APPEAL PANEL OF RACING NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF LICENSED TRAINER BEN SMITH

Heard at Racing NSW Offices

Appeal Panel:	**Mr L. Vellis - Convenor**; **Mrs S. Skeggs**; **Mr J. Murphy**
Representatives:	**Racing NSW - Mr S.G. Railton, Chairman of Stewards**
	Appellant - Mr W. Pasterfield, Solicitor
Date of Hearing:	**27 June 2024**
Date of Reasons and Orders:	**26 August 2024**

REASONS FOR DECISION

1. On 29 May 2024 Racing NSW Stewards conducted an inquiry in relation to licensed trainer Mr B. Smith (**Appellant**).

2. At the inquiry two charges were issued against the Appellant, as follows:

   Charge 1 | AR 245(1)(a) of the Australian Rules of Racing (**Rule**s) | Administration of prohibited substance in sample taken from horse before / after running in a race

   a. The details of the charge being that licensed trainer Mr B. Smith did cause to be administered to *Arale* on Thursday, 30 January 2024, the prohibited substance Meloxicam, which was detected in a pre-race blood sample taken from *Arale* prior to that mare winning Race 6, the Earthlight First Yearlings, Fillies and Mares Benchmark 72 Handicap at Canterbury Park Racecourse on Friday, 2 February 2024.

   b. AR 245(1)(a) is in the following terms:

      A person must not administer a prohibited substance on Prohibited list A and/or Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of race.

   Charge 2 | AR 140 | Offences where horse Handlers Use Banned Substances

   c. The details of the charge being that at his registered stables at Kembla Grange Racecourse on Thursday, 4 April 2024, licensed trainer Mr B. Smith did provide a urine sample that was found, upon analysis, to contain a number of substances banned under AR 137(1).

   d. AR 140(1)(a) is in the following terms:

A horse handler breaches these Australian Rules if… a banned substance under AR 137(1) is detected in a sample taken from the horse handler.

3. The Appellant pleaded guilty to both charges and the following orders were made:

   a. Charge 1 – penalty of a six month suspension of his trainers licence, reduced to four months having regard to his guilty plea and other mitigating factors;

   b. Charge 2 – penalty of a 12 month suspension of his trainers licence, reduced to nine months having regard to his guilty plea and other mitigating factors;

   c. The penalties for Charges 1 and 2 to be served cumulatively (i.e., a 13 month suspension of his trainers licence) and to expire on 29 June 2025;

   d. Acting under AR 283(7) the Stewards deferred the commencement of the suspension for a period of seven days to enable Mr Smith to disperse his stable on the basis that he does not nominate, accept or start a horse in a race during that period of time; and

   e. Acting under the requirements of AR 240(1) *Arale* was disqualified from its 1st placing in Race 6, the Earthlight First Yearlings, Fillies and Mares Benchmark 72 Handicap at Canterbury Park Racecourse on Friday, 2 February 2024.

4. The Appellant has appealed to the Panel against the severity of penalty. He was represented by Mr W. Pasterfield, solicitor. Mr S.G. Railton, the Chairman of Stewards, appeared for Racing NSW.

5. The Appeal Book was tendered as Exhibit A and other documents (including previous Appeal Panel and Racing Appeals Tribunal decisions) were also tendered and discussed during the hearing. Oral evidence was given by the Appellant.

Submissions

6. Mr Railton submitted that both charges were serious in their own right and that the penalties given were entirely appropriate.

7. While Mr Railton did not attributed any dishonesty towards Mr Smith's breach of AR 245(1)(a), he did submit that it was a significant breach of the Rules and referred to Ms Nicole Hudson's (Ms Hudson is the Acting General Manager of the Australian Racing Laboratory) evidence from the Stewards' inquiry, whereby at 5-242 Ms Hudson noted with respect to the Meloxicam detected in a pre-race blood sample taken from *Arale* that:

   "*Yes, so it was 4.8 nanograms per mil and the screening limit is 1 nanogram per mil of meloxicam. There have been 11 samples since 1 July 2016 when AR 257 came into effect and it is the second highest out of what we have detected in Racing NSW samples*".

8. Meloxicam is a Prohibited List B prohibited substance. It is a substance capable at any time of causing either directly or indirectly an action and/or effect within the digestive system

and/or the musculoskeletal system, and it is categorised as an analgesic, anti-inflammatory and antipyretic agent.

9. With respect to the Appellant's breach of AR 140(1)(a) Mr Railton noted that there were numerous prohibited substances detected in the Appellant's urine sample, these being oxycodone, oxymorphone and benzoylecgonine (i.e., cocaine).

