



HEARING RESULT

Distribution: Chief Executive
Group Integrity Services, Group Racing
Group Racing Development
Credit Controller
ARB, ATA, VJA, TVN
Office of Racing
T Moxon – National Drug Register
Racing Press

FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 23 February 2015

SUBJECT: **PENALTY HEARING RESULT – TRAINER: MARK RILEY**

Panel Judge Russell Lewis (Chair), Mr Josh Bornstein (Deputy) & Mr Geoff Ellis.

Appearances Mr Damian Sheales, instructed by Mr Patrick Dwyer, appeared as Counsel for Mr Riley.

Dr Cliff Pannam QC, instructed by Mr James Ogilvy, appeared as Counsel for the stewards.

Charge Breach of AR 175(h)(i)

The Committee of any Club or the Stewards may penalise: Any person who administers, or causes to be administered, to a horse any prohibited substance: for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race.

Decision On 29 January 2015 the RAD Board found Charge 1, a breach of AR 175(h)(i) proved.

Pursuant to AR 196(5)(vi) Mr Riley is disqualified for a period of 3 years, effective immediately.

Pursuant to AR 196(6)(b), Mark Riley must not start a horse in any race from the date of the Board's decision until the expiration of the period of disqualification.

In accordance with AR 196(6)(a) the Board has ordered that the commencement of the period of disqualification is deferred to 3 March 2015 only to the extent of providing Mr Riley with time to transfer horses from his stable and to comply with any other requirements of the disqualification.

Under AR 177 *Gold for Kev* is disqualified as 11th place-getter in Race 7 at Sandown on 13 July 2014 and the places amended accordingly.

**TRANSCRIPT OF
PROCEEDINGS**

RACING APPEALS AND DISCIPLINARY BOARD

**HIS HONOUR JUDGE R.P.L. LEWIS, Chairman
MR J. BORNSTEIN, Deputy Chairman
MR G. ELLIS**

EXTRACT OF PROCEEDINGS

DECISION

TRAINER: MARK RILEY

MELBOURNE

MONDAY, 23 FEBRUARY 2015

DR C.L. PANNAM QC appeared on behalf of the RVL Stewards

MR D.P. SHEALES appeared on behalf of the Appellant

CHAIRMAN: On 29 January 2015, the Board found Mark Riley guilty on Charge 1, which was laid under Australian Rule 175(h)(i). Under Australian Rule 196(5)(vi), where a person is found guilty of the above offence, a penalty of disqualification for a period of not less than three years must be imposed unless there is a finding that a special circumstance exists, whereupon the penalty may be reduced.

In this case, Mark Riley calls in aid the special circumstances referred to in LR 73A(c)(i) and (d); that is, he must prove on the balance of probabilities that at the time of the commission of the offence, he had impaired mental functioning that was causally linked to the breach of the rule and that such impaired mental functioning substantially reduced his culpability or that, in the interests of justice, the circumstances may be deemed or considered to be special.

As part of its conclusions, the Board was comfortably satisfied that on race day, 13 July 2014, Mark Riley or a member of his staff, with his authority and pursuant to his instructions, administered a prohibited substance to the horse, Gold For Key, and that such administration was a deliberate act.

Accordingly, in the context of the case, the onus is on Mark Riley to prove on the balance of probabilities that at the time he administered the prohibited substance or at the time a member of his staff administered the prohibited substance pursuant to his instructions, he, Riley, was suffering from mental impairment to such an extent that his culpability was substantially reduced.

Mr Sheales, who appeared for Riley, relied on the evidence of Dr Evans, Riley's general practitioner, Ms D'Abbs, a treating psychologist, and Dr Serry, a psychiatrist who was introduced into the case by Mark Riley's legal advisers to give opinion evidence. Mr Sheales also relied on the evidence of Robert Dunnett, a friend and owner; Mr Peterson, a registered nurse and owner, and Mrs Lisa Riley.

The Evidence

The Board accepts the medical evidence that for a number of years, Mark Riley has suffered from depression which has been aggravated by back pain. The level of the depression waxes and wanes on occasion, requiring medication. Nevertheless, Riley, although unable to involve himself in day-to-day activities around his stables, has been able to run his stables by keeping in touch with his staff via mobile phone. The evidence shows that Riley's physical condition improved following surgery on 8 July 2014. Dr Evans referred to this procedure as "relatively successful treatment".

