

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF MELANIE O’GORMAN

Appeal Panel: **Mr R Beasley SC – Principal Member**
 Mr K Langby
 Mrs J Nicholson

Appearances: **Racing NSW: Mr Marc Van Gestel, Chairman of Stewards**
 Appellant: Mr A Fleiter, Solicitor

Date of Hearing and
Orders: **4 March 2020**
Date of Reasons: **4 March 2020**

REASONS FOR DECISION – The Panel

Introduction

1. On 14 September 2019, the racehorse *She Just Said It* finished first past the post in Race 6 conducted at the Armidale Racecourse that day. *She Just Said It* is trained by the appellant, licenced trainer Melanie O’Gorman.
2. A post-race urine sample taken from the horse revealed the presence of the substance lamotrigine. This substance is a prohibited substance under the Rules of Racing. It is a drug prescribed to humans and is used as an anticonvulsant. It has no recognised use for the treatment of horses.
3. As a result of the positive sample, the Stewards conducted an inquiry. On 11 December 2019 the appellant was charged with, and pleaded guilty to, a breach of AR 240(2), which provides that a trainer breaches that rule if they bring a horse to a racecourse for the purposes of participating in a race, and a prohibited substance is detected in a sample taken from the horse either before or after the race. After considering the matters they considered to be relevant, the Stewards imposed a penalty of a \$6,000 fine. The horse

was also disqualified as the winner of the race under AR 240(1). The appellant has appealed to the Panel today against the severity of the penalty imposed upon her.

4. At the appeal hearing today, Racing NSW was represented by Mr Marc Van Gestel, the Chairman of Stewards. The appellant was represented with leave by Mr Anthony Fleiter, her solicitor.
5. The appeal book containing transcript of the Stewards' inquiry was admitted and marked as Exhibit A. The exhibits from the inquiry retain the letter or number designated to them. The appellant also gave oral evidence.

Facts

6. Based on the evidence in the appeal book, and the evidence given by the appellant, we make the following factual findings which are either uncontroversial, or unchallenged.
7. The appellant has been a licenced trainer for about 5 years, but involved in horse racing for much longer. Mr Van Gestel submitted she enjoys a good reputation.
8. She has her stables at Tamworth. She employs usually five staff, and has 20 to 25 horses in her care. Her Foreman, Ms Cindy McDonald, has been with her for about 2 years, and is very experienced in the racing industry, having worked in a senior position with trainer Kris Lees.
9. The appellant has not before been charged with a breach of the rules relating to prohibited substances.
10. On 17 June 2019, the appellant was contacted by Mr Shane Cullen, the Chairman of Stewards for the Hunter and North Western Racing Association. Mr Cullen informed the appellant that one of her horses, *Kyushu*, was found to have the prohibited substance lamotrigine in a urine sample taken on 19 May 2019. The sample was however declared negative.
11. As indicated above, lamotrigine is a human medication, usually prescribed as an anticonvulsant. It is a prohibited substance under the rules by dint of Division 1 of Part

2 of AR 240, which declares substances that directly or indirectly have an effect on a mammalian nervous system are prohibited, as are substances that are anticonvulsants.

12. As a result of the detection of the prohibited substance, Mr Cullen gave advice to the appellant as to what steps he considered she should now take to prevent such an occurrence happening again. One step was to ask the staff whether they were on any medication containing lamotrigine. It transpired that one staff member, Mr S Faulkner, takes medication that contains lamotrigine to control a medical condition.
13. Mr Cullen told the appellant she should ensure all her staff wash their hands after taking any medication. It further transpired that Mr Faulkner had been urinating in the horses' boxes. She was told to tell staff not to do this. Other advice was given concerning not leaving drink bottles within the vicinity of the horses.
14. The appellant says she took these steps, and also cleaned out the bedding from the stable of Kyushu: see T 10-11. This had shavings over the top of a hard, compacted dirt floor.
15. On 14 September 2019, *She Just Said It* won at Tamworth.
16. On 17 September 2019, Mr Van Gestel emailed the appellant advising her that *She Just Said It's* urine sample taken on 30 August 2019 had revealed trace amounts of lamotrigine. This advice was of course given before anyone knew the results of the horse's urine sample taken on 14 September. He urged the appellant to again speak to staff: Ex 5.
17. The appellant sent a reply to Mr Van Gestel dated 20 September 2019, in which she advised him of the various steps she had taken since being informed about Kyushu in June. She advised Mr Van Gestel that she had told all staff "*that urinating in stalls is not allowed*", and that they "*must wash their hands thoroughly*" after taking any medication. She had also asked all staff to provide her with details of all medical scripts. She also advised Mr Van Gestel that *She Just Said It* had been stabled in the same stall as Kyushu, but that this stall would now remain vacant: Ex 6.

