

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF BRIAN YOUNG

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. Brian Young (the Appellant) is a licensed trainer based at Dubbo.
2. On Friday, 13 December 2019, the Appellant entered the mare, *Laugharne*, in Race 2 at Scone in the Abby Thoroughbreds & Dalmore Benchmark 58 over 2,200 metres.
3. The Appellant left Dubbo at approximately 9 am on race day and arrived at Scone at approximately midday. Shortly after he arrived with the mare, the Stewards required that a pre-race urine sample be taken from her. This was at about 12:30 pm. *Laugharne* raced in Race 2 which was at 2 pm. The sample was sent to the Australian Racing Forensic Laboratory (ARFL) for analysis. The Certificate of Analysis of the sample from ARFL dated 30 January 2020 certified that the prohibited substance Metformin had been detected in the urine sample of the mare. The sample was then sent to Racing Analytical Services Ltd (RASL) at Flemington in Victoria. The Certificate of Analysis that RASL issued, dated 14 February 2020, also confirmed that the urine sample contained Metformin.

4. As a consequence of the detection of a prohibited substance in the urine sample, the Stewards conducted an inquiry at Tamworth Racecourse on Wednesday, 18 March 2020. This led to the Appellant being charged with, and pleading guilty to, a breach of the Australian Rules of Racing AR 240(2). The Stewards imposed a penalty of a fine of \$4,000. In doing so, the Stewards took into account the Appellant's long unblemished record and his plea of guilty.
5. The Appellant has appealed to this Panel against the severity of the penalty. Pursuant to s42 the *Thoroughbred Racing Act 1996*.
6. At the hearing before this Panel, Mr Van Gestel (Chairman of Stewards) appeared for the Stewards. The Appellant was unrepresented and appeared for himself. Due to the current pandemic, the appeal was conducted by audio visual link.

The Charge and Particulars

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

Mr Young, in relation to it we've given consideration to all aspects and we say that you should answer a charge. It's under Australian Rule of Racing 240, prohibited substance in sample taken from a horse at a race meeting. Part (2) says:

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 particulars of that charge that you, licensed trainer Mr Brian Young, as the trainer of *Laugharne* at all relevant times leading up to and including 13 December 2019 did present the mare *Laugharne* to race at Scone in race 2, the Abby Thoroughbreds & Dalmore Benchmark 58 Handicap 2200 metres on 13 December 2019 and a urine sample taken from it, prior to it competing in that event, was found upon analysis to contain the prohibited substance metformin. You've heard the rule and you've the charge.

Evidence

8. We received the appeal book into evidence as Exhibit A. It contained the exhibits and transcript before the Stewards. We received as Exhibit B extracts from the publication of Racing New South Wales in August 2018 and in November 2018. We also received into evidence a schedule of the details of two other occasions in which Metformin had been detected in urine samples and the penalties that were imposed on those occasions.

At the request of the Appellant, Dr Koenig gave evidence and was cross-examined by the Appellant.

