

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF BRENTON ANDREW

Appeal Panel: **Mr T Hale SC – Convenor**
Mrs J Foley
Mr J Murphy

Appearances: **Racing NSW: Mr Marc Van Gestel, Chairman of Stewards**

Appellant: Self Represented

Date of Hearing and **26 May 2020**

Orders:

Date of Reasons: **17 June 2020**

REASONS FOR DECISION –

The Convenor delivered the decision on behalf of the Panel

Introduction

1. Brenton Andrew (the Appellant) is a licenced trainer. He is licenced in Queensland and is based in Gatton, Queensland.
2. On Sunday 5 January 2020, he entered the gelding *Sugar Buzz* in race 6 at Ballina Racecourse. Race 6 was the Benchmark 66 Handicap over 1610m. *Sugar Buzz* came first by a long neck. Its starting price was \$11. The prize money for first place was \$11,000.
3. After the race, a urine sample was taken from *Sugar Buzz*. The analysis was carried out by the Australian Racing Forensic Laboratory. It detected dexamethasone in the post-race urine sample taken from *Sugar Buzz*.
4. As a result of the analysis, the Stewards conducted an inquiry, Mr M A Holloway Chairman and Mr R W Loughlin, at the Grafton Racecourse on 30 March 2020. During the course of the inquiry, the Appellant was charged with, and pleaded guilty to, a breach of Australian Rules of Racing AR240(2), which provides

AR 240 (2) - Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on

Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.

5. The Stewards imposed a penalty of a fine of \$5,000. They found that the appropriate penalty for the offence was \$7,000 but reduced the fine to \$5,000, taking into account the Appellant's plea of guilty and mitigating circumstances.
6. Pursuant to AR240(1), *Sugar Buzz* was disqualified and the second placed horse *Jahez* was declared to be the winner.
7. The Appellant has appealed to this Panel against the severity of the penalty.
8. Mr Van Gestel, Chairman of Stewards, appears for the Stewards. The Appellant is unrepresented and appears for himself.
9. Due to the current pandemic, the appeal was conducted by audio visual link.

The Charge and Particulars

10. The charge and the particulars of the charge against the Appellant were as follows:

Licensed trainer Mr Brenton Andrew you are hereby charged with a breach of AR240(2)

AR240(2) — Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and / or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.

The details of the charge being that you licensed trainer Mr Brenton Andrew, the trainer of the racehorse *Sugar Buzz*, brought *Sugar Buzz* to Ballina racecourse on Sunday 5 January 2020 for the purpose of participating in Race 6 Benchmark 66 Handicap 1610m and the prohibited substance Dexamethasone was detected in post race urine sample N233655 taken from *Sugar Buzz* following it running, and being placed first, in that race as:

- a. Dexamethasone is a prohibited substance pursuant to Part (2), Division 1 - Prohibited List B, 1(e), (f) and (j) as it has actions and / or effects on the musculoskeletal, endocrine and immune systems.
 - b. Dexamethasone is a prohibited substance pursuant to Part (2), Division 1 — Prohibited List B, 2(v) as it is an anti-inflammatory agent.
11. We received into evidence as Exhibit A the appeal book, which contained the evidence before the Stewards. We also received into evidence a table of penalties for offences similar to the charge against the appellant, where dexamethasone was detected in sample.

12. Dexamethasone is a prohibited substance under the Australian Rules of Racing because it comes within the definition of prohibited substances under Prohibited List B, Part 1 (e), (f) and (j) due to its effect on the musculo-skeletal, endocrine and immune systems. It could be further categorised as an "anti-inflammatory agent", under Prohibited List B, Part 2 (v). Dexamethasone is a corticosteroid medication, used in the management of a variety of clinical conditions due to its anti-inflammatory properties.
13. The Appellant accepted that he was at all relevant times the trainer of *Sugar Buzz*, which he trains on behalf of 10 owners, of which he is one.