10. Mr Railton submitted that while with respect to the oxycodone and oxycodone, the Appellant admitted that he had taken Endone for a pre-existing back injury (three compound fractures of his spine), taking such prescription medication needs to be approved by Stewards or the Licensing Committee, and there was no record of this occurring.

11. With respect to the cocaine, Mr Railton submitted that no satisfactory reason had been provided by the Appellant as to how this came to be in his system and that the Appellant should not be given any additional credit (as a discount was also provided to the Appellant for his guilty plea) for denying taking cocaine, when it was in any event found in his system with no satisfactory explanation.

12. Mr Railton also noted that the Appellant had only been relicensed for 15 months when Charge 1 arose, having previously been disqualified for three years and nine months for a range of breaches of the Rules, including:

    a. giving false evidence to Stewards during the course of an investigation (AR 232(i));

    b. refusing to give evidence during a Stewards' Inquiry (AR 232(h));

    c. bringing horses to a racecourse for the purpose of that horse starting in a race when a prohibited substance (cobalt) was detected above the level of 100 ug/l in a urine sample taken from that horse (AR 240(2));

    d. causing medication (an electrolyte paste) to be administered to horses on a race day (AR 249(1)(b));

    e. attempting to commit a breach of the Rules by instructing other persons to administer a medication (electrolyte paste) on a race day (AR 227(b));

    f. possession of various medications/substances/preparations that had not been registered and/or labelled and/or prescribed and/or dispensed and/or obtained in accordance with applicable Commonwealth and State legislation (the substances being formaldehyde; hyaluronic acid; levamisole; lignocaine; menthol; eucalyptol; phenylbutazone) (AR 252(1));

    g. administering a prohibited substance (cobalt) detected in samples of horses above the allowable limit following the running of a race (AR 245(1)(a)); and

    h. engaged in "improper conduct" by administering the carcinogenic substance formaldehyde to horses Anecdote, Kristensen and Marksfield (AR 228(b)).

13. The previous charges are listed not to judge or punish the Appellant for previous conduct for which he was already disqualified, but to illustrate that the Appellant's disciplinary record is very poor and consistent with Mr Railton's submissions that the penalties imposed for Charges 1 and 2 were appropriate in the circumstances and necessary to protect the racing industry and to act as a general deterrence to others.

14. Mr Railton also submitted that with respect to Charge 1 that any time a horse runs in a race with a prohibited substance in its system, the racing industry is inevitably damaged once that substance is detected. All the more so when that horse has won a race while that prohibited substance is in its system. A key purpose of the penalty provisions in the rules is to ensure that a message s sent to the public that such breaches are not tolerated by the officials, and to uphold the integrity and image of the sport.

15. Similarly, with respect to Charge 2, the Appellant was found to have prohibited substances in his system. If something was to go wrong with one of the horse sunder Mr Smith's care while he had such prohibited substances in his body, then the image of racing would be severely damaged. Mr Smith is not penalised as though such circumstance did occur at his stables on 4 April 2024, but this is the risk taken when ingesting or otherwise consuming such prohibited substances.

16. With respect to Charge 1, Mr Pasterfield submitted that it was an honest mistake, in that the breach was caused by a failure of the Appellant to adhere to veterinarian advice, which for a single use required that Meloxicam be administered at least three to four clear days prior to racing. The Appellant administered Meloxicam to *Arale* so that there were then only two clear days prior to racing. Mr Pasterfield also conceded that Mr Smith's stable practices and processes could be improved and submitted that Mr Smith had already undertaken to improve his stable practices and processes to ensure such a breach of the Rues does not occur in the future.

17. Given Mr Smith fully accepted the error, with Mr Pasterfield noting that the Stewards accepted it was not an error rooted in dishonesty, Mr Pasterfield submitted that a penalty of a fine or a shorter suspension would be far more appropriate, particularly given the Appeal Panel decision in *Shelton* (2024), in which licensed trainer Mr J. Shelton was fined $8,000 for a second breach of AR 245(1)(a), which both included the use of Meloxicam. Mr Railton pointed out a glaring difference between the Appellant's circumstances and that of Mr Shelton, in that Mr Shelton's breaches occurred nine years apart and were the main blemishes in an otherwise generally good disciplinary record across 50 years in the industry. The Appellant on the other hand had only been re-licensed for 15 months when Charge 1 occurred, after having been disqualified for three years and nine months. The Panel considers Mr Railton's submissions on the distinction between the *Shelton* matter and the Appellant's matter to be persuasive.

