

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF TESS WILKES

Appeal Panel: **Mr T Hale SC – Convenor**
 Mr C Tuck
 Ms J Madsen

Appearances: **Racing NSW: Mr Marc Van Gestel, Chairman of**
 Stewards.
 Appellant: Mrs Tess Wilkes – licensed trainer.

Date of Hearing: **16 April 2018**

Date of Reasons **16 April 2018**

REASONS FOR DECISION

Convenor – Mr T Hale SC, (Mr C Tuck, Ms J Madsen concurring)

Introduction

- 1.** Ms Tess Wilkes is a licensed trainer. She is the trainer of the gelding *Prince Coureuse*. She is part-owner of the horse with her husband, Mr D Wilkes, who is also a licensed stablehand.
- 2.** On 7 November 2017, the horse was placed first in Race 5 at Taree Racecourse. Race 5 was the Benchmark 46 Handicap over 1420 metres. It was a non-TAB meeting.
- 3.** After the race, a urine sample was taken from the horse. On analysis, the sample was shown to contain procaine. Procaine is declared to be a prohibited substance under the Australian Rules of Racing.
- 4.** On 11 January 2018, a Stewards' inquiry was held at the Stewards' room in Port Macquarie Racecourse in relation to the analyst's finding. It was conducted by Mr D R Smith as Chairman and Mr T D North.

5. Mrs Wilkes gave evidence, as did her husband Mr D Wilkes, who as I say, is a licensed stablehand and part-owner of the horse with Mrs Wilkes.
6. After taking some evidence, the inquiry was adjourned. The inquiry resumed 6 February 2018 when, after taking further evidence, Mrs Wilkes was charged with a breach of *AR175(h)(ii)*, to which she pleaded guilty. The Stewards imposed a penalty of a fine of \$5,000. The Stewards also disqualified the horse pursuant to *AR177*, and the horse *Color Purple* was declared the winner of the race.
7. Mrs Wilkes appeals to this Panel from the decision. She appeals pursuant to section 42 of the *Thoroughbred Racing Act 1996*. The appeal is by way of a new hearing. At the hearing before this Panel, Mrs Wilkes maintained her plea of guilty. She appealed only against the penalty of \$5,000, which she contended was too severe.
8. Mr Van Gestel appeared on behalf of the Stewards and Mrs Wilkes represented herself.
9. The charge was in these terms:

Licensed trainer Mrs Tess Wilkes you are hereby charged with a breach of *AR175(h)(ii)*

AR 175. *The Principal Racing Authority (or the Stewards exercising powers delegated to them) 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.

The details of the charge being that you, licensed trainer Mrs Tess Wilkes, the trainer of the racehorse *Prince Coureuse*, administered the prohibited substance procaine to the racehorse *Prince Coureuse* which was detected in post-race urine sample number N205962 taken from *Prince Coureuse* following the gelding running and being placed first in

Race 5 - Benchmark 46 Handicap conducted at Taree on 7 November 2017.

Evidence and Submissions

10. In evidence before us was the transcript of the hearing before the Stewards and the 20 exhibits before them, all of which became Exhibit A before this Panel.
11. The evidence in Exhibit A included the test results and the records showing the chain of custody of the sample taken from the horse, a report dated 22 December 2017 from Dr Tania Selig, Official Veterinarian with Racing NSW. Dr Selig also gave oral evidence by telephone to the Stewards' inquiry. There was also evidence by telephone given by Dr Adam Cawley. He is the Science Manager of the Australian Racing Forensic Laboratory. The transcript of the evidence of Dr Selig and Dr Cawley formed part of Exhibit A, as did the transcript of the oral evidence given by Mrs Wilkes and also Mr Wilkes.
12. The only additional evidence before us were two documents which became Exhibits B and C. Exhibit B was a schedule showing the penalties for procaine use from 1988 to the present. Exhibit C was Mrs Wilkes' disciplinary record.
13. *AR175(h)(ii)* is in these terms:

AR175. The Principal Racing Authority (or the Stewards exercising powers delegated to them) 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.
14. A prohibited substance is defined in AR178B. In her written report before the Stewards, Dr Selig explained that procaine is prohibited because it comes within AR178B(1), insofar as it is a substance capable at any time

of causing either directly or indirectly an action and/or an effect on the musculoskeletal system of a mammal. She also gave evidence that it comes within AR178B(2), as it is a central nervous system stimulant. Procaine does not come within the exceptions to the definition of a prohibited substance in 178C(2), which relevantly provides that certain substances are excepted from the provisions of 178B. Those substances include:

*"Anti-microbials (antibiotics) and other anti-infective agents but not including **procaine penicillin**." (Emphasis added.)*

15. In her report, which was before the Stewards, Dr Selig explained:

*"The finding of procaine in a urine sample from a horse would indicate the prior administration of either the local anaesthetic **procaine hydrochloride** or the **antibiotic procaine penicillin**. Unfortunately, it is not possible to distinguish the type of administration on the basis of analytical findings."*

She continued:

"Procaine penicillin is the active ingredient in a number of proprietary veterinarian prescriptions, antibiotic preparations, (she then referred to a number of products). These products are used to treat a wide variety of bacterial infections in horses involving organisms sensitive to penicillin."