Facts

14. The facts are not really in dispute. The Appellant provided a detailed statutory declaration to the Stewards dated 29 March 2020. Its contents are not in dispute and generally accord with the evidence obtained in the inquiries made by the Stewards. The evidence convincingly establishes how it was that *Sugar Buzz* ingested the prohibited substance.
15. The Appellant is a licensed trainer of thoroughbred horses with the Queensland Racing Integrity Commission. He has been licensed for five years. Previously, he held a stable hand license for about fifteen years. At the present time, he has five horses in work at his stables.
16. One of the horses in his stables is a horse named *Bobbio*. In November 2019, the Appellant consulted Dr Dolan, Veterinary Surgeon of Equine Veterinary Services of Hodgsonvale, Queensland, about treatment options for horses with symptoms of inflammatory airway disease.
17. Dr Dolan advised that horses exhibiting symptoms of inflammatory airway disease be treated with a combination of injectable Dexamethasone and sterile saline using a nebuliser once each day until symptoms desist or up until four days out from racing. He recommended that the Appellant use 2ml of Dexamethasone mixed with 2ml of saline. Dr Dolan also advised the Appellant that he use sterile saline alone up to one clear day prior to racing. The Appellant took that advice and purchased the Dexapent and the nebuliser.
18. One of the horses treated in this way for inflammatory airway disease was *Bobbio*. The stable's treatment book shows, in accordance with Dr Dolan's advice, *Bobbio* was treated with the Dexamethasone/saline mix using the nebuliser on 2 January 2020. *Sugar Buzz* was not one of the horses being treated in this fashion.
19. In December 2019, the Appellant had also sought advice from Dr Dolan about treatment for horses affected by the dusty conditions brought about by the drought. Dr Dolan advised that he should use the nebuliser to administer to those horses using only saline. Again, the Appellant followed the advice of Dr Dolan. One of those horses that the Appellant treated in this manner was *Sugar Buzz*. He last treated *Sugar Buzz* on

Friday 3 January 2020 at about 4:30 pm with the saline solution. This was less than 48 hours before the race in which *Sugar Buzz* was running.

20. In his evidence before the Stewards, he described the circumstances of the treatment this way:

CHAIRMAN: What dates would you have given this horse the saline?

B. ANDREW: The 3rd, 2nd and 1st.

CHAIRMAN: Okay, so three days in a row, and why were you doing that to Sugar Buzz? Why were you giving it plain saline?

B. ANDREW: Well, most of the horses, I was doing that with some of the horses, just to try, like I said, with the salt therapy, try and clear their airways. We just had that much dust on the property with the drought, I just kept finding the horses seemed to be coughing, you know, a lot - some worse than others - and we were virtually trying to narrow it down and work out what was the problem, and the vet had recommended to me - he said there were other people in a similar situation that were using that treatment, so that's when I purchased that nebuliser in December, and then that happened at the start of January.

21. The transcript before the Stewards records the following exchange:

CHAIRMAN: From what you have just described to me, Sugar Buzz has this nebuliser on from the 1st to the 3rd with saline alone in it, but Bobbio also has it on throughout that period from late December to the 2nd, so there are certainly two days at least, 1 and 2 January, where both horses are having this nebuliser put over their noses and one of them is getting Dexapent and one is not. Is that right?

B. ANDREW: Yes.

22. The evidence establishes to my satisfaction, which both Mr Van Gestel and the Appellant also accepted, that the nebuliser was contaminated with the Dexamethasone from the treatment of *Bobbio*.

23. Before the Stewards, the Appellant described the procedure in applying the nebuliser this way:

There's a little like rubber piece that goes over their nose and then there's a chamber, a plastic chamber, and on top of that chamber there is a little - well, what they call a medical cup [also referred to in the evidence as the reservoir], and it's got a filter or whatever it does, and when you hit or turn on "Go" on the battery, it humidifies it or makes it into a vapour that they breathe through and breathe out, so then you take them for a walk with it. I sort of made it a practice sometimes in that summer, sometimes it was too hot to walk them on the walker, so I would hand walk them, and this is where sometimes I'd put the nebuliser on them with the saline and take them for a 10-minute walk while they breathed it in.

24. The Chairman of the Stewards then asked this question:

What do you do in between treating horses with that, and by that I mean are you cleaning it out, or is it just something that drains dry?