18. With respect Charge 2 and the oxycodone and oxymorphone, Mr Pasterfield mentioned that Mr Smith had occasional cause to take Endone for his back injury as it greatly inconvenienced him and caused considerable pain. Mr Pasterfield also submitted that while he accepted the use of such medication was required to be approved by Stewards or the Licensing Committee, the Endone used by the Appellant was prescribed and there was no mischief intended. Mr Pasterfield also noted that the Appellant has had a recurring issue with Endone and was now seeking treatment at the Illawarra Drug and Alcohol Services to try and once and for all rid himself of such dependency. While this effort is to be commended, Mr Railton did submit that Mr Smith's use of Endone was also raised in his previous matter in 2019 and it was clearly an issue that was unresolved and was continuing to adversely impact the Appellant.

19. As to Charge 2 and the benzoylecgonine (i.e., cocaine), Mr Pasterfield submitted that the Appellant genuinely had no idea how the cocaine came to be in his system. Mr Smith gave evidence to this effect as well. Mr Pasterfield also submitted that on the day Mr Smith provided his urine sample, he did not actually handle any horses and was merely checking in on the progress of the stable on his day off, given he lived at the stables. Mr Pasterfield further submitted that there was no evidence that Mr Smith behaved in an erratic or unsteady manner on the day he provided his urine sample, nor was any evidence put forward that Mr Smith was adversely affected on the day in question so as to pose an obvious danger or risk.

20. Mr Pasterfield detailed the financial and professional hardship that a suspension would cause Mr Smith and submitted that a fine would be a more appropriate penalty, with the Appellant willing to submit to hair follicle drug testing at his own cost to alleviate any concerns the Panel may have regarding his ability to remain free of prohibited substances.

Panel Resolution

21. In considering the penalties for Charges 1 and 2 the Panel considered the following matters:

    a. Mr Smith's licensing history (noting that Mr Smith had only been re-licensed for 15 months when the circumstances surrounding Charge 1 arose);

    b. Disciplinary history (once again, it is inescapable that weight is to be given to the fact that Mr Smith only recently was re-licensed following a significant period of disqualification for a myriad of breaches, including breaches of prohibited substance rules);

    c. Mr Smith's stable practices in respect of treatment administrations and the recording of such treatments (Charge 1);

    d. Mr Smith's explanation regarding the detection of the prohibited substances (Charge 2);

e. Personal and professional circumstances;

f. The nature and circumstances of the offences;

g. Principles of specific and general deterrence and what message is sent to the industry in respect of such conduct;

h. The purpose of issuing penalties as a protective measure for the image and interests of the thoroughbred racing industry, with the main purpose of the imposition of penalties for breaches of the Rules being to protect the image and integrity of the sport, and to send a message to the community that racing takes steps to always do that); and

i. Precedent penalties for similar offences.

22. With respect to Charge1 and the breach of AR 245(1)(a), while this was short of the most serious breach of this rule, a breach of this rule would ordinarily result in suspension, or even disqualification. The Panel accepts this was a mistake, not dishonesty or an attempt to cheat, but roughly five times the screening limit of Meloxicam was detected in a horse that raced and won, and the Panel unanimously agrees that the original penalty of a six month suspension of Mr Smith's trainers licence, reduced to four months having regard to his guilty plea and other mitigating factors, is appropriate and the Panel sees no reason to depart from this penalty.

23. Similarly, with respect to Charge 2 and the breach of AR 140(1)(a), while the Panel has sympathy for the Appellant's back injury and supports his endeavours to seek and continue with treatment to fight his reliance on painkilling medication, the fact remains that three prohibited substances were detected in the urine sample provided by the Appellant and a breach of AR 140 would generally result in a penalty of a suspension of license. The Panel again unanimously agrees that the original penalty of a 12 month suspension of Mr Smith's trainers licence, reduced to nine months having regard to his guilty plea and other mitigating factors, is appropriate and the Panel sees no reason to depart from this penalty.

24. Where the Panel differs with respect to the penalties, is that the Panel has determined that it is more appropriate for the penalties for Charges 1 and 2 to be served concurrently rather cumulatively (i.e., in effect a nine month suspension of the Appellant's trainers licence).The Panel is supportive of the steps taken by the Appellant to address his issues with painkilling medication and is of the view that continuing with such treatment can only enhance the possibility of the Appellant making a successful return to training at the conclusion of his period of suspension.

25. The orders of the Panel are:

a. Appeal against severity of penalty allowed.

b. A penalty of a four month suspension of the Appellant's trainers licence for breach of AR 245(1)(a) is confirmed.

c. A penalty of a nine month suspension of the Appellant's trainers licence for breach of AR 140(1)(a) is confirmed.

d. Instead of the penalties for Charges 1 and 2 being served cumulatively, the penalties for Charges 1 and 2 will be served concurrently.

e. In lieu of a penalty of a 13 month suspension of the Appellant's trainers licence, the Appellant's trainers licence is suspended for nine months. Such suspension commenced on 29 May 2024 and will expire on 28 February 2025.

f. Appeal deposit to be refunded.
