

NEW SOUTH WALES
HARNESS RACING
APPEAL PANEL

APPEAL PANEL MEMBERS

Hon W Haylen KC

Mr B Skinner

Mr J Murphy

2 MAY 2024

APPELLANT KERRYANN MORRIS

RESPONDENT HRNSW

AUSTRALIAN HARNESS RACING RULES

190(1), (2) & (4)

DECISION

- 1. The Appeal is dismissed and the disqualification of Mrs Morris for 6 months is confirmed.**

1. On 19 April 2023, Stewards opened an inquiry following post-race samples taken from the horse Black Edition following the horse's wins at Newcastle on 12 December 2020 and at Penrith on 30 December 2020. Two samples reported the presence of levamisole, a substance with the potential to affect the immune system in horses.
2. Black Edition had been purchased from New Zealand by Trainer Mrs Morris and had arrived in Sydney around 20 November 2020. There was evidence before the Stewards that about 5 or 6 days before leaving New Zealand the horse was administered with a commercially available drench product, Matrix-C, that contained levamisole. It was later established that a Mr Ken Barren had control of the horse in New Zealand prior to its sale and had handled that treatment.
3. At the Stewards inquiry evidence about the nature and detection time of levamisole was provided by Dr Keledjian, from the Australian Racing Forensic Laboratory, and by Dr Wainscott, Regulatory Veterinarian for Harness Racing New South Wales (HRNSW). Apart from his evidence concerning the detection of levamisole in samples taken from Black Edition, Dr Keledjian had participated in a study in collaboration with HRNSW that showed that levamisole would 'cut out or drop off' tested horses between fifty and a hundred hours. He noted that there were other studies, in particular a study from the Hong Kong Laboratory in 2009, where similar results were detected. Based on the study in which he participated levamisole was detectable for only three to four days.
4. In his evidence, Dr Wainscott confirmed that levamisole was a prohibited substance under AHRR 188A, part (1)(a) and under subpart (b) was classified as an immunomodifier. The Racing Appeals Tribunal had determined that levamisole fell between a class 3 and a class 2 prohibited substance under the provisions of HRNSW Penalty Guidelines. Dr Wainscott accepted that the study referred to by Dr Keledjian was a small scale study involving 3 horses, noting that other studies used less horses or just one. There were practical reasons for using a small number of horses in these types of study. This study was referred to as the ARFL Report (Australian Racing Forensic Laboratory Report) authored by Dr Cawley and Dr Richards and was a collaboration with HRNSW. In this study levamisole was detected for 6 to 7 days in plasma and 3 to 6 days in urine. That Report was tendered in the hearing before the Stewards. Dr Wainscott referred to other papers produced over time that supported a limited time for levamisole to be detected in horses. He noted that the horse raced in Australia by Mrs Morris raced approximately 30 and 48 days after being treated with levamisole in New Zealand.
5. On 3 May 2023 after receiving detailed evidence, the Stewards noted that AHRR 90A(2.10)(a) stated: 'A trainer is at all times responsible for the administration and conduct of his stables, and, (b) A trainer is at all times responsible for the care, control and supervision of the horses in his stables'. Amongst reference to other rules the Stewards drew attention to AHRR 190 (1), namely, 'A horse shall be presented for a race free of prohibited substances'. Sub rule (2) stated: 'If a horse is presented for a race otherwise than in accordance with sub-rule (1) the trainer of the horse is guilty of an offence'. Sub rule 4 provided, 'An offence under sub-rule (2)...is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.' The Stewards then announced their intention to issue two charges against Mrs Morris pursuant to the provisions of AHRR 190, sub rules (1), (2) and (4).
6. The particulars of those charges were that Mrs Morris, being the licensed trainer of the horse Black Edition NZ, did present the horse to race at Newcastle on Saturday, 12 December 2020, with a prohibited substance in its system, namely levamisole, and had also

presented the horse to race at Penrith on 30 December 2020, with a prohibited substance in its system, namely levamisole. Mrs Morris pleaded guilty to both charges.