25. The Appellant answered, which led to the following exchange:

B. ANDREW: Yeah, well, it drains dry, but then there's just distilled water that you just tip a tiny bit in, a couple of mls, and give the cup a shake, a clean, and then tip it out.

CHAIRMAN: Was that being done between each time it was being used?

B. ANDREW: Yes, to the best of my knowledge I had, but like I said, whether I've made a mistake or something like that, I can't be 100 percent positive.

26. Before the Stewards, Dr Koenig said that the level of Dexamethasone was low. After he was referred to the evidence of the Appellant he said:

I would say that the reservoir is certainly the most likely culprit in that setting, whether it is by inadequate removal of the material that was previously there, or some residue being left in the reservoir or the remainder of the nebuliser, but the reservoir is the most likely scenario in this setting. Obviously we can't differentiate when we find dexamethasone between whether it has been given to the horse via nebuliser, injection or indeed orally - there is some research looking at the oral administration of dexamethasone - so we can't differentiate, but certainly on the basis of the evidence the nebuliser seems to be the most likely.

27. It is against that background that the Appellant's appeal is to be considered. The cause of the prohibited substance by *Sugar Buzz* was the failure to properly sanitise the reservoir. As the Stewards, and Mr Van Gestel on behalf of the Stewards put it, the presentation of *Sugar Buzz* with a prohibited substance in its system was due to "poor husbandry" by the Appellant.

28. It is against these undisputed facts that this appeal is to be considered.

Resolution

29. It is not in dispute that in breach of AR 240(2) *Sugar Buzz* was brought to the racecourse and a prohibited substance on Prohibited List B was detected in a sample taken from the horse. Under the terms of the rule, the Appellant, as trainer, was in breach of the rule.

30. A breach of AR240(2) is a strict liability offence or perhaps an offence of absolute liability. For present purposes, it does not matter which. In the case of a strict liability offence or an absolute liability offence, liability is imposed irrespective of whether the person has acted without fault. The policy behind the imposition of strict liability in AR240(2) is intended to encourage greater vigilance in ensuring that no horse is brought to a racecourse for the purpose of engaging in a race with a prohibited substance in its system.¹ It is also a deterrent against deliberate breach of the rule.

¹ See for example, the reasons of this Panel in the appeal of licensed training S Henley, 10 January 2020.

31. One of the key objects of the Australian Rules of Racing, including its penalty provisions, is to uphold the image, interests and integrity of racing. A breach of AR240(2) involving, as it does, the presentation of a horse to race with a prohibited substance in its system – always brings racing into disrepute. Penalties imposed for such breaches must redress that².
32. Mr Van Gestel relied upon the decision of the President of VCAT, Justice Greg Garde in *Kavanagh v Racing Victoria Limited (No.2)* (Review and Regulation) [2018] VCAT 291. In that decision his Honour adopted the approach in *McDonough v Harness Racing Victoria*, in which it was said that that prohibited substance cases *generally* fall into one of three categories. Mr Van Gestel submitted that this case comes within the first category. The first category is where through investigation, admission or other direct evidence, positive culpability is established on the part of the trainer or person responsible. Within that category, the culpability may be in the class of deliberate wrongdoing or it may be through ignorance or carelessness or something similar. In the passage in *McDonough* adopted by Garde J, it was said that:
- This is the worst case from the point of view of the trainer or other person concerned. In such a case, a severe penalty is likely to be appropriate.*
- Mr Van Gestel emphasises the reference to *the worst case* and *severe penalty*.
33. The second category is when the evidence does not establish how the prohibited substance came to get into the horse.
34. The third category is where the trainer (or other person charged) provides an explanation which is accepted and which demonstrates that the trainer has no culpability at all or limited culpability. There seems to be a cross over between the first and third categories in circumstances in which the culpability is limited.
35. In *Kavanagh*, cobalt was detected in the urine sample in excess of the threshold. It had been injected in the horses by a leading veterinarian who treated the horses. It was accepted that the trainers did not know and had no reason to suspect that the veterinarian had done this or had intended to do this. It was accepted in *Kavanagh*, that the trainers came within the third category.
36. Mr Kavanagh was fined \$4,000 in respect of the one horse he trained. In the related matter heard at the same time, Mr O’Brien was fined \$2,000 in relation to each of the four horses he trained and therefore the four offences of which he was convicted; a total of \$8,000. In imposing those fines, his Honour appears to have accepted and taken into account the submission that cobalt has no therapeutic benefits, that it is administered to enhance performance and that its administration is a significant welfare issue for racehorses.
37. His Honour also said:

²The appeal of Ms Collette Cooper, a decision of this Panel of 15 February 2018.