16. Dr Selig gave evidence before the Stewards that the published detection time for procaine is nine days for a single dose (T16). She also said that:

"Procaine is a drug that can have variable effects in the way it is excreted through the muscle and into the horse and so forth. So most vets use 21 days as their withholding period because of that and certainly it's a drug that should be given under the consultation of a vet, and a vet would have advised them of a 21-day withholding period."

17. The certificate of analysis did not provide an actual reading. It merely stated that procaine was detected in the sample. Dr Selig said that the current screening limit was 50 nanograms per litre, so the sample must have been above that concentration. Dr Cawley confirmed this in his evidence. He also said that procaine hydrochloride is typically excreted

much more rapidly than procaine penicillin. His estimate of the concentration in the sample was approximately 250 nanograms, which is five times greater than the threshold of 50. He said that a typical dose of procaine penicillin would be between 80 milligrams to 1.6 grams.

18. The facts are not really in dispute. Mrs Wilkes' treatment records indicate that on 31 October 2017, a horse was given a 20ml injection.

They record:

"Tommy - Shot penicillin 20ml-IM."

19. The evidence of Mrs Wilkes is that *Tommy* is the stable name for the horse. IM means intra-muscular or injected into the muscle.

20. On 31 October 2017, Mrs Wilkes rode the horse in the morning. She thought it was "a little bit off"; she felt some heat in the joint, although he was not sore. She thought it might be a slight infection in the leg or joint. She gave him a shot of penicillin. She said it worked and the next day he was back to himself. The following day, 1 November, she nominated the horse for the race meeting six days later, 6 November. She did not consult a veterinarian. It did not cross her mind. The bottle from which the penicillin was injected was handed to the Stewards when they attended the stables on 6 December 2017. The bottle had on the label the date of 28 January 2017. It recorded that the penicillin was for the horse, *I Know So*, which was also trained by Mrs Wilkes. It contained certain instructions, and it also recorded that it had been obtained from Newcastle Equine Centre.

21. In her evidence before the Stewards, Mrs Wilkes said that the procaine was not really for *I Know So*. She said that penicillin "comes in handy" and that she needed some more. She said that she gave the name of *I Know So* because the name of that horse was already in the system of Newcastle Equine Centre. After a short adjournment to make telephone inquiries of the Newcastle Equine Centre, Mr and Mrs Wilkes said that

Lauren Fletcher, (who is in fact Dr Lauren Fletcher), from the Equine Centre gave the penicillin to Mrs Wilkes and that Ms Fletcher was no longer working there. Mrs Wilkes and Mr Wilkes said that Ms Fletcher had said that it could be taken 7 days before a race.

22. When the inquiry before the Stewards resumed on 6 February, Dr Fletcher had been contacted by the Stewards. In evidence before the Stewards, part of Exhibit A, is a letter from Dr Lauren Fletcher BVSc addressed to Mr Drew Smith. In the letter she explained that when the horse tested positive she was no longer working either in the Newcastle area or for her former employer Newcastle Equine Centre. She left in July 2017. She said that she had never treated the horse in question. She said that the bottle of procaine penicillin, which was supposedly used, was not even dispensed by her but by a more senior colleague. She said that she could categorically state that the supposed conversation (in which it was said she advised seven days was a sufficient period before the race to permit the injection of the penicillin) never took place. She denied that she ever gave Mrs Wilkes any advice on procaine penicillin withdrawal times.

23. Also in evidence was an e-mail from Morgan Weber of the Newcastle Equine Centre, which was Exhibit 20 before the Stewards. That e-mail stated:

"The vet who prescribed the penicillin was Trish Nicholls. She no longer works at our clinic."

"Our policy regarding penicillin with racehorses is that no nurse ever prescribes penicillin, and the veterinarians advise that the withhold period is at least 28 days."

24. It is against this background that I come to consider the appropriate penalty to be imposed. Recently, *In The Matter of the Appeal of John Sprague*, a decision of this Panel of 22 February 2018 comprised of myself, Mr J Nicholson and Mr K Langby, on behalf of the Panel, I set out the applicable principles in determining penalty in cases of offences

involving a prohibited substance being detected in a sample taken from a horse, prior to or following the running of a race: see paragraphs 17-22. In that decision: I referred to the approach outlined by Thorley DCJ in *The Appeal of G Rogerson* (24 May 1998). In that appeal, his Honour said amongst other things:

"It seems to this Tribunal that breaches of AR178 should ordinarily be met with penalties of disqualification or at least suspensions and that fines should be reserved for those cases where special circumstances would dictate."

