

Appeal decision

Decision Date: 1 September 2015

Code of racing: Harness

Appeal panel: Mr B Miller (chair), Mr P James and Mr D Kays.

Appearances: Mr S Neaves, barrister, appeared for trainer Wayne Waltisbuhl.
Mr David Farquharson, chairman of stewards, appeared for Racing Queensland.

Decision being appealed: A 12 months disqualification of licence for presentation of a horse with a prohibited substance.

Appeal result: Decision varied. Penalty of \$5,000 substituted for 12 months disqualification.

Extract of proceedings – in the matter of an elevated TCO2 level in a pre-race blood sample taken from Benny Maguire which competed in Race 3 at Albion Park on Tuesday 7 July 2015. Trainer: Wayne Waltisbuhl

THE CHAIRMAN: At the outset, Mr Neaves sought to propose that the fact that there had been two different readings, namely 37.1 on the first sample undertaken by the Racing Science Centre Queensland and the second of 36.0 on the Part B sample undertaken by the Confirmatory Laboratory Testing in Victoria, raised the suggestion that obviously one could not rely on the first reading because of the fact that the second reading was non-confirmatory. He suggested that in accordance with the decision handed down in *Lambourn v. Racing Queensland* by Member Favell delivered on 6 September 2013, the issues were simply that the second sample demanded that there was sufficient rebuttal evidence by virtue of its reading to affect the standing of the first sample. Member Favell quoted that in his view despite Rule 191 the second certificate introduces doubt about the level of TCO2 in the blood at the relevant time and it is rebuttal evidence. He determined that the rebuttal evidence was sufficient to cast doubt on the value of the first sample.

In the opinion of this board the second certificate introduces no doubt whatever about the presence of the prohibitive substance. It certainly does identify that the substance may be below the threshold level as prescribed by the Rules. That threshold level is 36 and ordinarily any determination of the existence of a prohibited substance requires that the reading be 36 or above. Subsection 1 of Rule 191 however is specific. It stipulates that the first reading undertaken by the laboratory of sample A is prima facie evidence of the existence of the substance at that level. The second reading is purely confirmatory and is governed by subsection 2 which stipulates that if the second sample reading is of 36 or above, then it is not just prima facie evidence but it is conclusive evidence of the presence of a prohibited substance. That is the benefit of having confirmation of the second sample. In this instance, the second sample was below the level of reading of the first sample but it was still 36.

Accordingly, this board ruled that the charge was proven, namely that the horse had been presented to race with a prohibited substance in its system as the second sample confirmed the presence of a substance but at a rate below what was the standard threshold or equal to the standard threshold one should say. In the circumstances, the board dismissed the appeal on the question of conviction.

Thereafter, Mr Neaves sought to adduce evidence from Dr Trent Raeburn who is a practising veterinary surgeon in Queensland. He confirmed that he had given notice to Racing Queensland of his intention to call Dr Raeburn by telephone and that he had also given Racing Queensland notice that he required Dr Bruce Young to be present for cross-examination. Dr Bruce Young gave evidence in the initial inquiry before stewards as to the circumstances in which TCO₂ levels are tested and the affects that it has on a horse's system identifying that it has to have been administered close to the race (certainly within 24 hours) for it to have any effect as it dissipates from the system when treating the horse to a level that it would have previously had before administration. Mr Farquharson for the stewards requested that Dr Bruce Young be allowed to be present to listen to Dr Raeburn's evidence and to respond and to be cross-examined by counsel for the appellant and this board ordered that that was appropriate and the matter was adjourned to arrange for Dr Young to be called and to come into the court room and for Dr Raeburn to be contacted by telephone to give his evidence.

On the resumption and the resumed hearing by this board, Mr Farquharson advised the board that Dr Young did not propose to attend as he claimed to Mr Farquharson that he had already given evidence and as far as he was concerned that was as much as he was prepared to do. As a result, Mr Neaves believed that he was at a disadvantage not being able to cross-examine a witness who should have been placed on notice by Racing Queensland and presumably was. When questioned, Mr Farquharson simply said that Dr Young stood by the evidence that he had given and that was it.

