

APPEAL PANEL OF RACING NEW SOUTH WALES

APPEALS OF STEPHEN MCLEAN, DANIEL HENKEL AND HANNAH OLDEN

Panel: Mr R Beasley SC, Presiding Member; Mr J Murphy; Mr J Nicholson

Appearances: Mr M Van Gestel for the Racing NSW Stewards

Mr C Bova SC and Mr J Anderson for Mr McLean, instructed
by Mr J Baxter of Blanchfield Nicholls

Mr D Henkel Self

Ms H Olden Self

Date of hearing: 16 December 2021

Date of reasons: 21 December 2021

REASONS FOR DECISION

The Principal Member

Introduction

1. Following an investigation, and provision of evidence from the Racing NSW Investigations and Surveillance Unit, on 30 September 2021 Racing NSW Stewards charged licensed foreman Stephen McLean with a breach of AR231(1)(b) of the Australian Rules of Racing (**the Rules**) for “*failure to exercise reasonable care, control and supervision to prevent*

acts of cruelty committed on” a thoroughbred horse being trained by Mr Bjorn Baker. The horse is a 2-year-old gelding (Frosted x Sixty-four) that does not appear to have been named yet (**the horse**).

2. On the same day, charges under AR 231(1)(a) were brought against licensed stablehands Daniel Henkel and Hannah Olden, who were alleged to have “*committed an act of cruelty on the [horse]*” on 28 August 2021.
3. “Cruelty” under the Rules is defined to include “*any act or omission as a consequence of which a horse is mistreated*”. The particulars of the charge under AR 231(a) against Mr Henkel were that:

1. *You are a licensed stablehand with Racing NSW.*
2. *On the morning of Saturday 28 August 2021, you were assisting licensed foreman Mr Stephen McLean in attempting to have The Frosted Gelding enter the Warwick Farm equine pool to swim.*
3. *While assisting Mr McLean and in an attempt to force The Frosted Gelding to enter the equine pool, you obtained a Polyethylene pipe (Poly Pipe) and struck The Frosted Gelding on no less than 8 occasions with the Poly Pipe, with a number of those strikes being inflicted with force.*
4. *Such action being an act of cruelty as it resulted in The Frosted Gelding being mistreated.*

4. The particulars of the AR 231(a) charge brought against Ms Olden were the same as for Mr Henkel, save for particular 3, which is as follows:

While assisting Mr McLean and in an attempt to force The Frosted Gelding to enter the equine pool, you obtained a conduit pipe (Conduit Pipe) and struck The Frosted Gelding on no less than 5 occasions with the Conduit Pipe, with several strikes being inflicted with force.

5. The particulars of the AR231(1)(b) charge brought against Mr McLean are as follows:

1. *You are a licensed foreman with Racing NSW.*
2. *On the morning of Saturday 28 August 2021, you were in charge of The Frosted Gelding, and while leading the horse, you were attempting to have The Frosted Gelding enter the Warwick Farm racecourse equine pool to swim. Licensed stablehands Mr Daniel Henkel and Ms Hannah Olden were assisting you with this process.*

3. *In an attempt to force The Frosted Gelding to enter the equine pool, licensed stablehand Mr Henkel obtained a Polyethylene pipe (Poly Pipe) and struck The Frosted Gelding on no less than 8 occasions with the Poly Pipe, with a number of those strikes being inflicted with force and Ms Olden obtained a conduit pipe (Conduit Pipe) and struck The Frosted Gelding on no less than 5 occasions with the Conduit Pipe, with several strikes being inflicted with force.*
 4. *The actions of Mr Henkel and Ms Olden were acts of cruelty as they resulted in The Frosted Gelding being mistreated.*
 5. *During such incident, as the person in charge of The Frosted Gelding, you failed to exercise reasonable care, control, and supervision of The Frosted Gelding, to prevent the acts of cruelty particularised above.*
6. Each appellant pleaded guilty to a breach of the rule they were charged with. On 22 October 2021, a penalty of a 4-month disqualification was imposed on Mr McLean, commencing on 22 October 2021. Mr Henkel was disqualified for 4 months and 2 weeks. Ms Olden was disqualified for a period of 3 months. Each of the appellants has appealed to the Panel against the severity of the Penalty imposed upon them. Prior to the hearing of this appeal, on 25 October 2021 they were each granted a stay of the penalty imposed upon them pending the outcome of the appeal.
7. At the appeal hearing, the Stewards were represented by Mr M Van Gestel, the Chairman of Stewards for Racing NSW. Mr McLean was represented by Mr C Bova SC and Mr J Anderson. Mr Henkel and Ms Olden represented themselves. An appeal book containing the transcript of the Stewards' Inquiry was tendered in evidence, and marked as Exhibit A. This book contained the exhibits from the Stewards' Inquiry, which retain the number allocated to them at that inquiry. The Stewards also tendered the Poly Pipe and Conduit Pipe used on the horse. For Mr McLean, a statement and supplementary statement of his, and some additional character references were also tendered. No oral evidence was given at the appeal hearing.