18. The sample taken from *She Just Said It* on 14 September tested positive for lamotrigine, with a reading between 1 to 2 ng per ml, a far higher reading than the trace amounts detected before.
19. As indicated above, the appellant pleaded guilty to breaching AR 240(2) at the Stewards' Inquiry on 11 December last year. At that inquiry, she tendered signed statements from her staff indicating that after being contacted by Mr Cullen in June, they had been told:
- (a) to wash their hands thoroughly after taking medication;
 - (b) urinating in stalls was not allowed;
 - (c) they had to provide copies of all scripts for medication; and
 - (d) not to leave drink bottles or cans without lids lying around: Ex 1 to 4.
20. Mr Faulkner also gave evidence at the inquiry, and confirmed he takes a drug containing lamotrigine, a matter also corroborated by his doctor: Ex 11. He also admitted to urinating in the boxes prior to 17 June 2019, including Kyushu's box, where *She Just Said It* was subsequently stabled: see T 42-43. He however said he had stopped this practice (T 42 L 2078-2088), and also that he washes his hands after taking his medication, which he does not bring to the stables.
21. Subsequent to the positive sample being detected in *She Just Said It*, in late October and early November 2019, other horses trained by the appellant underwent testing for lamotrigine. The only horses that have detected a positive or trace amount of this drug where stabled in the end box, occupied by Kyushu and *She Just Said It*: Ex 8 to 10.

How did the lamotrigine get into *She Just Said It's* system?

22. Mr Van Gestel drew the Panel's attention to the VCAT decisions of *Mark Kavanagh and Danny O'Brien v Racing Victoria Limited* [2018] VCAT 291. He placed reliance on [15] of that judgment of Justice Garde where the Racing Appeal Panel decision of *McDonough v Harness Racing Victoria* was referred to with approval which outlines three categories for this kind of case:
- First, where the trainer admits some form of wrongdoing, including ignorance or carelessness.
 - Secondly, where the Tribunal is not able to make any finding as to how the prohibited substance was detected in the horse.
 - Thirdly, where the trainer is able to prove that the prohibited substance entered the horse's system in circumstances where they should not be found to be at fault – i.e., nobbling by someone, as an obvious example.
23. Mr Van Gestel submits this case is in the second category, because there is no way of knowing for sure how the substance entered *She Just Said It's* system, while acknowledging the source was likely to be Mr Faulkner.
24. We think the situation is much more like the third scenario. It seems extremely likely that Mr Faulkner is the source of the horse's positive swab. He says he does not take medication at work, and that he washes his hands after taking it. He says he stopped urinating in the boxes after being told not to in June. There is no proper reason for us not to accept this evidence.
25. Faced with these facts, it seems highly likely if not certain that Mr Faulkner is the source of the lamotrigine detected in the horse's urine sample. Further, while it is not certain, and there are other possibilities, we think the most likely reason for detection is that *She Just Said It* ingested the lamotrigine from dirt in the stall that Mr Faulkner had urinated in. It is of course possible Mr Faulkner urinated in the stall after June 2019, but he says he did not. Another possibility is cross contamination from his hands, but he says he washes them, and he has handled many other horses, and only those stabled in the last stall have been detected with any lamotrigine in their systems. The finding we make then is that *She Just Said It* ingested lamotrigine from the soil in its stall, which was

contaminated by Mr Faulkner urinating in it before he was warned off this practice by the appellant.

Submissions

26. Several prior decisions of the Panel and other racing bodies were mentioned by Mr Van Gestel and Mr Fleiter, who also summarised these decisions in written submissions provided to the Panel. The Panel has had regard to the following:

- *Kavanagh and O'Brien*, referred to above.
- *The Appeal of Joanne Hardy*, RAP, 16/2/18. In this appeal, a horse trained by the appellant was found to have consumed straw from a stall that had been occupied by another horse that had recently undergone surgery. The prohibited substance was a general anaesthetic. The stall had been cleaned, but not well enough. The Panel imposed a \$1000 fine in lieu of a \$4000 fine.
- *The Appeal of Chris Waller*, RAP, 10/2/17. In this appeal, a horse tested positive for the drug commonly known as “Ice” after what would appear to have been contact with a member of Mr Waller’s staff. No dishonesty was involved, and evidence was given of the generally high standards of the stable. CCTV was in place, but did not work at the time because of a software glitch. There was evidence of some staff testing positive to illicit substances after drug testing by the stable. A fine of \$30,000 was set aside by the RAP, which imposed a \$5000 fine.
- *Kerry Anne Morris inquiry*, HRNSW, 3/10/19. Lamotrigine apparently was ingested by a horse in this appeal as a result of environmental contamination. A conviction was recorded, but no penalty imposed by Stewards.
- RADB, *Appeal of Daryl Blackshaw*, 28/4/16. In this appeal, the RADB accepted that the appellant had rubbed a gel onto his wife’s neck, failed to wash his hands, and then cross contaminated a horse with a prohibited substance in the gel. No conviction or penalty was imposed.