What occurred on the morning of the race is a critical piece of evidence. Prior to and after attending a gymnasium, Riley made a number of telephone calls. In particular, he informed his foreman Logan McGill that rather than McGill take the horse to the races, he, Riley, would do so. Riley did in fact go to the stables and made ready two horses and attached the float to his vehicle. He then drove his vehicle with the float attached from Mornington to Sandown

racecourse. On arrival at the racecourse, Riley met Robert Dunnett, and Dunnett had \$250 each-way on the horse on behalf of and at the request of Riley.

Conclusions

The onus is on Riley to establish on the balance of probabilities that a special circumstance existed. In the Board's opinion, the evidence linking the impaired mental functioning to the commission of the offence falls short of what Riley must prove. Mr Sheales relied heavily on the opinion of Dr Serry, an experienced psychiatrist. Dr Serry based his opinion on documentation supplied by Riley's legal advisers and also on the evidence of Riley himself when he, Riley, was interviewed by Dr Serry on 17 February 2015. Dr Serry added that his opinion in part relied upon the accuracy of what Riley told him and the completeness of the information available to him.

The Board gives limited weight to the evidence of Dr Serry for the following reasons: (1) the difficulties and limitations associated with providing a retrospective opinion; (2) in the case of a retrospective opinion, Dr Serry conceded it was more difficult to opine on the extent or effect of mental impairment; (3) crucial information was not available to Dr Serry, namely (a) transcript of interviews with Riley on 15 and 17 July 2014 by the Stewards; (b) transcripts of interviews with members of Riley's staff; (c) transcript of Riley's evidence at the RAD Board hearing; (d) an account from Riley himself of what happened on 13 July 2014; (e) the absence of statements from Riley's

staff who were in communication with him or were present with him at the stables on that day.

The evidence of Dr Serry, Mrs Riley and Messrs Dunnett and Peterson has failed to satisfy the Board to the required standard that Riley's impaired mental functioning (a) was causally linked to a breach of the rule and/or (b) substantially reduced his culpability.

The Interests of Justice Argument

The thrust of Mr Sheales' submission on this point was that his client was suffering from impaired mental functioning and notwithstanding his client had failed to establish a special circumstance under LR 73A(c), it was open to the Board to find that Riley's impaired mental functioning was a special circumstance under LR 73A(d). Upon the whole of the evidence, the Board is not satisfied that, in the interests of justice, the circumstances may be deemed or considered to be special.

Accordingly, the Board has no option but to order as follows: pursuant to Australian Rule 196(5)(vi), Mark Riley is disqualified for a period of three years.

The Board will order that in relation to the deferment of the commencement of the period of disqualification, the date will be 3 March 2015. That is seven clear days.

Pursuant to Australian Rule 177, the horse, Gold For Kev, is disqualified from the race it contested. The Board draws to the attention of Mr Riley and his legal advisers the provisions of Local Rule 72A(i) which is in the following terms:

If a person is disqualified for any breach of the Rules relating to a horse: (a) any horse in which the person has an interest as owner or lessee is disqualified for all races after the disqualification of such person.

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 29 January 2015

SUBJECT: **HEARING RESULT – TRAINER: MARK RILEY**

Panel Judge Russell Lewis (Chair), Mr Josh Bornstein (Deputy) & Mr Geoff Ellis.

Appearances Mr Patrick Wheelahan appeared as Counsel for Mr Riley.

Dr Cliff Pannam QC and Mr Matthew Stirling, instructed by Mr James Ogilvy, appeared as Counsel for the stewards.

Charge 1 Breach of AR 175(h)(i)

The Committee of any Club or the Stewards may penalise: Any person who administers, or causes to be administered, to a horse any prohibited substance: for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race.

Charge 2 Breach of AR 175(h)(ii) [alternative to Charge 1]

The Committee of any Club or the Stewards may penalise: Any person who administers, or causes to be administered, to a horse any prohibited substance which is detected in any sample taken from such horse prior to or following the running of any race.

Charge 3 Breach of AR 178 [alternative to Charges 1 & 2]

When any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.

The charges relate to a prohibited substance, being alkalinising agents as evidenced by total carbon dioxide (TCO₂) at a concentration in excess of 36.0 millimoles per litre in plasma, which was detected in a blood sample taken from *Gold For Kev* prior to running in Race 7 the *Schwepes Handicap* (1400m) at Sandown on Sunday, 13 July 2014.