7. In submissions on penalty Mrs Morris denied administering anything to the horse, knowing how many were routinely tested. In the last decade she had trained more than 100 plus winners. Harness Racing was her life since she left school. At the present time she had 65 horses in work and three stable employees. She spoke of being supportive of charities and the mini-trots and provided details of her financial position. The records showed that Mrs Morris first took out a trainer's licence in 2009 and had a driver's licence going back to 2004. Performance statistics indicated that she had 11,364 starters for 1600 winners and 2800 placings. As a driver she had a further 5141 starters, 704 winners and 1224 placings.

8. In short, submissions on behalf of Mrs Morris: attacked the ARFL study of 3 horses to establish the period of time that levamisole was likely to stay in the horses system; alleged that the person who had administered the substance in New Zealand was inconsistent and unreliable in his evidence to such a level that it could not be relied upon; noted that there was no issue as to inappropriate conduct during the two races contested by Black Edition; and, that the Stewards inquiry had raised more questions than answers. It was also submitted that Mrs Morris had no way of knowing that the horse was treated with Matrix-C. These matters were said to justify a finding that Mrs Morris was blameless in this case and that it was not appropriate to apply general deterrence because her moral culpability was effectively absent.

9. The Stewards took some time to consider an appropriate penalty in this case and commenced their decision with this statement: 'In view of the available evidence and the absence of any evidence to the contrary, on the balance of probability, stewards cannot be comfortably satisfied that the detection of levamisole in the samples obtained from the horse Black Edition NZ on 12 December 2020 and 30 December 2020 were as a result of the horse having been treated with the product Matrix-C by Mr Ken Barren on 15 November 2020. The evidence of Dr Grierson, the papers of Ho, Barker and Loganathan, together with the Australian Racing Forensic Laboratory report, all provide for a detection time of no more than 6 days, much less than we have seen here with the treatment provided by Mr Barron on 15 November 2020, being 30 days before Black Edition NZ was presented to race in respect of the first charge and 48 days before Black Edition NZ was presented to race in respect of the second charge. Consequently, stewards regard the circumstances that have resulted in levamisole being detected in the samples subject of this inquiry as not having been appropriately explained.'

10. Stewards then considered a number of subjective factors concerning Mrs Morris' participation in harness racing as a trainer and driver and her performance in those roles, her registered training establishment consisting of 100 horse and financial support provided to family members and others as well as other matters. Personal circumstances were considered and acknowledgement of charity and ambassadorial work undertaken. The stewards then made the following statement: 'Stewards have given consideration to the circumstances in this matter in light of the submission made that you were blameless as you could not have known that the horse Black Edition NZ had been treated by Mr Barron. Against this, stewards note that you did not utilise the elective testing service made available by Harness Racing New South Wales. Stewards do not regard you as blameless in relation to these subject presentation offences as there was an opportunity for you to utilise the elective testing process after the horse Black Edition NZ entered your stable and prior to it starting in a race.'

11. The stewards then indicated that they would follow the decision of the Racing Appeals Tribunal in the case of Wade where the Tribunal considered a 15 months disqualification as

an appropriate starting point for a first presentation offence involving levamisole. A 25% reduction was allowed for the early pleas and the co-operation provided by Mrs Morris in

respect of each charge. A further reduction was allowed in relation to Mrs Morris's personal financial and professional subjectives, including charity and ambassadorial roles. In relation to each charge the stewards announced a penalty of 6 months disqualification to commence immediately, with both penalties to be served concurrently.

12. Mrs Morris promptly filed an Appeal to this Panel, citing the grounds as the penalty being excessive, and that the correct penalty would be none at all, as she was blameless in the presentation.

