

APPEAL PANEL OF RACING NEW SOUTH WALES

THE APPEAL OF LICENSED TRAINER GARY PORTELLI

Appeal Panel: **Mr R. Beasley SC – Principal Member; Mrs J Foley; Mr J Nicholson**

Appearances: **Mr W Birch, Deputy Chairman of Stewards**
Mr M Callanan, solicitor (Director, NSW Trainer’s Association)

Date of Hearing: **4 September 2020**

Date of Reasons and Orders: **4 September 2020**

REASONS FOR DECISION

Mr R Beasley SC, Principal Member (for the Panel)

Introduction and evidence

1. On 21 August 2020, Racing NSW Stewards imposed a fine in the sum of \$3000 on licensed trainer Mr Gary Portelli (**appellant**), in relation to a breach of AR240(2) of the Australian Rules of Racing. This rule provides that a person may be penalised 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 prior to or following its running in any race”.
2. The appellant pleaded guilty to the breach of the rule. It arose following analysis of a urine sample taken from “Lord Zoulander” after this horse ran in and won race 5 at the Kembla Grange racecourse meeting conducted on 19 May 2020. The urine sample contained the substance minoxidil.
3. Expert evidence was given about the substance minoxidil at the Stewards’ Inquiry conducted on 21 August. The Chief Veterinarian for Racing NSW, Dr T Koenig, advised that it is a prohibited substance under the rules. It is a “peripheral vasodilator” (a medication used to control blood pressure), that has no legitimate use on horses (T4

L175-185). Dr A Cawley, the Science Manager of the Australian Racing Forensic Laboratory, confirmed that the urine sample revealed minoxidil at a “low level” (T5 L209). As the horse had a prohibited substance in its urine sample, it was disqualified from its first place in the race under AR 240(1).

4. The evidence also revealed that minoxidil is an active ingredient in a shampoo or product used to treat (if that is possible) hair loss. The shampoo is available to purchase “over the counter”. It is not a prescription medication. The Stewards accepted, as does the Panel, that the likely cause of the minoxidil being in the horse’s urine sample was that a stablehand employed by the appellant who had been handling the horse was using this product. Whether the shampoo in question that contains the minoxidil (“Regaine”) actually does restore hair loss in humans is, mercifully, not something the Panel has to resolve. For our part, we simply accept that the prohibited substance entered the horse’s system via the appellant’s stablehand.

Submissions

5. Mr Birch for the Stewards acknowledged that there had been a non-intentional breach of the rule, but submitted that the fine imposed was warranted for the following reasons.
6. First, AR 240(2) is a rule that is designed to protect the integrity of racing. He submitted, correctly, that a breach of the rule is always a serious matter. Regardless of the circumstances, it is always a bad look for racing when a horse is found to have a prohibited substance in its system, even at a low level. All the more so when that horse has won a race while that prohibited substance is in its system.
7. Secondly, while Stewards had not given any specific warnings about minoxidil or “Regaine”, they had published warnings to trainers about other “human medications”, and their potential if used to result detection in race-day samples from horses. The appellant was unaware of these warnings. He should have been.
8. Thirdly, Mr Birch said that the appellant’s procedures at his stables could be improved. He did not keep, for example, a register of the prescription medications taken by his staff.

9. Fourthly, and partly because of the other matters, Mr Birch said that a fine was necessary as a deterrent to poor stable practices that might lead to similar incidents of prohibited substances being detected in urine samples. Mr Birch also submitted that the fine imposed here was supported by and consistent with the Panel's decisions in *the Appeal of Chris Waller* (10 February 2017), and *the Appeal of Brian Young* (17 June 2020).
10. For the appellant, Mr Callanan submitted that no steps taken by the appellant would have been likely to have prevented the breach of the rule here. This was a case of a breach of the rule where the appellant had no idea that his stablehand was using a product that could cause a positive swab result. Further, the product is a shampoo, not a prescription medicine that he might have been expected to know a staff member was taking. Mr Callanan also submitted that the offending in *Waller* and *Young* contained matters of aggravation that this case did not.

Panel resolution

11. As the Panel said in *Waller* at [13], a breach of AR 240(2) is always an objectively serious offence. A breach of this rule will often result in a suspension, or a disqualification. As breaches of this rule go though, this appeal involves a breach at the very low end of seriousness.
12. The Panel accepts that the appellant should keep a register of the medications taken by his staff. That would be prudent. Such a measure though is highly unlikely to pick up the fact that a stablehand struggling with hair loss is using a particular shampoo in the search for a cure. Even less would it likely send off an alarm bell about prohibited substances.
13. We also agree that the appellant should put in place a system whereby he is familiar with and up to date with warnings given by Stewards about various medications. However, the Stewards had not issued a warning about hair loss shampoos, either in relation to their efficacy, or their capacity to end up in a horse's urine sample.
14. Finally, the Panel agrees with Mr Callanan in relation to both *Waller* and *Young*. Mr Waller had a \$30,000 fine reduced to \$5000 in relation to the finding that one of his horses had the drug known as "Ice" in its system. While there was no finding of intent

or carelessness, there was evidence in that matter of staff previously having been found to have prohibited drugs in their system. Mr Young received a \$4000 fine for a positive urine sample for one of his horses, where the prohibited substance appears to have entered the horse's system because Mr Young was urinating in the stall.

15. Deterrence is important to the determination of penalty, but it is difficult to see what conduct could be deterred here that would have made any practical difference. Further, while the main purpose of the imposition of penalties for breaches of the rules of racing is to protect the image and integrity of the sport, and to send a message to the community that racing takes steps to always do that, we are of the opinion that reasonable persons would view what occurred here as a very unfortunate misadventure, rather than something associated with laxness or carelessness on the appellant's behalf. We do not consider that a fine should be imposed. While a separate issue, we note also that the appellant has already indirectly suffered a penalty here, as his horse has been disqualified, costing him money, and no doubt some embarrassment with his clients.
16. The Panel is of the view that in the usual circumstances of this appeal, no fine or other penalty should be imposed. The appeal against severity of penalty must be allowed, and the fine set aside.
17. The Panel makes these orders:
 1. Appeal against severity of penalty allowed.
 2. Fine in the sum of \$3000 set aside.
 3. Appeal deposit to be refunded.