

TASMANIAN RACING APPEAL BOARD

Appeal No 23 of 2007/08

Panel:	Mr R Pearce (Chairman) Mr T Cox Mr B McKay	Appellant:	Mr L Barker
Appearances:	Mr S Larkins for the stewards	Rule:	Harness Rule AR 190 (2)
Heard at:	Launceston	Penalty:	4 month disqualification
Date:	23 April 2008	Result:	Dismissed

REASONS FOR DECISION

1. Mr Barker presented the horse trained by him *Red Hot Ashes* to race at Devonport on 18 February 2008. Following a stewards' inquiry he was disqualified for four months for a breach of R190, which provides:

R190 (1) A horse shall be presented for a race free of prohibited substances

(2) 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.

2. A pre race blood sample taken from the horse was sent to Racing Analytical Services Ltd (RASL) for analysis. The sample was received by RASL and analysed on 21 February 2008. Following the analysis RASL certified the presence of total carbon dioxide (TCO₂) at the level of 37.1 mmol per litre in plasma. The reserve sample was sent to another laboratory, Australian Racing Forensic Laboratory in Sydney, for analysis. That analysis disclosed the presence of TCO₂ at the level of 36.8 mmol/L.

3. By operation of R188A(1)(b) and R188A(2) an alkalinising agent when evidenced by the presence of total carbon dioxide at a concentration above 36.0 mmol/L in plasma is a prohibited substance.

4. R191(1) makes the RASL certificate of analysis "prima facie evidence" of the presence of TCO₂ at a level exceeding the prescribed concentration. R191(2) provides that if the analysis undertaken by Australian Racing Forensic Laboratory certifies the presence of a prohibited substance then that certificate, with the RASL certificate, is "conclusive evidence" of the presence of the prohibited substance.

5. Each laboratory certified that "*the expanded measurement uncertainty for TCO₂ determinations at the threshold level of 36.0 mmol/L is 1.0 mmol/L*". We take that to mean that there is a 99.99% chance that the actual level of TCO₂ was within 1 mmol/L of the level reported in each certificate. Given that the second level was 36.8 there is, thus, a possibility that the actual level was under the threshold. It is only the effect of the element of uncertainty of measurement as it applies to the second analysis that creates any question at all in this case.

Mr Barker's appeal is on the grounds that given the result of the second analysis this Board ought not be satisfied that he breached the rule.

6. During the appeal we heard detailed evidence from Dr Vine who is the Laboratory Director of Racing Analytical Services Ltd and from Mr Vadasz who is the Acting Director of Australian Forensic Laboratory Ltd. Both are highly qualified and experienced chemists. There is nothing in the evidence, nor was it Mr Barker's case, that there was any material flaw in the process resulting in the issue of either certificate.

7. Putting aside for the moment the question of whether the certificates amount to "conclusive" evidence, even with the uncertainty factor, the question for us to determine is whether there is evidence that displaces the prima facie evidence arising by operation of R191(1) from the result of the first analysis. The only evidence relied on by Mr Barker is the result of the second analysis. There are, however, explanations for the difference between the two results. Subsequent confirmatory analyses are generally lower because of the passage of time and other factors.

8. More importantly, however, although the result of the second analysis gave rise to the theoretical possibility that the level was below the threshold, Dr Vine gave unchallenged evidence that the possibility that this was the case was extremely small. There was, in his assessment, somewhere between a 0.1% and 0.3% chance that a reported level of 36.8mmol/L was actually below 36.0 mmol/L even with uncertainty of measurement. His view was based on the proposition that the possibility that a particular level is true becomes progressively smaller as the level of variance from the expressed value increases. The effect of this is that as the variance approaches the limit of the uncertainty factor of 1.0 mmol/L the possibility of that level, at the extremity of the limit, being the actual level becomes extremely small.

9. For those reasons we are comfortably satisfied that when *Red Hot Ashes* was presented to race this horse had in it a level of TCO₂ that was above 36.0 mmol/L and that there has been a breach of the rule.

10. Mr Barker is unable to explain the presence of the prohibited substance in the horse that he presented to race. Offences such as this one are generally visited with a period of disqualification. We see no reason to impose a different penalty here. A fine is not appropriate either for the nature or circumstances of this offence or to Mr Barker's personal circumstances. It is Mr Barker's first offence but he has been training for a relatively short period of time and is not entitled to the mitigation that may otherwise arise from a long and unblemished period in the industry. We agree with the stewards' submission that the penalty should be a general as well as a specific deterrent. The penalty imposed by the stewards is appropriate and for that reason the appeal is dismissed.

11. Mr Barker's deposit will be returned to him.

DATED: 24 April 2008