

DECISION

Racing Integrity Act 2016, sections 252AH, 252BM

Review application number	RAP-91	
Name	Malcolm Willoughby	
Panel	Mr K J O'Brien AM (Chairperson) Mr D Kays (Panel Member) Mr J McCoy OAM (Panel Member)	
Code	Thoroughbreds	
Rule	Australian Rules of Racing 141(a) <i>The owner, trainer or other person in charge of a greyhound;</i> <i>(a) nominated to compete in an Event;</i> <i>must present the greyhound free of any prohibited substance.</i>	
Penalty Notice number	PN-009767	
Appearances & Representation	Applicant	Self-represented
	Respondent	Ms L Reece instructed by Queensland Racing Integrity Commission
Hearing Date	16 April 2024	
Decision Date	16 April 2024	
Decision <i>(delivered ex tempore)</i>	Pursuant to 252AH (1)(a) of the Racing integrity Act 2016 the Racing Decision is Confirmed	
Case References	<i>Wallace v Queensland Racing</i> [2007] QDC 168 <i>McDonough v Harness Racing Victoria</i> [2008] VRAT 6 <i>Henley v Racing NSW</i> Racing Appeals panel NSW 10 January 2020	

Reasons for Decision

- [1] The Applicant in this matter, Mr Malcolm Willoughby, is the owner and trainer of the Greyhound, Cyclone Winston.
- [2] On the 14 September 2023, the Applicant presented Cyclone Winston to compete in Race 9 at a race meeting conducted by the Ipswich Greyhound Racing Club.
- [3] Following the race, a urine sample was taken from the race winner, Cyclone Winston. That sample was subsequently found to contain the prohibited substance Gabapentin.
- [4] On 9 April 2024, following a Stewards hearing commenced in December 2023 the Applicant was found guilty of an offence against Greyhound Australasia Rule 141(1)(a) which provides that the owner, trainer or other person in charge of a greyhound nominated to compete in an event must present the greyhound free of any prohibited substance.
- [5] The penalty imposed on the Applicant, who had pleaded not guilty to the charge, was a fine of \$1,500, \$750 of which was wholly suspended pursuant to GAR174(3) for an operational period of 12 months.
- [6] Pursuant to section 252AB of the *Racing Integrity Act 2016* the Applicant now applies for a review of the Stewards decision insofar as it relates to the determination of guilt.
- [7] The essence of his argument as distilled from his Notice of Application¹ is that the scientific analysis showed a “false positive” reading to Gabapentin because of a particular supplement, Di Vetelact milk, which he had provided to Cyclone Winston. The Applicant contends that there are substances contained within that milk supplement which are of a similar molecular structure to Gabapentin and which are responsible, in his view, for the false result.
- [8] Before turning to a consideration of the merits of this appeal, it is to be observed at the Applicant is not charged with having administered the prohibited substance to Cyclone Winston. Had it been alleged that he had deliberately administered any such prohibited substance then then he could expect a more serious charge under GAR 142 or GAR 143.
- [9] The charge under GAR141(1) is an offence of strict liability and one which is often described as a presentation offence². The reasons for such a rule were alluded to by Honor Judge McGill in *Wallace v Queensland Racing*³ Essentially, they relate to the preservation of the integrity of the animal racing industry.
- [10] In *Henley v Racing NSW*⁴, the Panel observed:

“A breach of AR240(2) is a strict liability offence (or perhaps an offence of absolute liability; for present purposes. It does not matter). In the matter of the appeal of John Sprague, a decision of this Panel of 22 February 2018 comprised by myself, Mr J Nicholson and Mr K Langby, I explained that in the case of a strict liability offence, liability is imposed irrespective of whether the person has acted without fault. Statutory offences of strict liability are commonplace in the regulation of activities involving public welfare. Putting a person under strict liability is intended to assist in the enforcement of the statute or regulation by encouraging greater vigilance to prevent the commission of the prohibited act.... The policy behind the imposition of strict liability in AR240(2) is to similar effect. It is intended to encourage