Evidence

Film

8. The incident forming the basis for each charge was filmed by Ms Patricia Cozzi, a swab official with Racing NSW: Exhibit 1. The film makes good the particulars alleged in the charges. It shows Mr McLean holding and restraining the horse with the reigns. It shows Mr Henkel striking the horse as alleged. The film has sound. The Poly Pipe makes a loud whipping sound, and can be heard making contact with the horse. The horse is struck by Mr Henkel on its rump with a considerable degree of force. The film also shows Ms

Olden striking the horse with the Conduit Pipe as it reversed up the chute that leads to the pool. She uses force, but what appears to be less force than Mr Henkel.

9. The horse suffered no physical injuries as a result of being struck: Exhibits 17 and 18. Based on the evidence of the Chief Veterinarian of Racing NSW, Dr T Koenig, I find however that the horse would have experienced some degree of pain when struck by the pipes: T72 L3290 – T73 L3295.
10. Ms Cozzi's view was that what she observed was a "flogging": Ex 4 L110-128. That description might in part be influenced by her observations that the horse was struck on additional occasions to those captured on film – a matter denied by the appellants. While the term "flogging" might be too strong, in the sense that I would usually associate such a word with conduct that caused an injury such as a welt, the film shows highly inappropriate conduct. It shows clear mistreatment of a horse, albeit mistreatment that fortunately fell short of causing physical injury.

Mr Mclean's evidence of the incident

11. Mr McLean was the senior licensed foreman in charge, although he was formally employed as a "Racing Manager" by licensed trainer Mr Bjorn Baker. His employment with Mr Baker commenced on 25 March 2019. Mr McLean is 29 years of age, and has been employed within the racing industry since he was 15 years old.
12. As to the incident, although more than one attempt (and perhaps 4) was made to get the horse to enter the pool, there is no evidence that Mr McLean struck the horse. It would seem that several attempts were needed to try and get the horse to enter the pool, and that the horse ran backwards out of the chute on the first attempt: T13 L564. Mr McLean told the Stewards in his evidence at their inquiry that he did not ask or direct either Mr Henkel or Ms Olden to pick up the pipes. He did however instruct Mr Henkel to "tap the horse on the rump" to encourage it to go forwards down the chute to the pool, largely it seems because of the noise the pipe makes when used in a whip like action: T14 L595-599.
13. Although he agreed that he instructed Mr Henkel to "tap" the horse with the poly pipe, Mr McLean denied instructing Mr Henkel to "hit," "strike" or "belt" the horse: T15 L682. Further, he denied seeing Mr Henkel strike the horse with the poly pipe: T16 L702. Seemingly, this is why he did not direct Mr Henkel to stop striking the horse – he said he

did not do so as he “was more focused on the horse” and “just focused on the horse to observe if he’d taken a forward motion step”, “I hadn’t observed the hitting from Dan”: T 16 L 694 and 718; T17 L748.

