

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Hayes v Queensland Racing Integrity Commission* [2019]
QCAT 94

PARTIES: **ERIC HAYES**
(applicant)
v
**QUEENSLAND RACING INTEGRITY
COMMISSION**
(respondent)

APPLICATION NO/S: OCR079-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 10 April 2019

HEARING DATE: 28 March 2019

HEARD AT: Brisbane

DECISION OF: Member Cranwell

ORDERS: **1. The decision of the Queensland Racing Integrity Commission dated 6 March 2018 confirming the original decision is set aside.**
2. The Tribunal substitutes its own decision that Eric Hayes is not guilty of contravening rule 178AA of the *Australian Rules of Racing* on 19 August 2017.

CATCHWORDS: PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – OTHER PROFESSIONS, TRADES AND CALLINGS – thoroughbred trainer – whether trainer contravened r 178AA of the Australian Rules of Racing by administering an alkanising agent within one clear day of the race – where trainer’s evidence not challenged – where no direct evidence of administration of alkanising agent

APPEARANCES &
REPRESENTATION:

Applicant: S B Neaves, instructed by Miller Sockhill Lawyers

Respondent: J Ford

REASONS FOR DECISION

- [1] Mr Hayes is a licensed thoroughbred trainer in Queensland. Relevant to the present matter, he is the trainer of the horse Sonador Fire.
- [2] On 19 August 2017, Mr Hayes presented Sonador Fire to race at the Toowoomba Turf Club. The horse was subjected to a pre-race blood sample.
- [3] The blood sample was analysed by the Racing Science Centre, and returned a total plasma carbon dioxide ('TCO₂') concentration of 36.5 mmol/L. The B sample was subsequently analysed by the Australian Racing Forensic Laboratory, and returned a TCO₂ concentration of 35.8 mmol/L.
- [4] On 29 January 2018, the Queensland Racing Integrity Commission's ('the Commission') stewards charged Mr Hayes with breaching rule 178AA of the *Australian Rules of Racing*. That rule provides:

(1) A person must not administer an alkalinising agent, in any manner, to a horse which is engaged to run in any race, official trial or jump-out:

(a) at any time on the day of the scheduled race, official trial or jump out and prior to the start of such event; and

(b) at any time during the one Clear Day prior to 12.01am on the day of the scheduled race, official trial, or jump out.

(2) Any person who:

(a) administers an alkalinising agent;

(b) attempts to administer an alkalinising agent;

(c) causes an alkalinising agent to be administered; and/or

(d) is a party to the administration of, or an attempt to administer, an alkalinising agent, contrary to AR.178AA(1) commits an offence and may be penalised.

...

(5) For the purposes of AR.178AA, "alkalinising agent":

(a) means any substance that may elevate the plasma total carbon dioxide (TCO₂) of a horse when administered by any route;

(b) includes but is not limited to substances that are bicarbonates, citrates, succinates, acetates, propionates, maleates, lactates and trometamol (THAM, Tris Buffer or Trometamine) and also include products marketed as urinary alkalinisers and hind gut buffers;

(c) does not include substances:

(i) that are alkalinising agents which are contained in commercial feeds and/or balanced commercial electrolyte supplements which when fed and consumed according to the manufacturers' recommendations for normal daily use, which stewards are satisfied have a negligible effect on plasma TCO₂; and

(ii) provided that any exemption from the definition of alkalinising agent granted under this rule does not constitute a defence to a charge laid against a person following the detection by an Official Racing Laboratory of a TCO₂ concentration in a horse in excess of the threshold prescribed by AR.178C(1)(a).

[5] The stewards found Mr Hayes guilty of breaching rule 178AA and fined him \$2,500.

[6] Mr Hayes applied for an internal review.

[7] On 6 March 2018, the Commission's internal adjudicator confirmed the steward's decision.

[8] Mr Hayes has now applied for an external review by the Tribunal.

[9] Mr Hayes filed a statement dated 4 September 2018. Relevantly, he stated that:

I did not administer an alkanising agent to Sonador Fire within one clear day prior to the scheduled race. No evidence has been produced by the Stewards which prove (sic) that I administered an alkanising agent.

The test results do not prove administration and beyond that the test results show that no prohibited substance was detected.

