



HEARING RESULT

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FROM: Registrar – Racing Appeals and Disciplinary Board

DATE: 10 September 2009

SUBJECT: **HEARING RESULT – TRAINER KELVIN BOURKE**

Panel Mr Brian Forrest (Acting Chair), Mr Geoff Ellis, Mr Ron Taylor

Appearances: Mr Damian Sheales appeared on behalf of Mr Bourke.
Mr Terry Forrest QC appeared on behalf of the RVL Stewards.

Charge Breach of AR 175 (h)(ii)
(h) any person who administers, or causes to be administered, to a horse any prohibited substance:
(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

The particulars of the charge being that as the licensed trainer of the horse *Thisonesonme*, Mr Bourke administered, or caused to be administered, a prohibited substance to *Thisonesonme* prior to competing in the *Brierly Steeplechase* at Warrnambool races on Tuesday 5 May 2009, resulting in a TCO₂ reading in excess of 36.0mmol/L.

Plea Not Guilty

Decision Convicted and disqualified for a period of 6 months, the period of disqualification to commence at midnight Thursday 1 October 2009.

Thisonesonme disqualified as second placegetter of Race 6 the *Brierly Steeplechase* held at Warrnambool on Tuesday 5 May 2009 and the places amended accordingly:

1st – Al Garhood, 2nd – Believe in Victory, 3rd – What an Honour, 4th – Go and Get, 5th – Clearview Bay, 6th – Drumbeater.

Appeal to RAT against severity of penalty allowed: penalty varied to a period of 5 months disqualification.

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

***Reasons for Decision
in the matter of trainer Mr Kelvin Bourke
as heard on Monday 31 August 2009***

Mr B Forrest	Deputy Chair
Mr G Ellis	Member
Mr R Taylor	Member

Licensed trainer Mr Kelvin Bourke was charged by RVL stewards with breaching AR 175(h) (ii) which provides that the Committee of any Club or the Stewards may penalise:

(h) any person who administers or causes to be administered to a horse any prohibited substance:

(ii) which is detected in any sample taken from such horse prior to or following the running of any race

A blood sample taken from the horse *Thisonesonme* trained by Mr Bourke, prior to the running of the *Brierly Steeplechase* at Warrnambool on 5 May 2009 recorded, on post race analysis, a TCO₂ concentration above 36.0 millimoles per litre in plasma.

The analyst finding was 39.0 mmol/L. Referee analysis of the reserve sample was 38.7 mmol/L. Allowing for the uncertainty of measurement of plus or minus 1, the lower sample result was still above the threshold 36.0 and is therefore a prohibited substance; see AR 178B and 178C.

Before the Board the issue was whether Mr Bourke administered or caused to be administered the prohibited substance. The accuracy of the recorded TCO₂ reading was not in issue.

Stewards interviewed Mr Bourke, stablehands Danny Wilson, Len Moore and Gordon Thyne next morning, 6 May 2009. All had travelled to Warrnambool the previous day in Mr Bourke's truck carrying only *Thisonesonme*.

Wilson told stewards he drove the truck, leaving Mr Bourke's Drysdale stables at 5 past 9. Other than two brief stops, first at Waurnd Ponds to pick up Moore and then at Camperdown for a toilet break, there were no other stops during the journey. Moore and Thyne were front seat passengers and Bourke travelled in the back of the truck.

Moore who strapped *Thisonesonme* at Warrnambool told stewards he was picked up at Waurm Ponds Hotel where he had parked his utility. He agreed with Wilson that except for the stop at Camperdown, there were no other stops before Warrnambool and that Bourke travelled in the back throughout.

Thyne told stewards that the only stop was at Waurm Ponds and was “definite” the truck did not stop anywhere else. Mr Bourke said the truck stopped at either Camperdown or Terang so they could get a drink. He remained in the truck. No one checked on the horse and it was not his usual procedure to check on a horse when travelling long distances. All occupants of the truck agreed that Mr Bourke travelled the entire journey in the back of the truck.

However, there were inconsistencies in the evidence as to who was in the truck when it left the stables and where it stopped on the way. Another stable employee, Braden Finn, who was interviewed later, said Moore left the stables in the truck but was alone in saying this. Mr Bourke said Moore was at the stables and drove his (Bourke’s) utility to Waurm Ponds. Wilson confirmed this. Thyne said the truck did not stop between Waurm Ponds and the racecourse contrary to Wilson and Moore, while Bourke was not sure whether it stopped at Camperdown or Terang.