¹ RAP-91 Application for Review lodged 9 April 2024

² See *Wallace v Queensland Racing* [2007] QDC 168 and *McDonough v Harness Racing Victoria* 2008 VRAT 6 (24 June 2008)

³ *Wallace v Queensland Racing* supra at [28] and [63]

⁴ *Henley v Racing NSW Racing Appeals Panel* New south Wales 10 January 2020 at [15]

greater vigilance in ensuring that no horse is brought to a racecourse for the purpose of engaging in a race if they prohibited substance in its system.”⁵

The Panel in that case was of course concerned with a presentation offence involving a thoroughbred racehorse, but the principle is no different in the application of the equivalent Greyhound Racing Rule.

- [11] It should also be observed that this is not a case involving an excepted substance, nor is it a case in which a quantifiable threshold specifically applies to the sample involved. Consequently, the presence of any quantity of the prohibited substance is sufficient for the substance to be a prohibited substance⁶.
- [12] As this case does involve a prohibited substance proof using scientific analysis from at least one approved laboratory is required⁷. The Racing Science Centre Queensland Racing Integrity Commission, Brisbane and Racing Analytical Services Melbourne are approved laboratories for the purpose of the Greyhound Racing Rules.
- [13] The Responded here relies firstly on a certificate of analysis under the hand of Doctor Shawn Stanley, General Manager, Analytical services, Racing Science Centre dated 11 October 2023⁸ confirming that the sample code number 542753 was shown to contain Gabapentin.
- [14] Secondly, the Respondent relies on a certificate under the hand of Mr. David Betty, Laboratory Director, Racing Analytical Services Limited, certifying that the urine sample 542753 was shown to contain Gabapentin.⁹
- [15] Although some issue has been raised in relation to the numbering of the sample, the Panel is satisfied that the integrity of both the sample delivery process and the testing process is established by the material.
- [16] The test clearly relates to sample number 542753 (that which was taken from Cyclone Winston in compliance with GAR 154(4)) and the number 24-04919A is clearly only an additional number assigned by the Racing Science Centre. The progress of the sample is established to the Panels satisfaction by the various exhibits¹⁰.
- [17] The evidentiary value of these certificates is provided for in GAR154. Their combined effect is that they provide conclusive evidence of the presence of the prohibited substance.
- [18] GAR154(5) and GAR154(6) in particular, provide as follows.

(5) A certificate of analysis signed by a person at an approved laboratory who is authorised to and purports to have analysed a sample in (“A” portion) is with or without proof of that person’s signature prima facie evidence of the matters contained in it in relation to the presence of a prohibited substance for the purpose of any proceeding pursuant to the Rules.

(6) A second certificate of analysis signed by a person at an approved laboratory who is authorised to and purports to have analysed another portion of a sample (the reserve (“B” portion) which confirms that the prohibited substance detected in the reserve (“B” portion) and identified in the second certificate of analysis is the same as the prohibited substance detected in the “A” portion and identified in the first

⁵ *Henley v Racing NSW*, Racing Appeal Panel NSW 10 January 2020

⁶ Greyhound Australasia Rule 152(2)

⁷ Greyhounds Australasia Rule 153

⁸ Document 18 – Racing Science Centre Certificate of Analysis RSC24-041

⁹ Document 24 – Racing Analytical Services Limited Certificate of Analysis RS23/16024

¹⁰ Affidavit of Dr. Shawn Stanley affirmed 15 April 2024, documents numbered 11, 14, 16, 18, 20, 22 and 38.

certificate of analysis constitutes, with or without proof of that person's signature and subject to subrule (8) below, together with the first certificate of analysis, conclusive evidence of the presence of a prohibited substance.