Facts

9. The facts are not really in dispute. The Appellant has stables at Dubbo racecourse. Several years ago, the Appellant was diagnosed with Type 2 diabetes. His condition is being treated with Diabex XR tablets, which contain metformin hydrochloride which he takes each night with dinner. He is also treated with Jardiance tablets. This causes him to urinate more often than would be normal in order to get rid of surplus sugar.
10. The Appellant said that at the Dubbo racecourse the public toilets are about 100 metres away from the stables. He would usually arrive at the stables about 5 o'clock in the morning, when it was dark. At that time there are no lights to illuminate the 100 metres distance between the stables and the public toilets. For that reason, he, and others in the stable, would urinate in the horse boxes. He said that due to the Jardiance tablets, he urinates regularly in the horse boxes.
11. On 13 December 2019, he arrived at the Dubbo stables at about 3:45 am. He said that he urinated in *Laugharne*'s box that morning. He left Dubbo for Scone at about 9 am in a three horse float, which he used to transport *Laugharne*. He said that during the trip he stopped and urinated in the float.
12. Dr Toby Koenig BVSc (Hons) BVS is the Chief Veterinary Officer of Racing New South Wales. He provided a report to the Stewards, dated 18 February 2020. He also gave oral evidence before the Stewards and before this Panel. Metformin was detected in the urine sample taken from *Laugharne* and was also in the prescription medicine taken by the Appellant. Dr Koenig explained in his evidence before us that that Metformin is excreted rapidly from the body through the urine. It is expelled unmetabolised. However, it may remain in the environment for some period of time. Therefore, if the Appellant urinated in the box or the float, the Metmorfin may remain there for a prolonged period. However, if ingested by a horse, it would be excreted rapidly.
13. Dr Koenig said that the estimated level of Metformin in the sample was approximately 45 nanograms per millilitre. He said that that there had been two other occasions in which Metformin has been found in urine samples from horses. A sample from Canberra

contained approximately 74 nanograms per millilitre and a sample from Kemble Grange approximately 11 nanograms per millilitre.

14. Dr Koenig also explained that although there have been occasional instances of the use of Metformin in older show jumping horses, he was not aware of any instances of it being used in relation to thoroughbred horse racing. In summary, he considered that it would be of little assistance to racehorses.
15. Mr Van Gestel on behalf of the Stewards accepted that the Appellant did not intentionally cause Metformin to be ingested by *Laugharne*. He accepted that the evidence established that the mare ingested the prohibited substance as a result of the Appellant urinating in the mare's box and/or the horse float during the trip from Dubbo to Scone.
16. Racing NSW is the official monthly publication of Racing New South Wales. It is sent to all licensed persons in order to advise them of matters relevant to the racing industry. Licensed persons are expected to read it and pay attention to notices contained within it.
17. The August 2018 edition contained a report from the Chairman of Stewards (Mr Van Gestel), which warned of stable contamination with the use of oral and topical medications, including Metformin. It also warned of the practice of urinating in stables and that the practice should be immediately discontinued to avoid contamination. The warning was repeated in the November 2018 edition. It is worth setting out the warning in full and then.

WARNING REGARDING THE DETECTION OF HUMAN MEDICATION
In recent reports in this publication, I have warned trainers relative to the risks associated with stable contamination and with the use of oral and topical medications.

The Stewards have investigated a number of reports from the Australian Racing Forensic Laboratory whereby human medication that is taken in tablet or oral form, has been detected in raceday equine samples. These substances include:

- **METFORMIN - diabetic medication**
- TRAMADOL - opioid pain medication
- HYDROCHLOROTHIAZIDE - diuretic used for high blood pressure
- NAPROXEN - anti inflammatory
- VENLAFAXINE - anti depressant

Trainers and stable staff are warned that if taking medication, they should ensure that they do not have the medication in their possession whilst present at the stables.

Further, before commencing work persons should ensure that they thoroughly wash their hands. **The practice of urinating in stables should be immediately discontinued to avoid contamination.** (emphasis added)

18. The Appellant said that during 2018, he was badly affected by the recently diagnosed diabetes that he was suffering from. He said that this affected his concentration. He said that although he would have read the publication when it came out, his concentration was badly affected at this time and he cannot remember reading it.
19. He says that he has now changed his practices and always carries a container with him at the stables or when travelling so that it is no longer necessary to urinate in the horse boxes or the horse floats.

Resolution

20. This appeal was heard on the same day and immediately after the appeal in the matter of Brenton Andrews. The factual matters are similar as were the submissions made by Mr Van Gestel. It is therefore convenient to summarise the principles in the same terms as in the appeal in the matter of Brenton Andrew.
21. A breach of AR240(2) is a strict liability offence or perhaps an offence of absolute liability. For the present purpose as 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.
22. 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.

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

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

23. 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 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 by *McDonough* adopted by Garde J, it 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.