In further evidence Danny Wilson said he rode *Thisonesonme* in trackwork on race morning. He fed the horse breakfast, oats and maize, and dressed the horse for the races. He denied that any alkalinising agents or additives were contained in the breakfast or the night before feed. Asked whether any other staff had access to *Thisonesonme* on race morning prior to leaving for the races he replied that no one would have had anything to do with him.

Danny Wilson also said it was customary for Mr Bourke to give all horses a saltwash drench three to four days before racing. Bourke makes up and administers the drenches via tubing. To Wilson’s knowledge, Bourke gave *Thisonesonme* a saline drench on the Saturday before the *Brierly*. Wilson further stated he had never seen Bourke make up a drench; he did not know what were the ingredients or where they were stored. To his knowledge *Thisonesonme* was the last horse saline drenched on the property and this occurred on Saturday 2 May 2009.

Rohan Hawker the managing owner of *Thisonesonme* said he spoke to Mr Bourke on race morning, Bourke was confident about his chances “whatever beats us would win”. In the event *Thisonesonme* started \$3 favourite and finished second.

During a stable inspection on 6 May 2009, stewards found drenching equipment and among feeds and other substances, a tub of bicarbonate, a bag of potassium chloride, a container of ‘Humidimix’ and one of ‘Instant B’. Drenching equipment, a funnel and a container were

located in a horse stall adjacent to the work areas and a plastic tube was located in the stable office in the main shed. A white container found in the feed room contained a fluid residue which was said to be Salkavite.

When interviewed on 6 May 2009, Mr Bourke told stewards that he gave *Thisonesonme* a saline drench on Sunday 3 May in the wash area but did not drench the horse next day. He said he made up the Sunday drench containing 100 grams of Stressalyte and a Blud powder, but no bicarbonate or any other alkalinising agents. He agreed that he makes up the drenches and gives a saline drench to horses about to race. No one in the stable other than Danny Wilson or himself was involved with the feeding / attending to *Thisonesonme*.

Mr Bourke denied drenching or administering anything to *Thisonesonme* on race day. He could not explain the TCO₂ reading. Questioned about veterinary treatment of *Thisonesonme* leading up to race day, Mr Bourke said: "...he had a blood taken of him, oh, a few days ago now, just a blood count, that's all."

When interviewed on 18 May 2009, Mr Bourke repeated his denial of any drenching on race day. However, contrary to what he told stewards on 6 May 2009, he said he gave *Thisonesonme* a drench on Monday morning 4 May 2009 and that he used Humidimix not Stressalyte as previously stated. The drench, he said was a mixture of 100 grams of Humidimix and 30 grams of potassium in 1.25 to 2 litres of water. Mr Bourke also stated that veterinarian Dr Robert Corver had taken a blood sample from *Thisonesonme* on 4 May 2009 which recorded a TCO₂ reading of 35 mmol/L.

When this matter first came on for hearing on 16 July 2009, it was adjourned following an application by Mr Forrest QC for the stewards, Mr Sheales, counsel for Mr Bourke, consenting; to enable the stewards to make further inquiries into evidence brought to their attention for the first time that day. Stewards then interviewed Dr Corver and Braden Finn. Mr Bourke and Danny Wilson were re-interviewed.

The new evidence which underpinned Mr Bourke's defence to the administration charge, raised the question of whether on the morning of 5 May 2009, Dr Corver had inadvertently administered to *Thisonesonme* a drench intended for *King of Ashford*, another of Mr Bourke's horses and if so, the effect of that drench on the TCO₂ reading in question.

By way of background to this development, at Mr Bourke's training establishment, horses are not boxed but live in small paddocks. There is an L shape stable block on the property, 6 boxes and 4 tie up stalls. Horses are brought to the stable block where they are saddled for trackwork and after work are returned to their paddock. Before racing, horses are generally brought to the boxes for dressing.

Mr Bourke said he spoke to Dr Corver on Monday 4 May 2009 and requested he give *King of Ashford* a saline drench next day as he was due to race on the Thursday. On the Tuesday, morning Mr Bourke said he was at his property for about 45 minutes before he left for the races. Asked whether he saw Dr Corver at his stables that morning "No I don't believe I did, no, no". Asked how does Dr Corver know to go to *King of Ashford*, Mr Bourke replied "Well, if I'm not there, Danny will be there or Mo will be there...." And to how would Dr Corver pick out *King of Ashford* "Danny Wilson told him where he was."