- [19] Notwithstanding, these provisions however, the certificates of analysis do not possess evidentiary value and do not establish an offence if it is proved that the certification, testing or analysis process which preceded the production of a certificate was materially flawed¹¹. Thus, if the Applicant can prove any of those matters, then the presumptive conclusive effect of the certificates would be displaced.
- [20] In a situation where the responsibility of proof is so placed upon the Applicant, then the standard of proof is in accordance with the balance of probabilities¹².
- [21] The case for the Applicant is that sample taken from Cyclone Winston did not contain Gabapentin. Rather, he contends, the analysis has produced a "false positive" for that substance.
- [22] The arguments that the Applicant has raised at this hearing are essentially the same as those which he raised at the Stewards Inquiry. In addition to his account, the Stewards had also heard evidence from Doctor David Blide, the head canine veterinarian with the Queensland Racing Integrity Commission, who said that the test for the detection of Gabapentin was "a very specific test which does not cross react with anything else"¹³. Doctor Blade said, in short, that the Applicant's argument was "not supported by the science"¹⁴.
- [23] This Panel must of course form its own view of the matter and we do have before us as part of this hearing all of the material which was before the Stewards.
- [24] In his evidence before the Stewards Inquiry, the Applicant said that he had never sourced the drug, Gabapentin, and had never administered it to Cyclone Winston. After being provided with the analyst certificate he had contacted a company in France that sold urine test dipsticks for Gabapentin. He had purchased several of those sticks and had used them to conduct some testing of his own.
- [25] His first use of the of the dipsticks on the 22 October 2023 produced a positive reading for Gabapentin, although a negative result was provided for a test conducted on 26 October 2023.
- [26] A further test on Cyclone Winston on the 2 November 2023 returned a positive reading for the substance and tests which he conducted involving himself and his wife also produced negative results.
- [27] The Applicant has provided a certificate from his veterinarian Doctor Rae Newson, advising that Gabapentin has never been prescribed for the Applicants dogs.
- [28] The Applicant believes that certain compounds contained within the milk supplement Di Vetelact may be responsible for the result which he contends to be false.
- [29] The Applicant is not a scientist, but it is apparent he has gone to considerable effort in searching the Internet and other sources to establish his argument. He contends that his research indicates that two amino acids in Leucine and Isoleucine, which he says form part of his "normal feeding regime" can lead to a false positive reading with urine sample testing.

¹¹ Greyhound Australasia Rule 154(8)

¹² Greyhound Australasia Rule 152(1)

¹³ Transcript of Stewards Inquiry Part 3 lines 118 - 122

¹⁴ Transcript of Stewards Inquiry Part 3 lines 166 - 177

- [30] He has made inquiries with a veterinary neurologist Clare Rusbridge regarding positive readings for Gabapentin in greyhounds and has used the generic artificial intelligence platform ChatGPT to record the progress of his inquiries and has sought scientific information and advice from that same source.
- [31] Amongst material relied on by the Applicant is a document headed Cyclone Winston Research Request, part of an article which suggests that “looking for metabolites can sometimes be a better indicator of the presence of drugs compared to detecting the drug itself, depending on the contest and purpose of the analysis”, and a document dealing with Gabapentin being examined in a mass spectrometer.
- [32] These last-mentioned documents are very general in nature and contain a number of qualified opinions which make no reference to or connection with the particular analysis or circumstances of the present case.
- [33] As far as the veterinary neurologist Ms Clare Rusbridge is concerned, the Applicant had informed her of his belief that the powdered milk supplement Di Vetelact was a likely source of the false positive reading. He asked if she could “shed some light on why we are getting a false reading”. Ms Rutledge responded as follows:
- “Interesting... maybe this is across reaction with GABA, (although I would expect pregabapentin to be positive as well in that instance) Some whey supplements can contain GABA I think.”
- [34] In the Panel's view this brief comment does nothing to advance the Applicants case.
- [35] Ms Reece, who appears for the Respondent, submits that the material shows clear and cogent evidence of the presence of Gabapentin. She submits that the Applicant's contention that the positive test result was a false positive is a submission which in effect alleges a flaw in the evidentiary process engaged in by the approved laboratory.
- [36] Ms Reece submits that such a submission cannot be sustained in light of the detailed evidence of Doctor Stanley as to the processes followed in the laboratory¹⁵
- [37] Aside from establishing beyond doubt the integrity of the samples in question and dispelling any notion of confusion in that area, Doctor Stanley sets out in detail the sample testing process. Doctor Stanley deposes so that Gabapentin is a prohibited substance as defined by Rule 137(a) of the Rules of Greyhound Racing because it is capable at any time of causing either directly or indirectly, an action or effect, or both an action and effect, within one or more of the mammalian body systems listed under that rule¹⁶.
- [38] Gabapentin is marketed under the brand name Neurontin as well as under various generic names and is used to treat a neuropathic pain and is used also as an anticonvulsant in humans¹⁷.
- [39] Doctor Stanley's evidence¹⁸ dispels the Applicants assertion that the sample analysis has produced a false positive reading.
- [40] In his oral evidence before this Panel Doctor Stanley expanded upon that opinion, effectively saying that with the use of the modern mass spectrometer it is not possible in this case that a substance other than Gabapentin gave rise to the reading.

