample was shown to contain a TCO2 level of 38.8 millimoles per litre in plasma, with an uncertainty of measurement of plus or minus 1.0. The referee sample was analysed by the Australian Racing Forensic Laboratory, the New South Wales based laboratory, and that produced a reading of 38.3, with an uncertainty of measurement of plus or minus 1.0.

A resting sample was taken on 4 September 2013 at your stables and analysis revealed a plasma TCO2 level of 29.8, which is within the expected normal limits of a thoroughbred racehorse. Thus, the post-race blood sample revealed a plasma TCO2 level higher than the permitted threshold of 36 and the resting sample was well below that figure. Accordingly, the sample results indicated that the horse had a prohibited substance in its system.

Mr Wheelahan, who appeared for you, submitted that the appropriate penalty would be a period of disqualification of three months. The only matter of substance submitted by him was the plea of guilty in relation to this charge. The Board notes that you, Mr McLean, have provided no explanation for the high TCO2 reading.

Dr Pannam, who appeared for the Stewards, submitted that a penalty in the range of three to 12 months' disqualification was appropriate. He drew the Board's attention to the fact that in 2008, you had committed an offence relating to a high TCO2 reading for which you were fined and suspended for 28 days, which period of suspension was itself suspended for two years.

In the circumstances of this case, the principles of general and special deterrence are applicable, as well as denunciation of such conduct. The harm to the image of racing is a further matter to be taken into account. In the Board's opinion, the only appropriate penalty is one of disqualification and therefore, Jarrod McLean, you are disqualified for a period of six months, to take effect from and including 17 December 2013. The horse, Prymslea, must be and is disqualified.

In relation to Charge 4, you are fined the sum of $2000, to be paid on or before 31 December 2013.

One final matter: the Board has heard a proposal for a substitute trainer and other proposed arrangements in the event of disqualification. Disqualification brings with it consequences, and the Board is mindful of those consequences, particularly in relation to staff. The Board considers that the proposed arrangements are a matter for the consideration between Mr Wheelahan and the Stewards.

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**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**REVIEW AND REGULATION LIST** VCAT REFERENCE NO.Z616/2013

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| **APPLICANT:** | Mr Jarrod McLean |
| **RESPONDENT:** | Racing Victoria Limited |
| **WHERE HELD:** | Melbourne |
| **BEFORE:** | Senior Member His Honour Judge Williams |
| **HEARING TYPE:** | Hearing |
| **DATE OF HEARING:** | 17 February 2014 |
| **DATE OF ORDER:** | 18 February 2014 |

## ORDER

Considering all the matters outlined and raised, I am not persuaded to reduce the six month period of disqualification. I consider it is a fair and proper outcome in this case. The order I make is that Mr McLean be disqualified from training in Victoria for the period of six months from 17 December 2013, and that the horse also be disqualified.

**SENIOR MEMBER HIS HONOUR JUDGE WILLIAMS**

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

**APPEARANCES:**

| | |
|---|---|
| For Applicant | Mr Wheelahan of Counsel |
| For Respondent | Dr Pannam of Cousel |

## REASONS

### INTRODUCTION

1 On 9 December 2013 the RAD Board heard a charge under Australian Racing Rule 175(h)(ii), whereby it was alleged that licensed trainer, Jarrod McLean administered a prohibited substance, namely TCO2 in excess of the 36 millimole per litre threshold to his horse, Prymslea, which was detected in a post race sample.

2 The horse ran in an 1800 metre benchmark 58 race at Mildura on Friday 30 August 2013, and ran fourth, below market expectations.

3 It was shortly after this race that the relevant sample was taken. RASL testing of the sample showed a level of 38.8 millimoles per litre and ARFL testing of the referee sample showed a level of 38.3 millimoles per litre. Both readings are subject to an uncertainty tolerance of 1.0 millimoles per litre. But obviously both readings comfortably exceed the permitted threshold of 36 millimoles per litre.

4 Mr McLean pleaded guilty to the charge, and ultimately the RAD Board imposed the penalty upon him of six months disqualification, commencing from 17 December 2013. The horse was also disqualified.

5 Mr McLean has applied to this Tribunal for a review of the RAD Board decision. In effect this requires me to hear the matter afresh and conduct an independent review on the merits of the decision in order to reach a correct and preferable decision on the materials presented *Garde Wilson v Legal Services Board* (2008) BSCA 43.

6 I should record here that the book of the respondent's s 49 documents was tendered in evidence along with the appellant's material, which consists of Debbie McLean's statement and the exhibits thereto, and the referees' testimonials.

### The nature of the offending

7 The horse ran in the first race on that day, and as indicated, the relevant post race sample was taken at 3.52pm and when analysed twice, showed readings of 38.8 and 38.3 millimoles per litre. Other samples taken on that day were a pre race sample at 12.20pm which showed a reading of 32.5 millimoles per litre, and another post race sample at 2.43pm which showed a reading of 36.8 millimoles per litre. A resting sample was taken from the horse some days later on 4 September 2013, which showed a reading of 29.8 millimoles per litre.