Danny Wilson told stewards he brought *Thisonesonme* from his paddock between 8.30am and 8.40am and put him in the box next to *King of Ashford* who was tied up. No other horses were boxed at that time. He then went to the shed to pack the raceday bag and shower prior to dressing *Thisonesonme* for the races.

While in the shed, Dr Corver approached and without leaving the shed, Wilson said he directed Dr Corver to *King of Ashford* "He's in the box over there" adding "one of the other boys out there will help you."

On returning to the boxes about 10 minutes later, Wilson noticed *Thisonesonme* was there but *King of Ashford* was not. Wilson explained, "someone has obviously put *King of Ashford* out."

Braden Finn began work as a stable employee for Mr Bourke in mid April 2009. He told stewards that on 5 May 2009 he was working in the yard when approached by Dr Corver to give him a hand. Finn followed Dr Corver into the stable block and held the horse while Dr Corver gave it a drench. The horse given the drench was the only horse in a box. Finn said he did not know what horse was to be drenched and the vet did not mention the horse's name to him. The horse given the drench was rugged and tied up when he entered the box with the vet. He did not know the name of the horse and he could not recall its colour. Asked what horse he believed it to be, he answered "I have no idea."

Finn denied bringing the horse in from the paddock or taking it back, but then gave a qualification of sorts, "I remember leaving him in the box after he salined it. I could have taken him back half an hour later, I might not have, I can't tell you."

After being drenched the horse remained in the box while Finn went about his work outside. As to where the horse went "I couldn't tell you" and similarly answered questions as to whether *Thisonesonme* and *King of Ashford* worked that morning. Finn could not remember when he next saw Danny Wilson after the vet left. He also thought Mr Bourke appeared after the horse was drenched.

Dr Corver confirmed during a conversation with Mr Bourke in the evening of 4 May 2009 to discuss the results of a blood sample taken from *Thisonesonme* earlier that day, Bourke asked him to drench *King of Ashford* next morning.

Dr Corver estimated he arrived at the stables next morning at 8.40am and left 10 minutes later. After arrival he mixed the drench, a sachet of Blut power, 2 ½ heaped scoops of Salkavite (estimated weight 150 grams) and 1 scoop of bicarbonate of soda (60 grams) in water. He then walked to the shed, “I saw Danny Wilson. He asked me what I had to do and I informed him that Kelvin had asked me to saline *King of Ashford*.” He said to me, “He’s in the box. One of the boys will help you.” Dr Corver then walked across the courtyard area, to where the boxes are, saw Braden Finn and told him he had to saline drench *King of Ashford*. There was only one horse in a box and he gave it the drench. He then packed up and left.

Asked if he had noticed any resemblance of horses from one day to the next, Dr Corver replied “yes” and to the suggestion he may have drenched *Thisonesonme* said: “That’s the possibility. As far as my recollection is, I was asked to saline drench *King of Ashford* – they presented to me the horse that I presumed is *King of Ashford* and I’ve done the job that I was asked to do.”

In further evidence, Dr Corver said he had taken blood samples from *Thisonesonme* twice in the previous month and had treated *King of Ashford*. He said they are very similar horses and he could not identify one from the other – same colour and height with no real distinguishing marks. “I guess I can’t be certain that it was *King of Ashford*. At the time in my own mind and even you know the next day, my assumption was that I saline drenched *King of Ashford*.”

The Board notes that in interviews on 6 May and 18 May 2009, Mr Bourke could offer no explanation for the TCO₂ reading. The element of surprise may account for his state of mind when first interviewed, indignant as he was at being questioned when preparing to go to the races. By 18 May and subsequently, he had had plenty of time to “backtrack” as he said he had done, yet did not take the opportunity to advance the ‘wrong horse’ possibility to stewards until the hearing date.