Plea

Charge 1 - not guilty.
Charge 2 - not guilty.
Charge 3 - guilty.

Decision

Charge 1 - the Board finds the charge proved.
Charge 2 [alternative to Charge 1] - N/A.
Charge 3 [alternative to Charges 2 & 3] - N/A.

The hearing in relation to penalty has been adjourned to a date to be fixed.

**Georgie Gavin
Registrar - Racing Appeals and Disciplinary Board**

**RACING APPEALS AND DISCIPLINARY BOARD
(Original Jurisdiction)**

*RVL Stewards v Mark Riley
Reasons for Decision*

Judge R Lewis	Chair
Mr J Bornstein	Deputy
Mr G Ellis	Member

On 13th July 2014 *Gold for Kev* a horse trained by Mark Riley ran in a race conducted at Sandown racecourse. The race was run at approximately 3.45pm.

A pre-race blood sample was taken from the horse at 2.50pm and was analysed by Racing Analytical Services Limited (RASL.)

That analysis revealed a total carbon dioxide (TCO₂) reading of 37.1 millimoles per litre in plasma which, allowing for the measurement of uncertainty of 1.0, was 0.1 above the permitted threshold of 36.0.

Accordingly, RASL analysis detected a prohibited substance [see AR 178B(2) and AR 178C(1)(a)]

The referee sample was analysed by Racing Science Centre (RSC) Queensland.

That analysis revealed a TCO₂ reading of 36.2 which was 0.2 above the threshold of 36.0 but after taking into account the measurement of uncertainty of 1.0, was 0.8 under the threshold.

Pursuant to the provisions of AR 178D(3) where both laboratories detect the same prohibited substance, the certified findings of both represent prima facie evidence of a prohibited substance being detected.

In this case after taking into account the measurement of uncertainty the RASL finding was over the threshold and the RSC finding was under the threshold.

AR 178D(3) however is an evidentiary provision and does not provide that it is the only evidence upon which stewards may rely to prove the detection of a prohibited substance.

First it should be observed that the results of the analyses of both laboratories were above the threshold of 36.0.

Secondly, the stewards may rely upon other evidence, for example expert explanation for variation in analytical findings and expert opinion as to what conclusions may be drawn from the results of laboratory analyses.

In the event the stewards have issued three charges against Mark Riley.

Charge 1, laid under AR 175(h)(i) alleges that he administered or caused to be administered a prohibited substance for the purpose of affecting the performance or behaviour of the horse in the race.

Charge 2, laid under AR 175(h)(ii) is cast in similar terms except for the allegation that the purpose was to affect the performance or behaviour of the horse.

Mark Riley who is represented by Mr Patrick Wheelahan of Counsel had pleaded not guilty to charges 1 and 2 and denies that he or any of his staff with his knowledge or authority or under his instructions or direction administered a prohibited substance.

Charge 3, laid under AR 178 alleges that a prohibited substance was detected in the blood sample taken prior to the running of the race.

Mark Riley has pleaded guilty to the charge and says that he is unable to offer an explanation as to how or why the horse had a prohibited substance in its system. Implicit in his plea of guilty is an acceptance of the fact that the horse's TCO₂ level was above the permitted threshold.

The Standard of Proof

In proof of Charges 1 or 2, Charge 2 being an alternative to Charge 1, the stewards rely on facts proved by direct evidence and circumstantial evidence i.e. facts proved by a process of inference.

Since these charges are serious and since the consequences, inter alia, which may flow from a conviction on either charge are grave, the standard of proof is the well known *Briginshaw* standard [see *Briginshaw v Briginshaw* (1938) CLR 336 at 362].

The Board must be comfortably satisfied that each element of the charge has been proved. Further, where circumstantial evidence is relied upon, the facts relied upon for the purpose of drawing an inference must also be proved to the Briginshaw standard.

Matters arising from the directions hearing conducted by the Chair on 3 December 2014

At the hearing Mark Riley was present and was represented by Mr Wheelahan.

The stewards were represented as they are in this case by Dr Pannam of Queen's Counsel who appears with Mr Matthew Stirling.

At the directions hearing Mr Wheelahan agreed that in order to achieve the TCO₂ levels found by the laboratories, alkalinising agents would have to have been administered on race day either by nasogastric intubation ("stomach tubing") or possibly orally over the horse's tongue.

