

RACING NEW SOUTH WALES

APPEAL PANEL

15 December 2014

MR R CLUGSTON — PRINCIPAL MEMBER
MR D McKEE
MR T CARLTON

IN THE MATTER OF THE APPEAL OF
GARY PORTELLI

REASONS FOR DECISION

CHAIRMAN: This is an appeal by licensed trainer Gary Portelli (hereinafter referred to as “the Appellant”) against the severity of a penalty imposed by Stewards at the offices of Racing NSW, Drutt Street, Sydney on 10 November 2014 for breach of AR 178. That Rule provides that:

“Subject to AR 178G, 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 particulars of the charge were that “as the trainer of the gelding *Za Magic* at all relevant times leading up to and including 13 September 2014 he did bring the said racehorse to Rosehill Gardens Racecourse where it competed in Race 8, the PJ Irish Pub Parramatta Handicap, on that day and the gelding provided a pre-race blood sample which, upon analysis, had detected in it the prohibited substance Ibuprofen.”

The Appellant pleaded guilty to the charge before the Stewards and the Stewards imposed a monetary penalty of \$6,000. The Appellant adhered to his plea

of guilty in the proceedings before the Panel. The appeal is therefore a rehearing on the question of penalty.

The Stewards were represented in the proceedings before the Panel by Mr M Van Gestel, Deputy Chairman of Stewards – Operations, and Mr W Pasterfield, Solicitor, appeared for and with the Appellant by leave. The transcript of the Stewards' inquiry conducted at the offices of Racing NSW on 10 November 2014 and the transcript of the hearing of the charge which took place on the same day and the exhibits tendered in those proceedings have been admitted into evidence in the proceedings before the Panel.

The essential facts of this case are not in dispute. The racehorse *Za Magic* was presented to race and did run in the PJ Irish Pub Parramatta Handicap at Rosehill Gardens Racecourse on 13 September 2014. The Appellant who is a licensed trainer with Racing NSW was and had been the trainer of the horse since 11 August 2014.

At 4pm on that race day pre-race blood samples were taken from *Za Magic* by Ms Julie Smallwood in the presence of the Appellant's employee Mr Aaron Fernandez. By email dated 8 October 2014 the General Manager of the Australian Racing Forensic Laboratory ("the ARFL") Mr John Keledjian informed the Chairman of Stewards that the "pre-race blood sample received 15/9 from ATC has returned ibuprofen on screening only." Following receipt of that advice Mr G Rudolph, Deputy Chairman of Stewards – Racing, Dr C Suann, Senior Official Veterinarian with Racing NSW and others attended the Appellant's stable at Warwick Farm on 8 October 2014 where an inspection of the stable complex was conducted in the absence of the Appellant. In his email dated 10 October 2014 addressed to the Chairman of Stewards Mr Rudolph reported that "there were no substances that appeared to give rise to a finding of Ibuprofen, nor did the stable indicate any changes with respect to feed."

In Certificate of Analysis No ARF14/2757-B and dated 16 October 2014 the ARFL certified that the blood sample taken from *Za Magic* on 13 September 2014 was found to contain the prohibited substance Ibuprofen. As a result on 16 October 2014 the ARFL forwarded two blood tubes to Racing Analytical Services Ltd ("RAS") Flemington Victoria for confirmatory analysis. In Certificate of Analysis No RS14/15494 and dated 31 October 2014 RAS certified that "the blood sample was shown to contain IBUPROFEN."

In his report to the Chairman of Stewards of 5 November 2014 Dr Suann opined that “Ibuprofen is a non-steroidal anti-inflammatory drug and would be defined as a prohibited substance according to the Australian Rules of Racing since it has actions and effects primarily on the musculo-skeletal system, thereby complying with the provisions of AR 178B(1). Ibuprofen would be categorised as an analgesic and anti-inflammatory agent, thereby fulfilling the requirements of AR 178B(2).” Dr Suann went on to say in his report that whilst “ there are no registered pharmaceutical preparations containing Ibuprofen available in Australia for use in horses.....it is the active ingredient alone in a number of human pharmaceutical brands currently available in Australia.”

In the proceedings before the Stewards Dr A Cawley, Science Manager for the ARFL, gave evidence that his estimate of the quantity of the prohibited substance in the sample tested by the ARFL was 28 nanograms per ml, being a quantity that was easily detected by the laboratory.

In his evidence before the Stewards and the Panel the Appellant could not account for the finding of Ibuprofen in the sample taken from the horse *Za Magic*. His evidence was that whilst the horse had been treated with a paste containing Ibuprofen for a tendon injury sustained prior to the horse entering his stable, it had not been treated with any such paste since it had entered his stable. The only explanation that he could advance was that a Nurofen tablet being used by one of his employees may have inadvertently been administered to the horse or the powder from the tablet may have deposited onto the fingers of an employee.

The Panel has considered the evidence and the submissions on the question of penalty. The Panel considers that the Appellant’s breach is serious in the overall framework of the Australian Rules of Racing as it impinges on the level playing field which is fundamental to the overall integrity of racing. The Panel considers that it is necessary to impose a penalty such as would be likely to deter the Appellant from reoffending as well as other licensed trainers who may, in the future, be minded to commit the same or a similar offence.

On the other hand, the Panel takes into account the Appellant’s plea of guilty entered at the first available opportunity before the Stewards and his full cooperation with Stewards during their investigation. The Panel has also taken into account that the Appellant has been a licensed trainer for twenty-three (23) years with forty (40)

horses currently in work and who has trained over one thousand (1,000) winners and there has been no previous “prohibited substance” breaches.

The Panel has also considered the precedent table of penalties in previous cases of breaches of AR 177 and/or AR 178 involving the substance “Ibuprofen”. The Panel notes that the table is comprised of eleven (11) cases covering the period 1 June 2004 to 11 December 2013 emanating from various thoroughbred racing jurisdictions in Australia. The Panel also notes that in nine (9) of those eleven (11) cases the penalty imposed was a fine ranging from \$1,000 to \$10,000.

Ultimately, the Panel considers that whilst breaches of AR 177 are serious offences, the absence of aggravating features in this case and the presence of mitigating features referred to above leads to a finding that the Appellant’s case falls towards the lower end of the scale for breaches of AR 177. In the circumstances the Panel considers that the appropriate penalty is a fine of \$3,000.

The orders of the Panel are as follows:

1. Appeal against penalty upheld;
2. Penalty of \$6,000 fine imposed by Stewards varied to a fine of \$3,000;
3. Appeal deposit of \$200 forfeited.