14. I do not accept Mr McLean’s assertion that he did not see or become aware of Mr Henkel striking the horse. While I accept that he was focused on his role in holding the reins of a horse who clearly did not want to enter the pool and was using his considerable strength to back out of the chute, the fact that Mr Henkel was striking the horse with the poly pipe could not have been missed by Mr McLean. The film makes that exceedingly obvious. Mr McLean is not only in close proximity to Mr Henkel and the horse, but he could not have failed to hear the very loud sound made by the poly pipe when being used by Mr Henkel.
15. Mr Bova suggested that it may have not been squarely put to Mr McLean at the Stewards’ Inquiry that he could have failed to see or notice Mr Henkel striking the horse. I do not accept that – the Chairman raised the issue sufficiently, and more than once, and in the context of the film having been viewed, which alone demonstrates it is fanciful to assert that Mr McLean could have failed to observe or notice Mr Henkel striking the horse.
16. In contrast to the evidence referred to above, Mr McLean frankly admitted that Mr Henkel’s actions involved “definitely more than a tap,” and that the conduct as a whole was inappropriate, and amounted to mistreatment of the horse: T15 L663; T17 L747-757.
17. One further aspect of Mr McLean’s alleged role in the incident should be mentioned. In her evidence to the Stewards, Ms Cozzi suggested she had been told that Ms Roche had heard Mr McLean say to one or both of Mr Henkel and Ms Olden that if they did not help him get the horse in the pool they would not have a job on Monday: Exhibit 4 L 177-9; T 52 L 2355-2375. Mr McLean denied saying this, and Ms Roche said she did not hear it: Ex 8 L 370-380; Ex 5 L259. I find that Ms Cozzi may have been mistaken, as there is also no support for this part of her evidence from either Mr Henkel or Ms Olden, who denied Mr McLean had said words to that effect: Ex 9 L280-290. However, Ms Roche provided corroboration to Mr Henkel and Ms Olden’s evidence and submissions that Mr McLean became very frustrated by the horse’s refusal to enter the pool: Ex 5 T 231-252 (see also Ex 10 L 289-302).

Mr Henkel's evidence of the incident

18. Mr Henkel is a licensed stablehand, still employed by Mr Baker. He is 40 years of age, but has only recently become involved in the thoroughbred racing industry, commencing in June 2020 when he was employed by Mr Baker as both a stablehand, and someone who can perform duties as a “maintenance manager”. He is a relatively inexperienced thoroughbred horse handler.

19. Mr Henkel said that he was handed the poly pipe by another trainer (Ms Roche, who was in the vicinity of the pool at the time of the incident) but did not use it “until [Mr McLean] told me”: T22 L965. Precisely what instructions Mr McLean gave Mr Henkel are not clear on the evidence, although he seems to have been told once he had the poly pipe to not let the horse go backwards, which he interpreted to mean to “tap” the horse on the rump: T22 L967-980. As the incident progressed, Mr Henkel noticed that Mr McLean was becoming increasingly “frustrated” with the horse, and also that because of a bend in the poly pipe, he felt he was not getting “decent contact” with the horse, and so he “tried to do it a little bit harder”: T23 L1008. This evidence might be something of an understatement. Certainly from the vision and sound of the film, Mr Henkel appears to be striking the horse with some force. However, Mr Henkel denied that he was trying to inflict pain on the horse: T24 L1057-1085. He did however accept that his actions were not reasonable, and that the strikes “towards the end” may have been excessive, which is reflected in his plea of guilty to breach of AR 231(1)(a): T26 L 1184; Ex 9 L 440-442.

20. When led by Mr Anderson at the Stewards’ Inquiry, Mr Henkel asserted that part of his conduct in striking the horse with the poly pipe was to prevent it rushing backwards up the chute where there were perhaps three other horses and strappers: T 38 L1691-1703. He therefore asserted a safety concern, and was worried about risk of injury to others. I accept that there were other horses and strappers at the top of the chute that cannot be seen on the film, but I do not accept that their presence was any real motivation for Mr Henkel’s conduct. I do accept however that Mr Henkel did not intend to cause the horse any injury by his conduct.

21. One further aspect of Mr Henkel’s evidence that should be mentioned is that he has seen the poly pipe used on other horses at the pool area before the incident involved in this

appeal. He did not identify who these persons were, other than the pool attendant: Ex 9 L 361-395.