- VRT, *Appeal of Hanna Powell*, 30/8/19. This was another appeal involving accidental ingestion of a prohibited substance due to environmental contamination. A conviction was recorded, but no penalty imposed.
- RNSW Stewards' determination re Matthew Smith, 14/10/19.
- Recent fines imposed by Racing NSW Stewards in relation to the detection of human medication in horses.

27. Aside from contending that the circumstances here fell into the second category of case discussed in *McDonough* that was approved of in *Kavanagh and O'Brien*, Mr Van Gestel said the \$6000 fine was justified because there were some aspects of aggravation, and some matters of emphasis, not present in the appeals cited above:

- First, he noted the warning given to the appellant by Mr Cullen in June 2019 about this drug. This should have put the appellant on high alert about it. She further should have been aware of warnings given by the Stewards in publications such as *The Racing NSW* magazine, where in August and November 2018, Mr Van Gestel had warned trainers of human oral or topical medications being later detected in samples taken from horses. These warnings also indicated that the practice of urinating in stables should be immediately discontinued, and suggested thorough hand washing practices: see Exhibit B.
- Secondly, the box Kyushu was in should not have been used again. Cleaning it was appropriate, but disinfectant should have been used, but was not.
- Security cameras were not installed.
- Staff should have been given more frequent warnings about washing hands and not urinating in boxes. Signs should have been put up to this effect – as they are now in many other stables.
- Mr Faulkner could have been assigned work to horses not about to race.

28. Mr Fleiter submitted that the appellant had taken all reasonable steps available to her with the knowledge she had in June 2019. She did not know that the Kyushu box was the likely culprit until after the later positive sample from *She Just Said It*.

Resolution

29. On balance, we take the view that the appellant's actions following the June warning were in general reasonable. She found out about Mr Faulkner's medical condition and medication. She gave warnings about handwashing, and told all staff not to urinate in boxes. She cleaned out Kyushu's stall. Perhaps that could have been done more thoroughly, but that stall had not yet been identified as the most likely culprit for the contamination of *She Just Said It*. We agree with Mr Van Gestel that it would have been prudent to put up signs to reinforce handwashing protocols, and forbidding urinating in stalls. On the other hand, these messages were given, and an experienced foreperson was in charge.

30. This is an unfortunate incident. No dishonesty is involved. There was no intent to cheat. A generally reasonable response was taken after June 2019. Some steps however – like telling staff not to urinate in stalls, for example – should have been taken before June 2019. Amongst other things, it is a dangerous practice.

31. However, we find the source of the contamination was Mr Faulkner, and we find the culpability of the appellant to be low in all the circumstances.

32. Despite that low culpability, we must take into account that the primary purpose of the rules of racing that provide for penalising licenced persons who breach them is to uphold the integrity and image of racing. We must consider what message the penalty we impose sends to the racing community, all the participants in the industry, and to the public that follow it.

33. We do not think imposing no penalty at all is appropriate, which was Mr Fleiter's prime submission. A horse has won a race with a prohibited substance, and has had to be disqualified. While we find culpability to be low, it is not non-existent. Clearly, a system was in place (or not in place) that enabled Mr Faulkner to think it was okay to urinate in horse stalls. We accept he is remorseful, and did not consider the practice to be risky,

and that it might be difficult to police against this practice, but steps should have been taken before June 2019 to ensure as far as possible it did not.

34. Ultimately though, we also take the view that a penalty of a \$6,000 fine is greater than we think is warranted. We consider that this case is similar to the *Appeal of Joanne Hardy*, although we think the level of culpability here is slightly higher.

35. In the circumstances we would impose a \$2,000 fine, in lieu of a \$6,000 fine.

The Panel's orders are:

1. Appeal against severity of penalty allowed.
2. Penalty of a fine in the amount of \$6,000 set aside.
3. In lieu of that penalty, a fine in the sum of \$2,000 is imposed.
4. Appeal deposit to be refunded.