Mr Wheelahan also agreed that there were only two persons connected with the stable who were capable of stomach tubing a horse, namely Mark Riley and an employee Ms Jacqui Dalton.

The parties also agreed that a peak TCO₂ reading is generally achieved between 4-6 hours after the administration of a large dose of alkalinising agents.

The Stewards' Case

The stewards allege that race day administration of alkalinising agents was responsible for the elevated TCO₂ levels.

The stewards allege that either Mark Riley personally performed the administration or Ms Dalton, McGill or Evans, employees of Mark Riley's stable performed the administration pursuant to the authority of and under instructions from Mark Riley.

The stewards rely on the results of the analyses of the laboratories and the evidence of Dr Stewart, a highly qualified veterinarian and Dr Vine, an experienced and highly qualified analytical chemist to support the contention that alkalinizing agents were administered to *Gold for Kev* prior to race time on 13 July 2014.

The stewards submit that Mark Riley is an unreliable witness and lacks credibility. Further, they submit that Mark Riley had the means, opportunity and motive to administer alkalinising agents or to cause members of his staff to undertake the administration.

The Defence

Mark Riley's defence to the charge relevantly included:

- a. the evidence of administration by human agency was insufficient because a metabolic disturbance e.g. natural spiking of TCO₂ levels occurred in *Gold For Kev*;
- b. Mark Riley's strong denial of both personal administration and authorising anyone else to administer should be accepted.
- c. *Gold for Kev*, was according to treating veterinarians, a horse that fiercely resisted stomach tubing;
- d. Mark Riley did not have a credible motive to administer a prohibited substance to the horse.

Mark Riley gave evidence to the Board that the only time he was at the stables on race day was between 12.40pm or 12.45pm and 1.05pm and that he was busy preparing his horses to travel to the races.

He denies that during that period or indeed prior to that period on that day he administered alkalinising agents.

In relation to Ms Dalton he denies that he authorised or instructed her to administer alkalinising agents. If she did, then she did so without his knowledge and she was acting outside the scope of her employment.

Evidence

Mark Riley has pleaded guilty to Charge 3 (an alternative to Charges 1 and 2) and by that plea has admitted that a prohibited substance was detected.

On the issue as to whether the prohibited substance was present as the result of metabolic disturbance or whether it was due to administration by human agency, Mr Wheelahan relied on the evidence of Dr Clarke, a highly qualified veterinarian, who offered the opinion that "it cannot be ruled out that the prohibited TCO₂ level (which was just over the permitted threshold) was reached without the administration of alkalinising agents."

The Board is of the view that insofar as Dr Clarke expressed that opinion it is speculative and is not supported by relevant peer-reviewed research.

The statement of Dr Kohnke who supports Dr Clarke's opinion takes the matter no further. Dr Clarke also gave evidence that having regard to laboratory analyses and taking into account measurement for uncertainties, the TCO₂ levels in the horse were below the threshold. Dr Clarke's methodology employed in arriving at that conclusion is not supported by any other reputable racing laboratory in the world. In evidence, Dr Clarke admitted as much.

The Board prefers the evidence of Dr Stewart and Dr Vine as their opinions are based on peer reviewed scientific research and statistical analysis. Their evidence supports the notion that the only credible explanation for the elevated reading of TCO₂ detected in *Gold for Kev* is by way of administration.

Accordingly, the Board is comfortably satisfied that the prohibited substance was present in the horse's system as the result of human agency.

The question which then arises is who administered the alkalinising agents.

It has never been seriously suggested that sabotage by a person or persons outside the stable occurred. The Board is comfortably satisfied of the following facts

- (1) Riley has had at all material times the ability to stomach tube horses, is experienced in that practice and performs such treatments on the horses in his stable. He also has the ability to carry out other possible forms of administration, such as a slurry of alkalinising agents over the tongue via a syringe. Riley admitted that he was capable of and experienced in the stomach tubing of horses and that administration could take place orally via a syringe;
- (2) stomach tubing apparatus, syringes, and alkalinizing agents were found at Riley's stables.
- (3) Riley and several of his staff had access to the horse pre-race on 13 July 2014. The evidence demonstrates that:
 - (a) Dalton was at the stables from 4.30am -8.30am;
 - (b) Barry was at the stables from approximately 5am until 8.30am;
 - (c) McGill was at the stables from approximately 5am until possibly 7am (according to the evidence of McGill) or at least 8.30am (according to the evidence of Dalton) and then again at 9.30-10am; Riley stated that McGill told him that he left the stables at 10am;
 - (d) Jenkins was at the stables from approximately 12.55pm-1.05 pm;
 - (e) Evans was at the stables from approximately 12.45-50pm until 1.05pm;
 - (f) Riley was at the stables from approximately 12:40-45pm to 1:05pm and

- (g) Riley exercises a high degree of control over his staff and the operations of the stable.