8 Steward Rhys Melville had visited the premises where the horse was staying at 8.00am on the morning of race day, and he made an observation of blood in the nostril of the horse Prymslea during that visit. This

observation, when taken with the scientific opinion of Dr Stewart concerning the aforesaid readings and the timing thereof, allow the comfortable conclusion on my part, according to the *Briginshaw* standard, that administration – probably by stomach tubing via the nose – occurred on the morning of race day, and was of a large dose of sodium bicarbonate or some similar alkalising agent.

9 Taken further, it is the inevitable conclusion that this was done by Mr McLean for the purposes of enhancing the horse's performance in the race later that day. Dr Stewart rejected the other alternative explanations put forward by Mr McLean in his statements to stewards, which included the possibility that a tubing (if it occurred) two days earlier on or about the Wednesday the 28th, may have been responsible; or alternatively that small amounts of sodium bicarbonate in the nature of two tablespoons, were mixed in with the horse's fee on the Thursday night.

10 As I say, Dr Steward rejected both of those possibilities as having any likelihood of being responsible for the readings that were taken on the afternoon of race day.

11 These conclusions that I have made were in essence put by Dr Pannam on behalf of Racing Victoria and not essentially disputed by Mr Wheelahan on behalf of the appellant. Nor indeed did Mr McLean provide any explanation whatsoever to counter these conclusions when allegations of that nature were put to him by Steward Kane Ashby on 14 September 2013. And I refer in that regard to pp 135-148 of the respondent's s 49 documents.

## Submissions for the appellant

12 [I am referring by use of 'appellant' to Mr McLean.]

It was put by Mr Wheelahan on the appellant's behalf that he has made an early plea of guilty and that this has saved Racing Victoria the trouble and expense of proving the case, and that in the normal way, a plea of guilty demonstrates remorse on behalf of Mr McLean, and that he is in fact remorseful, and that these matters are a mitigating factor that should be taken into account in relation to penalty.

13 Secondly, Mr Wheelahan refers to the principles of parity or consistency of sentencing, referring of course to the desirability that any penalty here imposed be mindful of parity and consistency principles when compared with previous penalties in similar cases. In this exercise it was put that I should teat Mr McLean as a first time 'administration' offender, even though it was conceded he had a prior for a TCO2 offence in 2008. But it was put that that offence was a 'presentation case' against AR178, and therefore less serious compared with the administration case we are dealing with today. I will return to this point later.

14 Mr Wheelahan directed me to what he submitted were all the relevant AR175(h)(ii) TCO2 thoroughbred case in the last five years. Marshman, 2013. A guilty plea, second offence, three months disqualification.

Preusker, 2013. A guilty plea, no priors, six months suspension with three months of that suspended. Chibnall, 2013, not guilty plea to the 175(h)(ii), but guilty to 178 and 64 offences. Case proven, three months disqualification. Cooper, 2011. Not guilty to 175(h)(ii), guilty to 178. Case proven, six months disqualification.

15 Mr Wheelahan submitted that the pattern emerging from these recent AR175(h)(ii) cases is one of three months disqualification, and that this should be adhered to by way of parity principles in the present case.

16 Thirdly, Mr Wheelahan referred to the personal circumstances of Mr McLean and the effects upon him of disqualification. Mr McLean is aged 33 years with a partner and two young children. After finishing Year 12 at school, he commenced an apprenticeship as a chef, but he was released from this after two or three years when he obtained a full training licence in 2002. He has trained full time since then at Yangery – property, and later also at Pertobe – Lane property, both via Warrnambool. He and his partner bought a further property at Caramut Road four years ago, where they reside and agist.

17 It is put that the training is essentially a business carried out by the family, including his mother and father. It is put that taking into account all of Mr McLean's commitments and responsibilities, including mortgages, plant and equipment, staff, owners and horses, family and the like, that the disqualification has had a catastrophic effect on him.

18 I have read the extensive material from his mother exhibited, explaining all the financial affairs and explaining the trust arrangement which employs Mr McLean, and otherwise substantially governs the way the business operates. In the meantime Mr McLean is working in a local pizza shop, and his mother has noted the oppressive effects on him of the forced changes in circumstances that have occurred since the disqualification took effect in December last year.

19 Finally Mr Wheelahan referred me to the good character testimonials exhibited, and I have read these and taken them into account. In the light of all this material, Mr Wheelahan has submitted that a fair and just penalty would be no more than three months disqualification, which he asserts would be consistent with other recent similar penalties in these types of cases.

**Turning now to Dr Pannam's submissions on behalf of Racing Victoria**

20 He submitted that the offence is in the category of serious culpability, involving a deliberate alkaline tubing on race morning with a view to enhancing performance. And he submitted that for the sake of precedent, a heavy penalty was required for a number of reasons, including deterrence of Mr McLean himself, the deterrence of other trainers who might be tempted to engage in this sort of behaviour, and also importantly, for the sake of the image of racing in the eyes of the public.