13. The transcript of the Stewards inquiry and the submission made on behalf of Mrs Morris were in evidence before the Appeal Panel. Those submissions were raised again on Appeal, however, a significant addition was the calling of expert evidence focused on establishing the length of time levamisole might be detected in the system of a horse. Prof Ben Sykes and Dr Derek Major were called to give evidence by Mrs Morris and HRNSW called Dr Martin Wainscott, its Regulatory Veterinarian. It was agreed by the parties that an appropriate manner for receiving this evidence was to have an agreed list of issues that the experts would speak to at the one time before moving to the next agreed issue. In a number of matters Dr Major deferred to the opinion expressed by Prof Sykes and ultimately expressed the view that more information was needed about the HRNSW (ARFL) study. He accepted that the ARFL study had been carefully executed and provided useful information. The taking of this detailed evidence occupied the entire morning session of the Appeal.

14. In essence, Prof Sykes argued that the ARFL study based on only 3 horses was therefore significantly flawed in reaching a useful detection time for levamisole. He regarded previous studies in the same class because they were limited to testing one horse or less than three. Prof Sykes gave a detailed assessment of how Black Edition could have detectable levamisole in his system some 30-40 days after being drenched with that substance while in the care of Mr Barron in New Zealand prior to being sold to Mrs Morris to race in Australia. At one point in his evidence Prof Sykes argued that if at least 6 horses (but preferably up to 20) were tested over a considerable time frame that would ensure that outliers could be caught in the trial. In this context he spoke of a bell curve result that would detect some horses both early and late in the trial with the centre of the bell curve catching the majority of horses. It was also argued that if the larger number of horses were tested, it was likely that levamisole could be detected up to 63 days or even up to 90 days. It is to be observed that in this exercise Prof Sykes adopted what might be described as generous time frames and unheard of numbers of tested horses in reaching his conclusions.

15. Dr Wainscott has a long history, especially in harness racing, in testing and establishing time frames for industry participants to observe. The three horse trial conducted in relation to this case was significant for that number and deserves to be acknowledged. Importantly, the ARFL study did what Prof Sykes did not do – they conducted a trial. Prof Sykes did not conduct a trial although time may have been against him. The absence of a trial of his theory, however, leads this Appeal Panel to accept what has long been proved as a short detection time of levamisole against what needs to be proved by a large trial, which has not yet been conducted, to establish a detection time of up to 90 days. In this context it is noteworthy that both Prof Sykes and Dr Wainscott, when asked by the Appeal Panel, replied that they had not heard of levamisole being detected in racing horses after 30, 48 or 63 days.

16. While rejecting the Appellant's submissions concerning detection time limits it is appropriate to acknowledge the high regard in which the ARFL is held. The ARFL was founded in 1997 and has established itself as a significant laboratory staffed by highly

qualified professionals whose expertise is investigation and testing of drugs and ailments in the equine species. It is a world accredited facility in this field.

17. In concluding the Stewards findings in this case this statement was made: 'In view of the available evidence and the absence of any evidence to the contrary, on the balance of probability, stewards cannot be comfortably satisfied that the detection of levamisole in the samples obtained from the horse Black Edition NZ on 12 December 2020 and 30 December 2020 were as a result of the horse having been treated with the product Matrix-C by Mr Ken Barron on 15 November 2020....Consequently, stewards regard the circumstances that have resulted in levamisole being detected in the samples subject to this inquiry as not having been appropriately explained.' Despite the lengthy additional material presented to this Appeal, the Panel concurs in those findings.

18. Another significant issue, both before the stewards and on Appeal, was the extent of Mrs Morris' knowledge of the availability and purpose of elective testing of horses that was provided by HRNSW. In their decision on penalty the stewards stated: "Stewards have given consideration to the circumstances in this matter in light of the submission made that you were blameless as you could not have known that the horse Black Edition NZ had been treated by Mr Barron. Against this, stewards note that you did not utilise the elective testing service made available by Harness Racing New South Wales. Stewards do not regard you as blameless in relation to these subject presentation offences as there was an opportunity for you to utilise the elective testing process after the horse Black Edition NZ entered your stable and prior to it starting in a race. Stewards note the previous presentation offence and confirm the matter resulted from contamination, and although a conviction was recorded, no penalty was imposed. Despite no penalty having been imposed in respect of that matter, such involvement in a presentation offence for a prohibited substance should have heightened your awareness of the dangers of prohibited substances and the varied circumstances from which they can result.'