No staff member appears to have been made aware of Mr Bourke’s arrangement for *King of Ashford* to be drenched. Danny Wilson did not know until Dr Corver arrived, and then, in the belief that *Thisonesonme* and *King of Ashford* were in adjoining boxes, directed Dr Corver to the boxes without any further detail or instruction other than, “he’s in the box, one of the other boys will help you.” Dr Corver gets Finn to help him and without telling Finn what horse he has to treat (according to Finn) or otherwise further assuring himself he has the

right horse, proceeds to drench the only horse in a box. Given the nature of Wilson's instruction and the presence of one horse, the absence of any further check is probably understandable.

What is unexplained and unanswered were the movements of *King of Ashford* that morning and by whom. Finn cannot assist in any way. Mr Bourke cannot throw any light on the situation, saying he was not present. Nor is there evidence of any inquiry made of other staff members. Instead Mr Bourke is content to rely on Danny Wilson's word. "He wouldn't say *King of Ashford* was there if he wasn't."

Possibilities abound in all of this. The vet is unsure and no one else knows. It is possible *Thisonesonme* was given a drench, equally *King of Ashford* may have been the recipient as is the possibility of either horse being the one in the box when the vet arrived.

The Board regards Mr Bourke's unqualified support for Wilson on this occasion as opportunistic and in sharp contrast to when interviewed on 18 May when he was prepared to be dismissive of what Wilson had to say. Tr. page 16.

Danny Wilson is the only identifier of both horses but the Board does not have much faith in his evidence because when interviewed the day after Dr Corver's visit he revealed himself to be an unreliable witness prepared to mislead stewards about the last time a horse was drenched.

All in all the state of the evidence is such that it falls considerably short of enabling the Board to be reasonably satisfied that *Thisonesonme* was drenched by Dr Corver on the morning of 5 May 2009.

The Board now turns to consider other evidence. On Thursday 2 May 2009, an RVL vet took a blood sample from *Thisonesonme* at Mr Bourke's stables at 7.04am. The horse was kept under surveillance from then until arrival at Warrnambool racecourse where a further blood sample was taken at 2.19pm prior to it competing in the *Grand Annual Steeplechase*. On analysis the TCO₂ readings of the two samples were 31.9 and 32.8 mmol/L respectively.

The sample history of *Thisonesonme* also revealed that a routine pre-race sample on 9 April 2009 recorded 30.6 mmol/L. Eight other pre-race samples from 11 June 2007 to 30 July 2008 when *Thisonesonme* was in the care of other trainers ranged from 30.8 to 33.5 mmol/L, with an average TCO₂ reading for all tests, excluding the 5 May 2009 result, of 32.1 mmol/L.

The Board considers the sample history of *Thisonesonme* is instructive in that except for the subject reading, the results of all other tests were unremarkable in that none were suggestive of any naturally occurring abnormally high reading.

The Board also notes that Dr Paul O'Callaghan, RVL's Chief Veterinary Officer, wrote to Mr Bourke on 3 October 2008 informing him of an elevated TCO₂ reading of 36.4 mmol/L in a screening sample taken from *King of Ashford* at Geelong on 2 October 2008.

Dr O'Callaghan in a statement dated 13 August 2009 and in oral evidence made the following points:

- It is extremely unlikely that a horse could exceed 36.0 mmol/L of TCO₂ in plasma without administration of an alkalinising agent. The statistical likelihood of an untreated horse exceeding 37.2 mmol/L is in excess of 1 in 641,000.
- A horse's plasma TCO₂ can be expected to peak within 2-12 hours after administration of alkalinising agents and between 2-8 hours with sodium bicarbonate.
- TCO₂ levels return to normal within 24 hours of administration.
- The drench administered by Mr Bourke on 4 May 2009 would not affect the TCO₂ levels as Humidimix and Blut powder do not contain alkalinising agents.
- The only plausible explanation for the reading recorded on 5 May 2009 is that during the morning the horse was administered approximately 200 grams or more of sodium bicarbonate or an equivalent amount of other alkalinising agents. A mistaken administration of 74 grams (Dr Corver) would not be a realistic explanation for the level that was recorded.

Dr John Vine, Laboratory Director of Racing Analytical Services Limited, was of the opinion that an administration of 74 grams of sodium bicarbonate might raise a horse's TCO₂ concentration by approximately 1-2 mmol/L with a maximum level some 3-6 hours after administration, but that cannot provide an explanation for the measured concentrations in the samples collected later that day.

In cross examination both Dr O'Callaghan and Dr Vine were challenged at length on their opinions and on studies relating to TCO₂. In the Board's view, the challenge failed.