¹⁵ Affidavit of Dr. Shawn Stanley affirmed 15 April 2024

¹⁶ Affidavit of Dr. Shawn Stanley affirmed 15 April 2024, paragraph 17.

¹⁷ Affidavit of Dr. Shawn Stanley affirmed 15 April 2024, paragraph 19-20

¹⁸ Affidavit of Dr. Shawn Stanley affirmed 15 April 2024, paragraph 16.

[41] Doctor Stanley makes reference to the testing strips purchased by the Applicant from the French company Kappa City Biotech and used by him in his testing of Cyclone Winston in October 2023 and thereafter. Doctor Stanley deposes as follows;

26. Dip sticks tests a low-cost and convenient but have a high rate of incorrect results due to the limitations of the screening method. For this reason, the results produced are only considered to be "indicative" and a more accurate analysis is always required. For example, when used in roadside drug screening to identify drivers under the influence of controlled substances, no action is taken until a fresh sample is collected and tested using a more robust instrumental method.

27. The experiment conducted by the Applicant, to my mind, does not offer any practical benefit as the dip stick test may have detected Gabapentin that was present from the contamination of one of the unregulated products that were administered to his greyhound. It is not uncommon for herbal based treatments to contain prohibited substances that are accidentally introduced into the raw material or due to cross-contamination from poorly cleaned mixers and other equipment used during processing¹⁹.

[42] In relation to the issue of the Di Vetelact milk supplement, Dr Stanley deposes:

29. I disagree with the applicant's contention that amino acids in Di-Vetelact could be the cause of the positive results for Gabapentin. My reasons are as follows.

- a. The three amino acids that have been proposed, that's a potential cause of the positive result are phenylalanine, tryptophan and tyrosine and have a chemical formula of $C_9H_{12}N_2O_2$ and $C_9H_{11}NO_3$ respectively.*
- b. In the protonated ($[M+H]^+$) form that is a mandatory prerequisite for the molecule to be able to pass into the mass spectrometer, these amino acids will have precursor ions at m/z 166.20, 205.23 and 182.20 respectively.*
- c. In the analytical method detailed in the Analysis Documentation Package provided by the RSC, the Q1 resolution of the mass spectrometer was set to "high" and consequently ions outside of the narrow range of m/z 171.95 to 172.35 are filtered off and do not pass through to the collision cell. Hence, they fail at the first very first hurdle.*
- d. Furthermore, there is no evidence provided to show that they have a similar LC retention time AND that those amino acids can generate a SRM ion ratio that is a match (as per the ILAC-G7-Part B criteria) to the authentic Gabapentin reference material.²⁰*

[43] This Panel has found the evidence of Doctor Stanley to be compelling. It demonstrates a proper understanding of the chemistry involved in laboratory testing of this nature. At best, the material and the submissions advanced by the Applicant are speculative and lacking in any detailed understanding of the science involved.