I accept that the administration of prohibited substances to horses in preparation for racing is very serious – the more so in group and listed races. This is mitigated in the present case by the fact that neither Kavanagh and O'Brien knew that the horses they were about to race had been given a prohibited substance.

38. In the case of the Appellant (Mr Andrew):

- a. As in the cases of Mr Kavanagh and Mr O'Brien, he did not know that the horse had been given a prohibited substance;
- b. Although a prohibited substance, Dexamethasone has therapeutic benefits and it had been administered to *Bobbio* in Dexapent for therapeutic purposes on the advice of Dr Dolan. The dosage was low. The circumstances were not nearly as serious as in *Kavanagh*. It was not administered for the purposes of performance enhancement.
- c. The race at which *Sugar Buzz* presented was not a group or listed race, but was at Ballina Racecourse in a Benchmark 66 handicap.
- d. Like Mr O'Brien, the Appellant had no prior convictions.

39. The Appellant's culpability arose from his inadequate cleaning of the reservoir of the nebuliser before treating *Sugar Buzz* with it. He failed to adequately remove the residue left in the reservoir of the nebuliser after the treatment of *Bobbio*. As Mr Van Gestel put it, the presentation of *Sugar Buzz* with a prohibited substance in its system was due to "poor husbandry". That culpability was more serious than that in *Kavanagh*, where the culpability was the failure to ensure that treatment was properly supervised at all times, in circumstances in which the treatment was administered by an experienced veterinarian.

40. As I have said, the purpose of AR240(2) is to encourage greater vigilance in ensuring that no horse is brought to a racecourse for the purpose of engaging in a race with a prohibited substance in its system. The punishment to be imposed should be sufficient to emphasise this by bringing to the attention of those in the industry the importance of taking appropriate care in the running of their stables, so as to prevent this happening and bringing to attention the risks of not doing so.

41. Mr Van Gestel supplied us with a table setting out the penalties that had been imposed on trainers in cases where Dexamethasone had been detected in the samples taken from horses. Of course, in each case the penalty is to be determined on its own facts, which depend on the level of culpability of the trainer. In the present case, the Appellant has a relatively low level of culpability.

42. In *Kavanagh*, Garde J took into account the fact that the horse was disqualified and the prize money had to be returned. He said:

As a matter of principle, if a contravention has been deemed to enhance performance of a horse, little or no weight might be given to the forfeiture of the trainer's share of prize money and the need to return prize money. However, where that is not the case, it is difficult to see any reason in principle

why their circumstances should not be considered as part of the matrix of facts to be taken into account in determining penalty.

43. In the present case, upon the disqualification of *Sugar Buzz*, the Appellant was required to refund his share of the prize money. *Kavanagh* confirms my view that, in the circumstances of this case this is relevant to penalty. Having regard to this, the Appellant's early plea of guilty and the matters referred to in [38(a)-(d)] above, lead me to the conclusion that the appropriate penalty should be less than the fine of \$4,000 imposed by the Stewards in the matter of Brian Young, which penalty this Panel has today confirmed in dismissing Mr Young's appeal against the severity of penalty.

44. I also consider the penalty should be less than the fine of \$4,000 in the case of *Kavanagh*, who had a prior conviction, but more than \$2,000 being the penalty for each offence imposed in *O'Brien*.

45. In the circumstances, the appropriate fine is \$3,000.

The Panel's orders are:

1. The appeal against penalty is allowed.
2. The order imposing a fine of \$5,000 is set aside, and lieu thereof a fine of \$3,000 is imposed.
3. The appeal deposit is to be refunded to the Appellant.