Ms Olden's evidence

22. Ms Olden, who is a licensed stablehand who was employed by Mr Baker as a foreman (although more junior to Mr McLean) had only been working for Mr Baker for 10 days at the time of the incident. While only 27 years of age, Ms Olden has considerable experience with horses, and has worked for other trainers. She also holds a Diploma in Equine Veterinary Nursing.
23. At the time of the incident, Ms Olden was injured. She had a broken rib and an injured hand (Ex 10 L367) and was supposed to be on light duties. She said she could swim horses, although whether light duties would involve dealing with a horse as perhaps difficult as the horse involved here might be a different matter. In any event, Ms Olden described the horse as being “quite difficult”, and told the Stewards that there were four attempts to get him into the pool on the day of the incident: T29 L1302. She was handed the conduit pipe by “a person” (T 31 L 1408) and was told by Mr McLean to “tap the horse” with the pipe until he “moves forward” (T 31 L1380-1387) although it might be that this is what Ms Olden interpreted to be what she was required to do. She also said that she in part was striking the horse with the conduit pipe to prevent it rushing backwards up the chute where there were other horses and strappers. In this sense, she also suggested a safety aspect to her conduct. She agreed however that the amount of force she used was not appropriate: T34 L1527; T35 L1577. She did however feel to some extent that she had to do what she was told: Ex 10 L320-328.

Submissions

Stewards

24. As to the proper approach to imposing penalties, and in particular for breaches of AR 231, Mr Van Gestel first drew to the Panel's attention a list of precedent penalties which demonstrate that for breaches of the welfare rules a disqualification is almost always imposed. He placed particular emphasis on the Panel's decision in *The Appeal of Lisgny* (RAP, 9 June 2021) which involved a severity appeal brought by the appellant who had pleaded guilty to a breach of AR 231(1)(a) in circumstances where he was found to have used spurs during trackwork that were not approved by racing authorities. He was further

found to have used those spurs with excessive force, which caused significant lacerations to the abdomen of the horse he was riding. In *Lisgny* the Panel made the following observations about the purpose of imposing penalties under the Rules, and about the likely penalty to be imposed for a breach of AR 231:

13. *Acts of cruelty against racehorses in breach of AR231(1)(a) involve amongst the most serious offending under the Rules of Racing. Persons who intentionally engage in acts of cruelty against horses will almost invariably be disqualified for lengthy periods. Depending on the level of carelessness or recklessness involved, even unintentional acts of cruelty in breach of AR231(1)(a) will in most instances result in a penalty of a lengthy disqualification.*

14. *It is a mistake to think that the purpose of imposing penalties for breaches of the Rules of Racing is punishment. They are protective in nature, in the sense that they are designed to protect the image and integrity of racing. This of course looms particularly large when cruelty offending is being considered or offending such as under AR134 involving excessive use of spurs that causes injury. Penalties are also imposed in order to deter the kind of conduct relating to all three charges in question here. In relation to these principles of penalty, see generally *The Appeal of Kevin Randall* (RAP 28 May 2021) at [48]-[51] and the other decisions and judgments referred to therein.*

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20. *The penalty for a breach of AR231(1)(a) - which involves the infliction of cruelty on a horse - will almost always involve a disqualification. Excessive use of spurs in breach of AR134, which cause injury to a horse, will also almost invariably result in disqualification. Very frequently for such offending nothing short of a relatively substantial period of disqualification will achieve the purposes of imposing penalties under the Rules. The Panel also accepts that the public perception would be that a disqualification is warranted for breaches of these Rules. A cruelty offence can simply never be treated with anything other than the utmost seriousness. However, the Panel must also impose penalties based on a consideration of all of the facts before it. In this case, the Appellant used spurs that were owned by a licensed trainer who had instructed him to use them. This is not an excuse for the*

Appellant using spurs that were not authorised, but it is, to some degree, relevant to penalty.

