

RACING NEW SOUTH WALES

APPEAL PANEL

IN THE MATTER OF THE APPEAL OF CHRIS WALLER

Heard at Racing NSW Offices on Friday, 10 February 2017

Date of Decision: 10 February 2017

APPEAL PANEL: Mr R Beasley SC - Principal Member
Mr T Carlton
Mr J Fletcher

APPEARANCES: Mr M Van Gestel, Chairman of Stewards for Racing NSW

..... Mr John Byrnes, Solicitor, for Mr Waller

REASONS FOR DECISION

PRINCIPAL MEMBER:

1. On 5 October 2016 a urine sample was taken from the horse Betcha Thinking (the horse) following that horse running a race at Canterbury Park. The horse's urine sample, when tested, revealed a level of 4 to 5 micrograms per litre of methylamphetamine (meth) in that sample.

2. Mr Chris Waller, a licensed trainer, was the trainer of the horse. He subsequently pleaded guilty to a breach of AR 178. That rule was in the following terms:

AR 178. 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.

It is not dispute that meth is a prohibited substance.

3. Following a Stewards' Inquiry, the Stewards imposed a fine of \$30,000 as the penalty for this breach of the rules. Mr Waller has appealed to this Panel against the severity of that penalty. He is represented today on the appeal by Mr John

Byrnes, solicitor. The Stewards are represented by Mr Marc Van Gestel, Chairman of Stewards.

Facts

4. Some matters of agreed fact have emerged from the evidence:

(a) The meth detected in the horse's urine was at a very low level. Meth is, however, a prohibited substance at any level under AR 178.

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(b) There is no evidence upon which any finding can be made as to how the meth got in the horse's system. The expert evidence indicates that it was probably put in the horse's system within 24 hours of the race. It is more likely than not that the source was a member of Mr Waller's staff by inadvertent means.

5. There is no suggestion of a deliberate administration to the horse.

6. It is unlikely that the concentration detected of the substance had any impact on the horse's performance.

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Submissions of the Stewards

7 Mr Van Gestel drew the Panel's attention to the Stewards' Report in the appeal book (marked annexure A in this appeal) and pages 46 to 48 of the inquiry transcript, which set out in summary form the stewards' reasons for the penalty imposed. Mr Van Gestel took into account the following matters, which he said should satisfy the Panel of the appropriateness of the \$30,000 fine imposed. Those matters are follows:

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(a) A section 178 offence is objectively serious. Racing needs to be drug free, which is why the rule is one of absolute liability.

(b) An aggravating factor in this case is the nature of the drug detected. Meth is a drug of notoriety in the community and is having extremely harming social consequences.

- (c) The drug is not one that is ever appropriate in the treatment or management of horses.
- (d) Although Mr Waller had a CCTV security system in place, it was of no assistance here because it failed to work.
- (e) After testing of 17 of Mr Waller's staff (noting he has a staff of about 100) following the positive urine sample from the horse, six of those tested positive to illicit substances. That was an adverse reflection, in Mr Van Gestel's submission, on the stable standards.
- (f) Mr Van Gestel said stewards took into account the steps introduced by Mr Waller to avoid a repeat of this breach of the rule - such as random drug testing of staff and additional measures and hand washing. These measures should have been put in place before the incident with the horse.
- (g) Most particularly, regardless of Mr Waller's prior record in relation to AR 178, the Panel's attention was drawn to some offences under AR 178 involving feed contamination and also the disqualification of the horse Junoob following the running of The Metropolitan race in October 2014, which resulted in a \$30,000 fine.
- (h) Mr Van Gestel said Stewards took into account that the various precedents (which are discussed in a moment) and also the comments of Mr Armati in the *Smith* case concerning the need to impose appropriate penalties for drug breaches that seek to uphold or reinforce the image and integrity of racing.