The board then listened to the evidence of Dr Raeburn per telephone. His evidence was concise. He said that he had been a practising veterinary surgeon since 2009, that he treated racing horses and racing animals, that he was aware of the effects of drugs on the various systems of horses although he was not totally aware of the circumstances relating to the implications of the use of TCO₂ on animals but he understood the basic parameters whereby it was accepted in all journals of veterinary science that 90 per cent of horses have a standing reading of TCO₂ level at between 28 to 32mls, that 5 per cent of horses are below that range and that the remaining 5 per cent of horses are above that range and can be 33, 34 or even higher. He said that he was aware that this horse suffered from mild dehydration and his view was that the effect of dehydration on TCO₂ would have an effect albeit marginal. He couldn't say to what extent but it would certainly have an effect as would an illness that he believed this horse was suffering from because of the blood readings that had been taken and tested and further that the horse in question had been the subject of quite convoluted attempts by the attending veterinary surgeon to take blood and in doing so that would have had some marked effect also. Again it may only have been minimal but it would certainly upset the horse's constitution on a physiological structure and could cause the horse to have a raised concentration of TCO₂. His view was that it was dangerous to rely on a reading that may have been taken from a horse that had been subjected to fairly harsh treatment and to then rely on the strict reading that had been imposed because that could have been increased because of the number of things that occurred, the sickness, the rough handling, etcetera. He was questioned also about the fact of a sample of blood having been taken from the horse and then been air transported for testing down south as to whether that would

have had any attempt or effect on changing the levels and he said he wasn't qualified to comment on that and really didn't know but confirmed that over a period of time there will be some degradation in the degree of the sample testing.

Mr Farquharson then cross-examined him, questioning strongly the issue of whether or not at 29.8 if that can be taken to be the horse's standing level, would that put the horse in the 90 per cent or normal range and he agreed that that probably did but he opined that other things could have an effect upon the reading. He said one of those is that the vet obviously took blood under some difficulty and there was no doubt in his opinion that the horse was suffering from a virus and was sick at the time in question. In fact, he understood that the horse performed very poorly on the night in question and it was confirmed that the horse had in fact finished last by some 90-odd metres.

The issue here is whether those increased factors of illness, difficulty with providing blood and the horse playing up would have a bearing on the margin of the level, and the evidence of Dr Raeburn seems to be simply that it would have but he couldn't speculate as to what degree. Mr Farquharson of course said that it would have no effect whatever.

There is no doubt that the horse, had the level of both samples been within the range of 36 on the first sample and below 36 on the second sample, then no charge would have been levelled because it would have been just too difficult and dangerous for a charge to be structured, but the point is here that there was a reading of 37.1 and as such the charge had to stand. The question then to be decided is what is the effect of all of these issues on the penalty that was to be imposed? The stewards imposed a penalty of 12 months disqualification. They said primarily because it had only been recently that the same trainer had been subjected to a disqualification of six months from an offence in late 2013. After the six months disqualification, Mr Farquharson had interviewed the trainer and had warned the trainer and taped the conversation with the warning that if he was to suffer a similar fate again then the penalties would be far more significant and severe. In the opinion of this board if that was the case then why did not the stewards take more care in ensuring that proper testing procedures were followed and why was there not evidence to suggest that all steps had been taken by them in that regard. The stewards relied solely on Dr Bruce Young's evidence given in the transcript but Young refused to attend for the purposes of being cross-examined and in the circumstances, there has to be some consideration given as to why Dr Young was not prepared to have his evidence tested. One doesn't need to read too much into the fact that the second reading was 36 and could with all of the circumstances imposed have been considered to be below 36. That of itself would not have allowed the appellant to escape a conviction but one must certainly take into account whether or not the penalty of 12 months disqualification is sustainable in all the circumstances. In the view of the board such a penalty is not sustainable.

It had become apparent that during the course of the inquiry, even the stewards were concerned about the level of the readings. In the overall event, this board does not believe that the penalty of 12 months can be maintained and it believes that a disqualification is not an appropriate penalty in circumstances where there is some doubt about the level of the readings. The first reading could be as low as 36.1 which is only 0.1 over the threshold and with a further reduction being available perhaps because of the issues raised by Dr Raeburn. The second reading was 36 and could be below 35 with the same issues. If that had been the case, the stewards more likely than not, would not have prosecuted but they were able to justify the finding of the substance and therefore they believed that Mr Waltisbuhl had administered the substance. He was not charged with administration; he was charged with

presenting the horse with a concentration of TCO₂ above the threshold. In the opinion of the board there is some doubt, not that that is sufficient to allow him to escape a conviction, but certainly there is doubt in respect to what penalty should have been imposed and in the circumstances a fine of \$5,000 is substituted for the 12 months disqualification.

Further right of appeal information: The Appellant and the Steward may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **28 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au