19. When this case was opened on 27 June 2023, the parties spoke to the matters to be considered in the Appeal hearing. It was agreed that a resumption of the hearing would be delayed because the expert witnesses could not be available before 7 September 2023. For Mrs Morris it was submitted that there were two factual issues to be determined: the science, interpretation and calculation of withdrawal and detection times; and, the role of selective testing where Mrs Morris was in no position to have the horse tested. It was foreshadowed that Harness Racing documents would show that this testing was limited to non-active substances and that Harness Racing prior to 2020 had never allowed horses to be tested for every substance known within the industry. It was also submitted that elective testing was limited to substances having a long life in the horse. Further, a trainer needed to identify what substance was being tested for in the horse. It appears that there was also a suggestion that, in any event, Ms Morris did not know of the availability of elective testing.

20. In response to those matters, the Integrity Officer of HRNSW, Mr Prentice gave evidence on the same day. He was shown industry notices where long acting substances were mentioned and a 2018 notice regarding elective testing that did not identify any substances. Mr Prentice said that those notices covered a broad range of substances and that trainers could ask for any substance in the horse to be tested for. Relating to a previous matter, Mrs Morris had asked Harness Racing to test for all substances that might be prohibited. He agreed that the term 'elective testing' was not defined in any notice but sometimes substances were identified in notices. During 2020 there were documents that allowed any substance to be tested but they were not identified because there could possibly be thousands of substances. Trainers could ask for everything to be tested. There

had never been a period where trainers were required to elect what substances were to be tested.

21. At the 7th of September 2023 hearing of this Appeal, Mr Paul, the Deputy Chairman of Stewards, gave evidence about elective testing conducted by HRNSW. Mr Paul had been a Steward for 19 years, however, there had not been a strict policy regarding this testing and there was no notice of the testing procedure. There was an understanding in the training ranks that the laboratory was available for any specific concerns they had and there was a lot of testing undertaken. On the same day, the Chairman of Stewards, Mr Bentley, gave evidence that HRNSW could provide advice to participants regarding what substances could be tested under the elective testing scheme.

22. In relation to Mrs Morris' knowledge of the elective testing regime, during the Stewards inquiry Ex E was her request for testing under this regime. The request was dated '14 Oct 19', just over a year prior to the Black Edition issue. No particular substance was identified. This was the case earlier referred to where Mrs Morris pleaded guilty to a charge under AHRR 190 due to a sample taken from the horse Princess Kenny NZ detecting Lamotrigine, a prohibited substance. While a guilty plea was entered, the Stewards recorded that plea but did not impose a penalty. The Stewards were satisfied that this was environmental contamination emanating from a septic sewer system and the use of prescription medication by a relative.

23. Mrs Morris gave evidence at the Appeal. She noted that in relation to Black Edition there was a pre purchase veterinary check on 28 October 2020 noting that no medications had been given to the horse and indicating that the horse was OK. She may have seen the elective testing document before but had not seen any policy on the matter. She did not recall being aware of the elective testing notices but after being shown her own application in 2019 for elective testing, agreed that she was aware of that process but did not have the time to read industry notices. In cross examination, it was put to Mrs Morris that in December 2020 she knew that she could apply for elective testing of Black Edition – she agreed that was correct but stated that she had already spent a significant amount on having the horse cleared from New Zealand and asked why should she spend even more on this process. Finally, Mrs Morris agreed that it was her responsibility to ensure that the horse was free from prohibited substances.