21 Dr Pannam submitted that such an approach, namely a heavy penalty, is consistent with what I myself said in *Holman*, as to a general firming up of penalties in these sort of cases.

22 Dr Pannam further submitted that it was not correct to conclude that three months disqualification was a 'going rate' for these sorts of cases. Of the case of Marshman, he said it was not really a typical penalty period as the Board was influenced by her age of 78 years and prospective retirement from the industry. Of Preusker, in which both he and Mr Wheelahan were involved, he says despite the plea of guilty, the TCO2 readings were borderline and also the outcome in terms of penalty was crafted so as to allow Preusker to carry on his other work as a farrier, which required him at times to enter licensed premises.

23 Dr Pannam also drew attention to some other cases. *Holman* I have already referred to, in 2009. It was not a tubing case, rather an excessive bicarbonate in the feed. Four months disqualification. Kelvin Bourke, 2008. A not guilty plea, TCO2 case, six months disqualification. And Cooper which has already been referred to, which was six months disqualification.

24 He also referred to some other cases which although under different provisions, mainly 178E and 64G, he submitted were similar enough in culpability to the present case. The cases of Beshara and Karakatsonis, both in 2013, which resulted in disqualifications of six months for Beshara and nine months and two years respectively for the two Karakatsonis'.

25 Hence Dr Pannam put that it was not at all the case that there was a pattern of results warring a conclusion that three months disqualification was the 'going rate'.

26 Finally Dr Pannam submitted that there was no real remorse shown by Mr McLean, especially in the absence of any explanation for the true events of Friday 30 August 2013 and the cause of the high TCO2 reading. And further that Mr McLean's references to financial hardship were nothing beyond the norm for this type of penalty, and should have been thought about before he went about administering the prohibited substance.

## Conclusions

27 First, all these submissions on both sides outline the relevant considerations for me to take into account, and I do take account of them all. Secondly, I consider this case particularly to be quite an egregious example of a trainer dishonestly attempting to gain an unfair edge over his rivals in the race. An example of a deliberate alkaline tubing on race morning, followed by a complete lack of candour about the matter in his subsequent dealings with the investigating stewards – and this is done by a trainer with a similar prior conviction. True, it was a 'presentation' charge under AR178, but it involved the same action on your party, namely a TCO2 stomach tubing,

albeit on that occasion it was on race eve, which you admitted to stewards was indeed careless.

28 This previous case must have alerted you not only to the risks of TCO2 tubing on or close to race day, but also to the possible consequences in terms of detection and penalty. It can only be said that when you acted as you did, you paid no regard to the integrity of the very industry in which you are involved, and no regard to the negative image that this sort of offending produced in the minds of the public.

29 Thirdly, you did indeed plead guilty after the charge was levelled against you, and you must be given credit for this as it has rendered unnecessary the full blown trial and presentation by Racing Victoria of the evidence. I did make the point in discussions that it was a strong case for Racing Victoria and not overly difficult (in my experience) to prove. But guilty pleas are to be encouraged, and appropriate credit for it must be and is allowed.

30 Remorse is not so easy. Your counsel put that you now are remorseful, and more than one of your character testimonials refers to remorse on your part. Yet this is in stark contrast to your behaviour during the stewards' investigations after the offending, where you failed to make any admission, and you completely declined, and still have declined, any rational explanation for what occurred. And a deal of your account of things to stewards obviously lacked candour. So in my view unqualified remorse on your part is something of a grey area in this case.

31 As to the parity issue, obviously parity in sentencing is a proper matter to consider and strive for. However, this is not always easy. All cases differ in their factual matrixes to varying degrees. Penalties are over a range from three months disqualification and three months suspension at the lower end, up to four, five, six months disqualification and arguably beyond, as outlined herein before.

32 Amendments made to the Australian Rules of Racing in March 2013 would indicate a general endeavour by racing authorities to stiffen penalties, especially in this area of prohibited substances. All these matters impinge on the attempt to follow in any robotic fashion any previous 'going rate'. I would be most reluctant to accept any period of disqualification as a 'going rate' for any particular case, including this one.

33 This case, as I said before, is a serious and highly culpable example of substance administration by someone with a relevant prior conviction. This calls, in my view, for a condign approach to punishment. Some cases involve elements of ignorance, or accident, or lack of control on the part of the person who perpetrated the administration; calling perhaps for some leniency. But none of those features appear in this case.

34 Finally, I of course take account of your personal circumstances as outlined above, including the hardships – financial and emotional that have been

demonstrated. Although it must be said that a lot of these consequences are expected to flow from a disqualification in any of these sort of cases.

35 Considering all the matters outlined and raised, I am not persuaded to reduce the six month period of disqualification. I consider it is a fair and proper outcome in this case. The order I make is that Mr McLean be disqualified from training in Victoria for the period of six months from 17 December 2013, and that the horse also be disqualified.

**SENIOR MEMBER HIS HONOUR JUDGE WILLIAMS**