Dr Glen Roberston-Smith, a specialist in equine surgery provided a statement on behalf of Mr Bourke containing the results of a drenching trial involving 6 unidentified racehorses in training. It was his opinion that the subject TCO₂ reading is explicable by an administration of a drench (on his instructions containing 100 grams of sodium bicarbonate) at the time it was said to be administered on 5 May 2009.

The Board does not have confidence in the results of the trial, as apart from the question of identity, other unknown factors associated with the horses and the methodology of the testing, question their reliability. It is also noted that a test during the hearing confirmed the

accuracy of the estimates of sodium bicarbonate in Dr. Corver's drench relied upon by Dr.s O'Callaghan and Vine.

Proceedings before the Board call for adequate evidence of sufficient force to justify the Board being comfortably satisfied in relation to the charge before it, having regard to the seriousness of the charge and the gravity of the consequences flowing from a particular finding (*Briginshaw V Briginshaw*, High Court, per Dixon J.)

In approaching its task, the Board is required to determine whether a combination of all the facts and circumstances which the Board finds or accepts provide a compelling basis from which a reasonable inference of what is alleged may be drawn.

There is a lack of direct evidence implicating Mr Bourke. However on all the facts and circumstances there is a strong circumstantial case against him. Although it was customary for Mr Bourke to drench his horses leading up to racing, his evidence revealed, at best, a faulty recollection of the timing of his administration of drenches. On the morning of 5 May 2009, he had the opportunity to drench *Thisonesonme*, a horse that when under stewards observation two days later, TCO₂ readings of blood samples were found to be normal.

The Board does not accept Mr Bourke's denials of administration of alkalinising agents to *Thisonesonme* on 5 May 2009, to be the truth.

The Board is satisfied to the requisite standard of proof that on 5 May 2009, Mr Bourke, in breach of AR 175(h) (ii), administered *Thisonesonme* alkalinising agents of such quantity as to elevate the TCO₂ to the levels recorded in the blood samples taken that day.

For these reasons, the Board finds the charge against Mr Bourke of being in breach of AR 175 (h)(ii) proved.

TRANSCRIPT OF PROCEEDINGS

RACING APPEALS AND DISCIPLINARY BOARD

MR B. FORREST, Acting Chairman
MR G. ELLIS
MR R. TAYLOR

EXTRACT OF PROCEEDINGS

TRAINER: KELVIN BOURKE

DECISION

MELBOURNE

THURSDAY, 10 SEPTEMBER 2009

MR T. FORREST QC (instructed by Minter Ellison) appeared on behalf of the Stewards

MR D.P. SHEALES (instructed by Lander and Rogers) appeared on behalf of Mr K. Bourke

ACTING CHAIRMAN: The charge which has been found proven against Mr Bourke of administering a prohibited substance is a very serious one. Mr Bourke is a trainer of long experience and a renowned former cross-country jockey. Although this is his first TCO2 offence, he knows the risks associated with alkalinising agents.

A verbal warning in 2006 and a warning letter in October 2008 about elevated TCO2s intended as wake-up calls went unheeded as there was no evidence of a precautionary approach to, or the keeping of records of, the administration of alkalinising agents as might avoid a breach of the drug rules. Additionally, trainers are constantly reminded in “Inside Racing” of the hazards of alkalinising agents.

Mr Bourke was prepared to cheat in order to obtain an unfair advantage for his horse to the detriment of participants complying with the rules and who are entitled to expect that competitors do so.

In drug matters, both denunciation and deterrence are important considerations, denunciation of the conduct and deterrence not only to the offender but to others who might be minded to engage in similar conduct.

The present case, one of administering a prohibited substance, is, as already stated, a very serious one. Culpability for the offence rests entirely with Mr Bourke, conduct that was not negligent or merely reckless but deliberate. Nor was there any sign of remorse.

The Board has considered the submissions of counsel and has taken into account Mr Bourke's reputation in the industry and his personal circumstances. The penalty which the Board considers appropriate in all of the circumstances of this case is a disqualification of six months and that is the decision of the Board. The period of disqualification is to commence on 1 October 2009.

Further, the finding of the Board triggers the operation of AR.177 which provides for the mandatory disqualification of Thisonesonme from the Brierly Steeplechase at Warrnambool on 5 May 2009 in which it finished 2nd and the placings are amended accordingly.

END OF EXTRACT