Appeal decision

Date: 21 April 2015

Code of racing: Thoroughbred

Appeal panel: Mr B Miller (Chair), Mr P James and Mr G Casey

Appearances: Mr Darryl Strong appearing on behalf of and with the appellant trainer John Thomas
Mr Rion Hitchener appearing on behalf of the stewards

Decision being appealed: Conviction and penalty imposed under AR178(g)

Appeal result: Appeal upheld

The appellant John Thomas was the trainer of Party Spin which, after competing in Race 8 at Ipswich Turf Club on 19 December 2014 was shown to exhibit the finding of Hyoscine in a swab sample taken on that day. An Inquiry was opened by stewards on 16 March 2015 some three months after the race and after analysis of the sample was received by Racing Qld stewards. The Inquiry transcript identifies the steps taken by the stewards to identify how Hyoscine came to manifest in the sample and depicts what was considered by stewards at Racing Qld to have been an exhaustive examination of all possibilities that were undertaken at the time. Those examinations included testing of the feed and supplements used by Mr Thomas in his regimen at the stables, the investigation of grasses and plant material growing in and near the stable area and on the parklands adjacent thereto and evidence from Mr Thomas relative to his regimen of feed and information collated from his stable diary. None of the test results suggested that Hyoscine could have been included in those materials and as a result, notwithstanding the protestations by Mr Thomas as to his lack of guilt in usage of any substance whatever, the stewards determined that the trainer was guilty of what can be simply referred to as the *presentation offence* under the relevant Legislation and Rules. That Rule 178 says:

> *Subject to AR178(g) 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.*

The Rule is intended to ensure that people who are in charge of racehorses and race them whilst a prohibited substance is manifest in the system of the horse should be penalised unless the stewards can be satisfied that there is no other possible explanation for the finding of the substance and they accordingly impose the penalty on the trainer for presenting the horse to race with that substance present. Of course the stewards have a discretion as can be identified by use of the words *may be penalised* at the end of the Rule. That would tend to indicate that if there is an explanation that is reasonable in all the circumstances then the stewards could determine that no penalty or even conviction be recorded. In this particular circumstance the stewards having undertaken investigations that

did not apparently identify any other possible cause that could result in the manifestation of the prohibited substance recorded a conviction and imposed a fine of $2,000.00.

The appellant is a man of senior years with an unblemished record throughout his history. He was very ably represented by Mr Darryl Strong who presented to this Board significant evidence pointing to the failures that are regularly encountered during investigative procedures undertaken by stewards and particularly in respect to various drug screening thresholds that are imposed and changed over time. Mr Strong was forthright in his approach to the presence of Hyoscine and relied upon representations that had been made even by stewards in other States for samples to reflect not only the presence of a drug and in particular Hyoscine. His view and that of those stewards in certain circumstances is that it would be appropriate for referee laboratories to be able to quantify the substance by volume not simply by presence. It is however the qualitative and not the quantitative analysis that makes the Rule somewhat predatory in its conclusions. Mr Strong presented to this Board a number of documents purporting to identify that there was no dispute to the fact that Hyoscine had been found but there was certainly a dispute that the manner in which the investigations had been undertaken by the stewards of Racing Queensland were done at such a late point in time after the event that it must lead one to a conclusion that there was a distinct possibility that the substance could have been ingested in the manner in which Mr Thomas alleged to the stewards. That suggestion was through the feed that had been purchased from a highly regarded feed merchant or through the ingestion of the grasses and parts of the plant *crab apple* that were known to constitute traces of Hyoscine in differing degrees and at different times of maturity. The stewards were unable to identify that any feed tested by them and there were two different samples taken at different times or any of the crab apple material or grass showed or exhibited signs of Hyoscine. This Board has however heard evidence that the feed from which Party Spin had been fed had been long dissipated before tests were undertaken by Racing Qld stewards. In the interim period further material had been purchased, albeit from the same produce merchant, and of course no trace of Hyoscine was shown. At the same time evidence was available to identify that the grasses and weeds with crab apple included had been removed from the parklands area on which Party Spin grazed on a regular basis. It was these elements that Mr Strong and the appellant strongly argued should have led one to a conclusion that nothing wrong had been done by Mr Thomas and that it was purely some unknown element that had been the contributing factor to the existence and the finding of the substance in question. This Board can appreciate why stewards are faced with dilemmas in circumstances where even they have great respect for the trainer in question and are left with no other conclusion available other than to suggest that that trainer was in charge of the horse at the relevant time and therefore must have been responsible. That is the reason why a penalty of $2,000.00 was recorded with the conviction. It is perhaps somewhat surprising that if the stewards were so positive in their views as to where the material arose or emanated from that they did not impose a penalty by way of suspension.

Accepting the fact that the horse in question did return a positive finding Mr Strong submitted that this Board should take into account the determination made by it in the matter of Jason Carkeet (Harness Racing). In that case Mr Carkeet presented a horse for racing and it was subsequently found there was a prohibited substance in its system that substance being Hyoscine. Upon enquiry, questions did arise as to the source of the contamination and stewards found that the contamination probably occurred from some pre-mixed feed that had been used in the stable which had been sold by an apparently reputable feed merchant. The stewards charged the trainer with a breach of Rule 190 of the Australian Harness

Racing Rules, found the trainer guilty but did not impose a penalty. The stewards, in that case, believe they were required to impose a penalty regardless of the circumstances. This Board confirmed that the horse in question was disqualified and any monetary award for the appropriate people was unavailable because of the substance being shown to be present. Harness Racing Rules however and in particular Rule 256(6) identified that even though an offence may be found proven a conviction need not necessarily be entered or a penalty imposed. This Board found that in the special circumstances that existed the recording of a conviction in that circumstance was not warranted or reasonable.

In that respect Mr Strong asked that we follow that line of reasoning to support his contentions and those of the appellant that no conviction be recorded and no penalty be imposed. Unfortunately there is no corresponding rule to AHR Rule 256(6) in the Australian Rules of Thoroughbred Racing. All that can be said is that Rule 178 allows the stewards the opportunity of not imposing a penalty and, at the same time, of not recording a conviction.

The stewards did not take that opportunity but this Board is not bound to follow suit. It is of course necessary for the members of this Board to be satisfied that if they were to avail themselves of the use of the meaning *may impose a penalty* they should be satisfied that there are reasonable grounds for doing so. This Board has heard evidence that Hyoscine was in endemic proportions not long prior to the instance in question and as a result the testing procedures were such as to persuade members of all the stewards panels not to impose conviction. In this circumstance there is the evidence that there was presentation of the horse with the substance in its system however all of the evidence provided by the appellant would indicate that at the relevant time there more likely than not was Hyoscine present in either the feed utilised in the stable or in the grasses and crab apple weeds upon which the horse grazed. It is the determination of this Board that the presentation of that substance was more likely than not as a result of that feed or grass material and not by anything done by the trainer in question.

The trainer has already been damaged by the disqualification of the horse and the failure by him and the owners of the horse to receive financial return as a result. That, in the opinion of this Board, is a sufficient penalty and the appeal is upheld both as to conviction and penalty imposed.