[10] In his oral evidence to the Tribunal, Mr Hayes stated that he had been following the same procedures for 54 years. He normally finishes giving his horses alkanising agents on Wednesday before a Saturday race. He may give a horse potassium citrate on Thursday morning if a horse is having trouble urinating.

[11] Mr Hayes was referred to his evidence at the stewards' inquiry, where he stated:

The mare was administered nothing by us intentionally. The only thing I can come up with is potassium citrate in her water, which is a normal procedure Sunday and Saturday that my wife does for me for me all the time because I forget ... Now, whether she has just gone ahead on the Saturday morning and put it in, she doesn't think she did, but I have no explanation as to why the mare's level was up apart from that. None whatsoever.¹

[12] At the hearing, Mr Hayes stated that when he went home after the stewards' inquiry, his wife reminded him that he had taken away Sonador Fire's water the evening before the race because he suspected her of bleeding. He explained that dehydrating the horse lowers the blood pressure and reduces the horse's risk of bleeding.

[13] Mr Hayes was asked in cross-examination why the horse was presented to race if she was bleeding. Mr Hayes stated that 85% of horses bleed when they race, and he only held a suspicion that Sonador Fire was bleeding arising out of her performance the last time she had raced. He did not know for sure that she was bleeding.

[14] Mr Hayes presented as a truthful witness. His evidence was not seriously challenged by the counsel for the Commission. In those circumstances, I accept Mr Hayes' evidence that he did not administer an alkanising agent to Sonador Fire within one clear day of the race in question. I also accept his evidence that his wife did not mistakenly administer potassium citrate in the horse's water on the Saturday morning

¹ Transcript of Inquiry, 29 January 2018, p 12.

of the race, as the horse's water was taken away on Friday night. I found Mr Hayes' explanation that his wife reminded him of this after the stewards' inquiry to be credible. In this regard, I note that the stewards' inquiry took place five months after the race in question.

- [15] Expert evidence was provided by Dr Derek Major and Professor David Brynn Hibbert. Ultimately, this evidence was of little assistance as neither expert was able to provide direct evidence as to whether an alkalinising agent was administered.² They were not in Toowoomba on the day of the race, or in the preceding days, and did not maintain an observation of Sonador Fire during those times.
- [16] The experts' reports spent a considerable amount of time canvassing the probabilities that Sonador Fire's TCO₂ concentration was greater than 36 mmol/L based on the laboratory results. However, this level has no relevance to rule 178AA. In particular, I note that Mr Hayes was not charged under rule 178C, which provides:
- (1) The following prohibited substances when present at or below the concentrations respectively set out are excepted from the provisions of AR.178B and AR.178H:-
- (a) Alkalinising agents, when evidenced by total carbon dioxide (TCO₂) at a concentration of 36.0 millimoles per litre in plasma.
- [17] Professor Hibbert provided a series of probabilities that a normal horse would return the laboratory results returned by Sonador Fire or greater. In the case of the Australian Racing Forensic Laboratory result, that probability was 0.58%. In the case of the Racing Science Centre result, the probability was 0.18%.³ In other words, between 18 and 58 normal horses in every 1,000 horses would return those results.
- [18] The improbability of an event does not preclude it from occurring. Indeed, Professor Hibbert's oral evidence was that the probability of the two laboratory results varying by 0.7 mmol/L (36.5 – 35.8 mmol/L) was a less than 5%.
- [19] In my view, a particular TCO₂ concentration is not in itself sufficient to make a finding of guilt under rule 178AA, as opposed to rule 178C. Had Mr Hayes not presented as a truthful witness, or had his evidence been seriously challenged on cross-examination, or had there had been any direct evidence that an alkalinising agent had been administered, the probabilities calculated by Professor Hibbert could have provided support for a finding of guilt under rule 178AA. However, as set out above, that is not the case in the present matter.
- [20] Based on the evidence before me, I consider that the most likely explanation for the laboratory results is simply that Sonador Fire was one of the 18 to 58 horses in every 1,000 which would return those results.
- [21] I will set aside the decision under review.

² Joint Report, 8 February 2091, p 2.

³ Report of Professor Hibbert, 23 November 2018, p 7.