[44] The Applicants has demonstrated a layman's understanding of certain of the issues involved, but that understanding does not equate to the quality of scientific evidence given by Doctor Stanley.

[45] In the result, the Panel is not satisfied that the Applicant has proven on the balance of probabilities that the certification, testing or analysis process which preceded the production of the certificates of analysis in this case was materially flawed. Indeed, the Panel is positively satisfied to the contrary.

¹⁹ Affidavit of Dr. Shawn Stanley affirmed 15 April 2024, paragraph 26-27

²⁰ Affidavit of Dr. Shawn Stanley affirmed 15 April 2024, paragraph 29

- [46] The Applicant does not specifically appeal against the penalty that has been imposed on him by the Stewards, but the Panel should make some reference to it. We reiterate that the Panel accepts that this is not a case in which the Applicant can be said to have knowingly administered the substance to Cyclone Winston.
- [47] The Penalty Guidelines for this offence provide a starting point of a \$2,000 fine for a first offence of this nature, with an entitlement to a 25% reduction for an early plea of guilty.
- [48] These proceedings are not penal in nature, and each case must be must of course be assessed according to its own circumstances.
- [49] Of fundamental importance remain considerations of deterrence, both general and specific, although that latter consideration does not loom large here due to the Applicants previous exemplary record, and of course the maintenance of the integrity of the greyhound racing industry.
- [50] There is a heavy onus on trainers and others in charge of greyhounds to ensure that greyhounds are presented to race free of any prohibited substances. The reasons for that onus have been referred to earlier in this decision.
- [51] Although the Applicant did not plead guilty to the charge, that being a particular feature of mitigation under the guidelines, he does have a good, indeed an unblemished, disciplinary record for which he should be given credit.
- [52] It is clear also that he has made considerable efforts to try and ascertain the source of the prohibited substance and he deserves recognition for those efforts.
- [53] In *Henley v Racing NSW*²¹ the Panel recognised that prohibited substances cases generally fall into one of three categories. The first category is where, through investigation, admission or other direct evidence positive culpability is established on the part of the trainer or person responsible. This is clearly not such a case.
- [54] The second category is where at the conclusion of any evidence and plea, the Panel is left in a position of having no real idea where that prohibited substance came to be present in the animal involved.
- [55] The third category is where the trainer or other person charged provides an explanation which is accepted, and which demonstrates that the trainer has no culpability at all or only limited culpability.
- [56] The Panel in that case recognised that in some instances the level of culpability may fall somewhere between the second and third of these categories.
- [57] Ms Reece, for the Respondent, has submitted that this is such a case, and the Panel accepts that as being a fair submission in the circumstances.
- [58] Consistency of penalty is a matter to be considered and the fine of \$1,500 dollars, \$750 which was suspended, is consistent with the penalties imposed in other cases to which the Panel has been referred²².
- [59] In the Panel's view, the penalty imposed on the Applicant here was appropriate in all circumstances.

²¹ *Henley v Racing NSW*, Racing Appeal Panel NSW 10 January 2020

²² Queensland Racing Integrity Commission Stewards' Report, Chris Brydon 25 July 2023; \$1,500 fine
Queensland Racing Integrity Commission Stewards' Report, Graham Hall 14 July 2023; \$2,000 fine
Queensland Racing Integrity Commission Stewards' Report, Leanne Hall 24 July 2023; \$2,000 fine
Queensland Racing Integrity Commission Stewards' Report, Robbyn Black 2 April 2023; \$1,500 fine
Queensland Racing Integrity Commission Stewards' Report, Clinton Thompson 27 July 2023; \$2,000 fine

[60] In accordance with section 252AH (1) of the *Racing Integrity Act 2016*, the order of the Panel is that the racing decision the subject of this Application is confirmed.

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