25. As to the facts of this appeal, Mr Van Gestel submitted that the appellant's Henkel and Olden clearly intended to strike the horse with the pipes, and did so with considerable force. Their actions should be found to have caused pain, and were as a matter of obviousness entirely unacceptable and inappropriate. Mr Van Gestel submitted that such conduct has the potential to, and does, cause real damage to what he described as racing's "social license." In short, he submitted that this conduct is the kind of conduct that can do enormous harm to the reputation and image of a sport and industry that employs tens of thousands of people directly, and generates enormous revenue for the State.
26. It can be stated now that Mr Van Gestel's submissions are accepted. The conduct of the appellants Henkel and Olden in striking the horse in the manner they did is an obvious example of conduct highly damaging to the image of racing. I further accept Mr Van Gestel's submissions that there were obvious alternatives to the unacceptable conduct of the appellants. One was to use a "bully whip" – not to actually whip the horse, but to tap it around the fetlocks to encourage it forward. Another option, and perhaps the best for this horse on the day in question, was to leave an attempt at swimming for another time, rather than hurting and potentially traumatising him (and creating what looked to be a somewhat dangerous situation) by persisting with attempts to force the horse into the pool.
27. As for the appellant McLean, Mr Van Gestel submitted that he was the senior person in charge. He urged the Panel not to accept Mr McLean's claims that he did not notice the horse being struck. As mentioned above, I do not accept this claim. I further accept Mr Van Gestel's submission that Mr McLean had a clear obligation to prevent the mistreatment of the horse by stopping the employees he was in charge of from striking him. Instead of doing so, at a minimum, by doing nothing to prevent the conduct of Mr Henkel and Ms Olden, he encouraged it by omission.
28. Finally, in respect to all appellant's, Mr Van Gestel submitted that a penalty of a fine would be totally inadequate as a response to their respective breach of the Rules. He submitted only a disqualification of the kind imposed by the Stewards would send the right message

that racing authorities deplore and will not tolerate mistreatment of horses of the kind involved here by licensed persons.

Mr McLean submissions

29. Mr Bova first drew to the Panel's attention that his client had not been charged with a breach of AR 231(1)(a) (committing and act of cruelty), but rather had pleaded guilty to a breach of failing to exercise reasonable care and supervision of the horse such as to prevent the conduct of the other appellants (AR 231(1)(b)). His offending under the Rules therefore was akin to negligence, rather than involving conduct where there was any intent to be cruel or mistreat the horse. He submitted then that there should not therefore be some automatic application of precedent penalties for breaches of AR231(1)(a) to his client's breach of AR 231(1)(b).

30. Mr Bova also accepted and placed reliance on the Panel's decision in *Lisgny*, but submitted that his client's conduct was more closely related to the breach of the rules of licensed trainer Kym Waugh who was involved in the same incident as Mr Lisgny. Ms Waugh, who was not present at trackwork, had instructed Mr Lisgny to use the non-approved spurs, although she was unaware the spurs used were not approved for use. She also had of course not instructed Mr Lisgny to use the excessive force he did. Ms Waugh was fined a total of \$7,500. Mr Bova submitted that in circumstances where the Panel should find that Mr McLean had not noticed the conduct of Mr Henkel and Ms Olden, he should be penalised with a fine as Ms Waugh was, and submitted that his client's conduct was less serious than the conduct of Ms Waugh: McLean submissions at [35]. That submission was based on the fact that Ms Waugh had instructed Ms Lisgny to use the spurs that had not been approved by Racing NSW, and their use had caused real and nasty injuries to the horse Tarsus: McLean submission at [37]. By contrast, Mr McLean had only instructed Mr Henkel and Ms Olden to "tap" the horse, and no injury had been caused. The submission made was that the appropriate penalty was a fine in the sum of \$5,000, reduced to \$3,750 on account of Mr McLean's plea and cooperation: McLean submissions at [47].

31. Mr Bova also submitted that the penalty imposed by the Stewards on Mr McLean should be substantially reduced (to the fine suggested or at a minimum to a suspension) based on the following matters:

- (a) While his conduct can be described as negligent, Mr McLean did not have any intention for the horse to be harmed. In fact, the horse suffered no physical injury.
- (b) An extensive list of character references submitted for Mr McLean establish that he has been a highly competent and caring horse person for a long period of time.
- (c) He is highly unlikely to offend in this manner again.
- (d) He pleaded guilty at an early opportunity, and cooperated fully with Stewards. That conduct, and other evidence, including his statements, demonstrate proper insight into his offending, and genuine contrition.
- (e) His breach of the Rules, and the penalty imposed by the Stewards, have caused proven hardship. His employment with Mr Baker was terminated in September. He obtained employment with another trainer in October, but that job ended when he was disqualified. Since the time that a stay was granted, Mr McLean has obtained a position at the stables of Ms Waterhouse and Mr Bott. If a suspension is imposed, in lieu of a disqualification, duties other than those involved in the training and handling of horses will be offered to Mr McLean during the period of any suspension.