24. As mentioned earlier, Mrs Morris was a prominent member of the harness racing fraternity and was held in high regard. She was not only successful with her horses but was active in charity work and industry matters. It is extraordinary that she could not find time to keep up to date with industry notices, especially in relation to prohibited substances such as levamisole. Given her status in this industry it would be expected that when she was purchasing a horse from overseas she would be meticulous in assuring that every potential hurdle to the horse racing satisfactorily in the Australian jurisdiction, would be met. The Appeal Panel considers that the Stewards were correct in finding that the failure of Mrs Morris to utilise the elective testing service made available by HRNSW leads to the conclusion that she could not be regarded as blameless in relation to the two offences. Importantly, the burden rested upon Mrs Morris to produce evidence that she was blameless in relation to these charges. At times the submissions put on her behalf seemed to suggest otherwise.

25. The longstanding case of McDonough, a decision of the Victorian Racing Appeals Tribunal chaired by Judge Williams (24 June 2008), set down three categories of wrong conduct to be considered in prohibited substance cases- (1) where the conduct of the trainer can be clearly established as wrong; (2) where the Tribunal was unable to determine

what really occurred; and, (3) where the trainer was found to be blameless. In this case, neither the Stewards nor this Appeal Panel were able to determine what really happened

and how levamisole came to be detected in Black Edition after contesting races on 12 December 2020 and on 30 December 2020.

26. It is appropriate to mention the lengthy submission covering numerous matters filed on behalf of Mrs Morris. It was alleged that Mr Barron's evidence was inconsistent, could not be given any significant weight and that his credit was in doubt. A complaint was made that he was not presented for cross examination yet no such application was made. There was also criticism of the failure to call the authors of the ARFL report but again there was no request to do so. Unfortunately, a number of issues raised in that submission either wrongly stated the established factual position or were unable to prove the inaccuracy alleged. Those matters were adequately dealt with in the final response filed by HRNSW. The remaining matters have been dealt with above.

27. The final matter to be considered is the penalty imposed by the Stewards. In the primary submission filed by HRNSW on Appeal, it was noted that 'just 6 months disqualification was in the appropriate range, and indeed, perhaps low, given: (a) the 'starting point' identified in the penalty guidelines; (b) the fact that there were two positive swabs; (c) the lack of any credible reason for the positive swabs; (d) the lack of evidence of remorse from the appellant; and, (e) the fact that the subjective circumstances...do not otherwise warrant a lesser sentence.' Positive subjective circumstances and contributions to the industry were appropriately taken into account. The Stewards had adopted a low starting point of 15 months disqualification, then applied a 25% discount for the early pleas of guilty and her co-operation, and 'a further very generous 35% reduction for her positive subjective circumstances'. The fact that this was her first offence was already taken into account in the 15 month starting point.

28. After considering these matters, the Appeal Panel is satisfied that the 6 months disqualification is appropriate in the particular circumstances of this case. The orders of the Panel are, that the Appeal is dismissed and the disqualification of Mrs Morris for 6 months is confirmed.

29. There is one more matter that the Appeal Panel wishes to address and that concerns the lengthy time before final submissions from the parties were available for consideration. This was a strongly contested matter that faced difficulties, understandably, before the parties were in a position to set hearing dates. The relatively short disqualification of Mrs Morris warranted a speedy hearing and decision. The first hearing was conducted on 27 June 2023 and the second hearing was conducted on 7 September 2023 when the matter was concluded. The parties agreed to file further submissions given the nature of the expert evidence and the numerous issues to be addressed. It was not until mid-April 2024 that the submissions from both parties were finalised. By that time Mrs Morris' disqualification had been served. The industry is well aware that the Appeal Panel was established to ensure the speedy resolution of contested cases. For that aim to be achieved requires the parties to co-operate in the speedy finalisation of submissions. The Appeals Panel expects that goal to be achieved in all future cases.

Hon Wayne Haylen KC – Principal Member

Mr B Skinner – Panel Member

Mr J Murphy – Panel member

2 May 2024