On the day in question, stomach tubing equipment and syringes were on the premises and were readily accessible, as were alkalinising agents.

Mark Riley told stewards that horses in his stable were regularly stomach tubed and that he could perform the procedure in 10 minutes or a little longer, the actual delivery of the alkalinising agents by naso-gastric tube taking less time.

Mark Riley told stewards that he first arrived at the stables at 12.40pm or 12.45pm and left at 1.05pm.

During that time he said that he helped staff, including Evans, to prepare horses for travelling to the races and he hitched the float to his vehicle.

He strenuously denied that he treated or authorised treating the horse with any substance.

When first interviewed by stewards on 15 July 2014, Mark Riley said that he was the only person capable of stomach tubing horses [Tab 3B, p 8, para 30].

Thereafter other employees were interviewed including Ms Jacqui Dalton.

Initially Ms Dalton told stewards on 23 July 2014 [Tab 3E] that she was not capable of stomach tubing a horse and that Mark Riley was the only person capable of doing it (page 9, line 9).

On 2 September 2014 at 12.52pm when further interviewed she admitted that she was capable of stomach tubing horses and had done so previously when instructed by Mark Riley [Tab 3M, p 9 & 10]. She also admitted that prior to this further interview, Mark Riley had told her that he was under investigation and that he asked her questions about which she was unable to recall but 'he possibly asked me what time I got to the stables which of course I would have told him I arrived at 4.30am' (p21).

Mark Riley was interviewed at 2.46pm on the same day [see Tab 3N].

He denied ever having directed Ms Dalton to stomach tube horses at his stables.

As to Ms Dalton's presence at the stables on race day she said that she arrived at the stables at 4.30am and left at 8.30am.

Conclusions

The Board is of the opinion that Mark Riley is an unreliable witness. The Board is satisfied that he lied to stewards on the question of whether Dalton had ever stomach tubed horses or had done so on his instructions.

Further, many of Mark Riley's responses to questioning by stewards and cross examination in the hearing before the Board were characterised by ambivalence, equivocation, obfuscation and prevarication.

Shortly prior to the close of the Defence at the hearing before this Board, two written statements of veterinarians were sought to be relied upon by Riley. Both stated that *Gold for Kev* was notoriously difficult to treat with stomach tubing. For at least 6 months prior, Mr Riley did not give any indication to stewards or to this Board in his witness statement that the horse was resistant to stomach tubing. The explanation of Mr Riley for this startling omission was incredulous.

Riley's evidence that he would not have had the time to stomach tube the horse was contradictory and unpersuasive. Similarly, his evidence that horses in his stable were not stomach tubed between 2 June and 15 July 2014 did not survive cross examination intact.

Dr Kelly's evidence was somewhat equivocal. He admitted to having only a hazy recollection of treating the horse and the horse resisting stomach tubing. The Board is not persuaded by his evidence or the untested statement of Dr McInnes which refers to events some years ago, prior to the horse being gelded.

The remaining issue in relation to Charge 1 is whether the stewards have proved that the administration of the prohibited substance was carried out for the purpose of affecting the performance of the horse.

The Board, being comfortably satisfied that the prohibited substance was administered on race day by Mark Riley or a member of his staff, on his instructions, is comfortably satisfied to draw the inference that Riley's purpose was to affect the performance of *Gold for Kev* in the race. In drawing this inference the Board has also had regard to a significant number of cases before it involving elevated TCO₂ levels which demonstrate a widespread belief in the racing industry that such administrations enhances the performance of horses in races. The Board also notes that Mark Riley stood to gain 25% of any prizemoney and also had a \$500.00 wager on the horse.

The Board is comfortably satisfied that Mark Riley or a member of his staff with his authority and pursuant to his instructions administered a prohibited substance and the Board having ruled that in the

circumstances Riley's purpose was to affect the performance of the horse, is comfortably satisfied that Charge 1 has been proved.