32. I accept the submissions made by Mr Bova for Mr McLean outlined in [31(a) to (d)] above. As to (e), while hardship is an almost invariable consequence of disqualification, and the principal purpose of penalties remains what is set out in *Lisgny* at [13] (see [24] above), I consider that the matters concerning Mr McLean's employment are still a relevant consideration to the appropriate penalty to be imposed upon him.

Mr Henkel

33. Through references he tendered, and from his statement and submissions, I accept that Mr Henkel has been a person of good character prior to this offending. He is relatively inexperienced with the handling of horses, having spent most of his working life in the RFS. I accept, despite his conduct here, that he genuinely cares for horses, and loves working with them. I accept that he did not intend to harm the horse. I accept he might not have intended to inflict pain on the horse, but his actions with the poly pipe were at least

negligent if not reckless as to whether pain was being inflicted, even if that was not his intent.

34. Mr Henkel is genuinely remorseful for his conduct, and pleaded guilty at an early opportunity. He has retained a position with Mr Baker while on a stay. He will be engaged in duties other than training or handling horses if he is suspended rather than disqualified.

Ms Olden

35. Ms Olden also tendered references in support of her application for a reduced penalty. These references support the view that she is a highly competent and caring horse person, and a person of good character. I accept she did not intend to injure the horse, or inflict pain. To the extent this can be determined from the film, she appears to be using less force with the conduit pipe than Mr Henkel was with the poly pipe.

36. Ms Olden is also genuinely contrite, pleaded guilty to the charges, and cooperated with the Stewards. She too will retain her position with Mr Baker if suspended rather than disqualified.

Resolution

Mr McLean

37. As stated above, I do not accept that Mr McLean could have failed to notice that the horse was being struck by Mr Henkel and Ms Olden in the manner it was. He was the senior person in charge, and should have stopped them. In part, Mr Henkel and Ms Olden's conduct in my view is a result of his failure as the senior foreman – in effect their “boss” – to stop them from using the pipes on the horse in the manner they did.

38. The imposition of a disqualification of the kind imposed by the Stewards here on Mr McLean is in the range of rational penalties that could be imposed for his breach of the rule. If all there was to go on was the film, in my view this would be the appropriate penalty. Nothing less would provide the proper protective measure needed to demonstrate that racing authorities will not tolerate conduct of this kind by a foreman in failing to supervise the handling of a horse such that it is mistreated. Nothing less would send a proper message of general deterrence.

39. However, there is more to consider here than just the film. Before turning to those matters, I should first state that I reject the submission that a fine would be an appropriate penalty, and certainly not a fine of \$3,750. There is no proper analogy in my view between the conduct of Ms Waugh referred to above, and that of Mr McLean. Ms Waugh in effect made a mistake about whether spurs she asked to be used had been approved by Racing NSW. That was the extent of her culpability. That is why she received a fine, rather than a more severe penalty. She did not stand next to a horse, holding its reins, while two other persons hit that horse with pipes. There are only two proper options for penalty here – a suspension or a disqualification.
40. Having considered all of the submissions made for Mr McLean referred to above, I am persuaded that a suspension should be imposed rather than a disqualification. This is a close-run thing, and I accept all the submissions made by Mr Van Gestel about the damage or potential damage done to racing's social license by conduct of this kind, and that welfare and integrity issues are paramount to the industry as a whole. However, I consider a suspension is a sufficient penalty in the circumstances here to fulfil the objectives of imposing penalties under the Rules. This is in part because I accept the conduct here was out of character. I am confident that Mr McLean will not engage in a similar breach of the Rules in the future. Importantly, like Mr Lisgny, I accept he did not intend for the horse to be harmed. In my view that does place his conduct into a different category to offending under the welfare rules to persons found to have intentionally been cruel, or to have been indifferent to whether they were being cruel. By contrast, Mr McLean became frustrated, was caught up in the heat of the moment, and failed to stop other staff striking the horse, in circumstances where he did not want the horse injured. In fact, no injury did occur.
41. Finally, although by no means decisive, I consider that Mr McLean's employment situation is relevant. But for the breach of AR 231(1)(b) here, the evidence before the Panel is of a person who is a fit and proper person to be involved in racing. A suspension will enable him to continue in racing, albeit not in the training or handling of horses until his suspension ends.
42. For all the above reasons, I would allow Mr McLean's appeal, and in lieu of a 4-month disqualification, impose a suspension of the same length.