24. Mr Van Gestel emphasises the reference to *the worst case* and *severe penalty*.
25. The second category is when the evidence does not establish how the prohibited substance came to get into the horse.
26. 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.
27. Mr Van Gestel submitted:
- (a) that although the Appellant did not intend *Laugharne* to ingest Metformin, the mare did so due to the negligent conduct of the Appellant and his failure to accede to the warnings against the conduct prominently displayed in the monthly publications of August and November, 2018;
 - (b) the penalty imposed must be sufficient to encourage vigilance in complying with the rule and to deter any breach of it;
 - (c) in the circumstances of this case, the penalty must be sufficiently severe to emphasise the importance of the obligation of licensed persons to read and adhere to warnings in the monthly publication of Racing NSW. Licensed persons should understand the risk in not doing so. As in the case, ignorance is no excuse and might lead to them being exposed to significant penalties;

- (d) that the two other occasions of breach of the rule by reason of Metmorfin had led to a fine of \$5,000 in one case, where there was a reading of 75 nanograms per litre and \$4,000 where there was a reading of 11 nanograms per litre;
- (e) notwithstanding the Appellant's plea of guilty and unblemished record in 15 years of training, the fine of \$4,000 fine imposed by the Stewards was the appropriate penalty to be imposed.

28. The Appellant submitted that:

- (a) he did not intend *Laugharne* to ingest the prohibited substance, which Mr Van Gestel on behalf of the stewards accepts;
- (b) he relies upon the difficulty he faced at Dubbo Racecourse in the early hours of the morning given the medication he was taking and the fact that the public toilets were unlit and more than 100 metres away;
- (c) the fact that he has ceased the practice of urinating in stables or horseboxes and carries a container with him;
- (d) although he accepts that ignorance is no excuse, he relies on the fact that he was unaware of the warning contained in the August and November 2018 editions of Racing NSW and that this was due to the stress of his medical condition at the time;
- (e) he relies upon his unblemished record in 15 years of training.

29. While I have considerable sympathy for the Appellant given the inadequate toilet facilities in the early hours of the morning, I nonetheless agree with the submissions of Mr Van Gestel and his submission that \$4,000 is the appropriate penalty to impose. In doing so, I take into consideration and give weight to the fact that the Appellant pleaded guilty to the offence, at all times cooperated with the Stewards and was frank in his dealings with them and the fact that in 15 years of training he has not been convicted of any offence against the Rules of racing.

30. In my opinion, the conduct of the Appellant, which led to *Laugharne* ingesting the prohibited substance, Metformin, was negligent. The Appellant was fully aware that he was taking medication, yet he was regularly urinating in the horseboxes and on 13 December 2019 urinated in the horse float during its trip from Dubbo to Scone. Quite apart from the warnings in the publications, he should have been aware of the possible

risks of his actions. The importance of presenting a horse to race without prohibited substances in its system is fundamental and must be understood by every trainer.

31. If nothing else, it exposes the horse to disqualification if a prohibited substance is detected, with the consequent forfeiture of prize money if placed.
32. If the Appellant was not aware of the risk of the mare ingesting the medication as a result of his actions, he should have been. Clear warnings had been given in the August 2018 and November 2018 editions of the official monthly publication of Racing NSW. The fact that the Appellant's concentration might not have been as it should due to his medical condition, is, in my view, no answer to his obligation to take into account such warnings. He was, after all, continuing as a licensed trainer. In these circumstances, any penalty less than a \$4,000 fine would be insufficient to meet the policy considerations which underpin AR240(2). Further, as Mr Van Gestel points out, a fine of less than \$4,000 would be inconsistent with the two other cases concerning the detection of Metformin in horses presented for racing.

The Panel's orders are:

- (1) dismiss the Appeal;
- (2) confirm the fine of \$4,000 imposed by the Stewards;
- (3) the appeal deposit is forfeited.