25. That approach has been consistently adopted by this Panel and the Racing Appeals Tribunal. There are textual differences between 178 and 175(h), however, the applicable principles are the same or similar.
26. Further, in the decision, *In the Matter of the Appeal of John Sprague*, on behalf of the Panel, I emphasised that rules such as this are intended:

"[T]o uphold the image, interests, and integrity of racing by seeking to enforce the prohibition on a horse racing with a prohibited substance in its system. The rule seeks to do so by imposing strict liability on those who present a horse to race to encourage vigilance in ensuring that the horse does not have a prohibited substance in its system by deterring a lack of vigilance with the prospect of a penalty if there is found to be a breach of the rule."

27. Mr Van Gestel also referred us to *The Appeal of David Vandyke* delivered by this Panel on 24 March 2017. The Panel was comprised of Mr Beasley SC, Principal Member, Mr Clugston, and Mr Fletcher. At paragraph 29, the Panel held that the administration charge was the more serious of the charges under AR175(h).
28. At the conclusion of Mr Van Gestel's submissions and before Mrs Wilkes made submissions to us, we adjourned to give consideration as to whether we should advise Mrs Wilkes that we were considering increasing the penalty. We did so having regard to the approach of Kirby P (with whom Handley and Sheller JJA agreed) in *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282, particularly at

pp. 296-297. Although that was an appeal concerning sentencing in a criminal matter, the principles of procedural fairness referred to have application to the present circumstances. Mr Van Gestel did not submit that we should impose a more severe penalty than the Stewards imposed. This Panel is not bound by that. Under s.43(3)(c) of the *Thoroughbred Racing Act*, the Panel is to “*make its decision on the real merits and justice of the case.*” That might entail imposing a more severe penalty. As a matter of procedural fairness, and applying *Parker*, if we were contemplating an increase of the penalty, we had an obligation to inform Mrs Wilkes of this. Amongst other things, this would enable her to make application to withdraw her appeal, if she so chose. However, upon the resumption, we advised Mrs Wilkes that we were not contemplating an increase in penalty.

Resolution

- 29.** In this matter, the factors of particular concern are: Firstly, there was no check, or proper check, as to the appropriate withholding period for procaine. Mrs Wilkes simply relied upon what she thought she and her husband had been told at some stage. As I have already pointed out, the evidence makes clear that she was not told by anyone at the Newcastle Equine Centre that the withholding period was only seven days. As Dr Selig has said, veterinarians would normally advise the withholding period is 21 days.

- 30.** Secondly, as I have just mentioned, the intent of AR 175(h) is to encourage vigilance. It is intended to ensure that a horse is not racing with a prohibited substance in its system by the threat of a substantial penalty if the rule is breached. There was, in this case, no proper investigation or consideration of the withholding period for procaine. No vigilance was demonstrated. One day after administering procaine to the horse, Mrs Wilkes nominated it for a race which would take place only seven days after the administration of the substance. In my view, Mrs Wilkes did not take her responsibilities sufficiently seriously.

- 31.** Thirdly, it is to be noted that in 2011, Mrs Wilkes was suspended for a similar offense. This should have put her on her guard to make the appropriate inquiries.
- 32.** The following matters go to mitigation of the penalty to be imposed. Firstly, Mrs Wilkes has had a 30-year history in the industry. She does not have a good record in relation to offences of this kind and as such she is not entitled to leniency. As I have said, in 2011 she was suspended for four months for a similar offence. Nonetheless, her record is not something which aggravates the seriousness of the offense. Secondly, we take into account her early guilty plea. The evidence clearly establishes that she cooperated at all times with the Stewards. Thirdly, the race in which the horse participated was not a major race. It was a non-TAB race. The total prize money was \$6000 with \$3305 going to the winner. The evidence does not indicate any significant wagering on the horse. Fourthly, Mrs Wilkes is a hobby trainer. She does not have many horses. Fifthly, the procaine was administered seven days before the race, for what were clearly only therapeutic purposes and in the circumstances described above.
- 33.** It will be apparent from our approach during the course of the hearing that the Panel had serious misgivings as to whether the penalty imposed by the Stewards might have been too lenient. It was for that reason that we adjourned at the conclusion of Mr Van Gestel's submissions to consider whether we should warn Mrs Wilkes that there was a possibility that we might impose a more severe penalty. We did not give that warning. In reaching the conclusion not to do so, the Panel gave significant weight to the fact that Mr Van Gestel, on behalf of the Stewards, did not ask for an increase in penalty. He submitted that the fine was not excessive and that it was entirely appropriate in the circumstances.
- 34.** Having taken all the circumstances into account, I do not consider that the fine of \$5,000 is excessive. Accordingly, I would order that the

appeal on severity be dismissed; the fine of \$5,000 be confirmed, and the appeal deposit forfeited.

MR C TUCK: I agree with the reasons and proposed orders of the Convenor.

MS J MADSEN: I agree with the reasons and proposed orders of the Convenor.

Proceedings concluded.

The Panel' s orders are:

1. Appeal against severity of penalty dismissed.
2. Penalty of \$5,000 is confirmed.
3. Appeal deposit forfeited.