Mr Henkel

43. Mr Henkel was disqualified for a period of 4 months and two weeks by the Stewards. Mr Van Gestel told the Panel that he received a slightly longer penalty than Mr McLean because he had been the person actually striking the horse. While I of course accept that it was Mr Henkel striking the horse, I am of the view that Mr Henkel's conduct is less culpable than that of Mr McLean.

44. Mr Henkel is not an experienced handler of thoroughbred horses. In my view he was put in a stressful situation. He was encouraged to use the poly pipe by his boss. That encouragement came from not only what was said to him, but also what was not said – specifically, “stop.” In my view, to regard Mr Henkel as more culpable than Mr McLean fails to recognise the relationship between what effectively was the “boss” and a more junior employee. That is not to excuse Mr Henkel's actions, nor does it mean he has not breached AR 231(1)(a) – he has, and his conduct is an objectively serious breach of the rules. However, its proper context involves recognising that he was effectively encouraged by a more senior person to act in the manner that he did. That is not to suggest Mr McLean wanted or told Mr Henkel to hit the horse as hard as he did, but it is a fact that Mr McLean did nothing and exercised no authority to stop Mr Henkel or even indicate that he did not approve.

45. Beyond those matters, as outlined above, I accept that Mr Henkel is a person of good character, and is genuinely remorseful to the extent that I consider the incident has had a powerful impact upon him. While I do not consider that the penalty imposed by the Stewards is by any means manifestly excessive, I consider a suspension better reflects Mr Henkel's culpability than a disqualification. I would allow Mr Henkel's appeal, and in lieu of a 4 month and two-week disqualification, I would impose a three-month suspension. Under AR 283(5), I would also suspend one month of that suspension on the condition that Mr Henkel does not breach any of the Rules for a period of 2 years.

Ms Olden

46. Much of what is said above in relation to Mr Henkel can be repeated for Ms Olden. She too was placed in a situation of stress by her boss. I consider she felt somewhat overwhelmed.

I would not go as far as finding she was forced to act in the manner she did, but I do consider she got caught up in a situation with a senior foreman where she felt she needed to act in the manner she did.

47. Ms Olden in my view did not intend to harm or cause pain to the horse. She is a person of good character, and a competent and caring horse person. She has proper insight into her conduct, is remorseful, and I am of the view that it is extremely unlikely Ms Olden will breach any welfare rule in the future. The purposes of imposing penalties under the rules are served by the imposition of a suspension rather than a disqualification.

48. I would allow Ms Olden's appeal, and in lieu of a three-month disqualification, I would impose a two-month suspension. Under AR 283(5), I would suspend one month of that suspension on the condition that Ms Olden not breach any of the Rules for a period of two years.

Mr J T Murphy and Mr JJ Nicholson

49. We have read the above reasons of the Presiding Member. We agree with the orders he proposes, for the reasons he has set out.

Orders

50. The Panel makes the following orders:

McLean Appeal

1. Appeal in relation to severity of penalty for breach of AR231(1)(b) allowed.
2. In lieu of a 4-month disqualification, the appellant's licence is suspended for a period of 4 months. That penalty commences on 22 December 2021, and expires on 22 April 2022, on which day he may resume duties as a foreman.
3. Appeal deposit to be refunded.

Henkel Appeal

1. Appeal in relation to severity of penalty for breach of AR231(1)(a) allowed.
2. In lieu of a 4-month two-week disqualification, the appellant's licence is suspended for a period of 3 months. Under AR 283(5) one month of that suspension is itself suspended on the condition that the appellant not breach any of the Rules of Racing for a period of 2-years. That penalty commences on 22 December 2021, and expires on 22 February 2022, on which day he may resume duties as a stablehand.
3. Appeal deposit to be refunded.

Olden Appeal

1. Appeal in relation to severity of penalty for breach of AR231(1)(a) allowed.
2. In lieu of a 3-month disqualification, the appellant's licence is suspended for a period of 2 months. Under AR 283(5), one month of that suspension is itself suspended on the condition that the appellant not breach any of the Rules of Racing for a period of 2-years. That penalty commences on 22 December 2021, and expires on 22 January 2022, on which day she may resume duties as a stablehand.
3. Appeal deposit to be refunded.