Submissions for Mr Waller

8. Mr Byrnes provided the Panel with detailed written submissions and supplemented them today with oral submissions.
9. He drew the Panel's attention to a number of matters that he says the Stewards took into account that he submits they should not have, and others that he says they ignored that they should not have. He urged upon the Panel a different approach to the following matters:

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- (a) Mr Byrnes submitted that the failure of the CCTV system is irrelevant to penalty. It occurred because of a software glitch for which the Appellant should not be blamed. Rather his submission was that Mr Waller should have received credit for the state of the art system he had which was installed at considerable expense.
- (b) Mr Byrnes rejected the Stewards' submission that the positive drug testing of six of Mr Waller's staff for other substances (with the exception of one member for meth) was relevant to the sentence to be imposed on the Appellant.
- (c) Mr Byrnes contended that Mr Waller had received little or no apparent credit for measures put in place since the incident here. These include random drug testing for staff and extra measures to ensure contamination of horses did not occur.
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- (d) He submitted that the Appellant conducts a large stable to very high standards of integrity and probity and high standards of ensuring offences like this do not occur.
- (e) Mr Byrnes also made a submission as to the potential unfairness of AR 178 in relation to technical breaches of the rule involving very small amounts of prohibited substances in circumstances where there is no definitive evidence as to how the substances came to be in the horse's system.

Precedents

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10. Both Mr Van Gestel and Mr Byrnes discussed in particular the decisions of *Farley*, *McNair* (RAT, 4/12/15), *Waterhouse* (RAP, 2/9/05) and *Laurie* (Racing Appeals and Disciplinary Board of Victoria, 24/9/15).
11. Mr Byrnes submitted that consideration of the facts and circumstances of the *Laurie* and *Waterhouse* decisions was instructive to his contention that Mr Waller should be convicted without penalty. He said those cases involved similar breaches of the rule where no penalty was imposed. He drew the Panel's attention

to *McNair* as part of the submission that Mr Waller should at a minimum have received a lesser penalty to the Appellant in that case.

12. Mr Van Gestel sought to distinguish various aspects of these decisions from the circumstances here, with particular reliance on Mr Waller's prior offending under AR 178.

Panel Resolution

- 10 13. In the Panel's view a breach of AR 178 is an objectively serious offence. It is paramount to the integrity and image of racing, perhaps even to its long term viability as an industry, that it be drug free. Detection of prohibited substances in horses is damaging to the industry. Ordinarily such an offence would result in a suspension or disqualification.
14. Having said that, the Panel takes note of the very small amount of prohibited substance detected in the horse's urine in this matter. Based on the expert evidence of Dr Suann, the Senior Veterinarian of Racing NSW, on the balance of probabilities the amount detected here would not have affected the horse's performance.
- 20 15. Mr Waller contends he should get credit for his co-operation with the stewards. We agree that is a relevant sentencing factor. We do not, however, place too much weight on it. As with other licensed persons, Mr Waller's co-operation with the Stewards in their work is to be expected.
16. We disagree that Mr Waller's offending is aggravated by the absence of CCTV footage. The evidence is that a software glitch may occur – this can't be sheeted home to Mr Waller.
- 30 17. We take some account of the fact that six persons employed by Mr Waller had positive drug testing close to this incident. We do not over-emphasise this, however. The stable is large. There is a limit to the intrusions an employer can make into their employees' private lives and conduct.

18. Mr Waller is entitled when being sentenced to be given credit for the additional steps he has put in place since the incident. We also consider he was already running a professional stable to high standards.
19. The Panel has considered Mr Waller's relevant record. It is not a bad record in the sense that it does not reveal any incidents of a deliberate breach of the rules concerning drugs.
- 10 20. The Panel has considered the fundamentals of sentencing and has considered what is sought to be achieved by a \$30,000 in the circumstances of this case with this offender. The objective seriousness of the offence must be taken into account. The integrity and image of racing must be considered. Deterrence must also be considered. Specific deterrence seems largely irrelevant here. Mr Waller's offence involved no intent, and the standards of his stable were already high and he has sought to make them higher. General deterrence - in the sense of emphasising to participants in racing that the higher standards are required where prohibited substances - is relevant.
- 20 21. Considering all these matters, our reaction to the penalty is that it is too severe. That reaction is underscored upon consideration of what the Panel sees is the most relevant precedent here, the appeal of *McNair*.
22. The Appellant in *McNair* had a considerably worse record than Mr Waller. His breach of AR 178 also involved meth. The urine sample from his horse had a reading of 170 micrograms per litre, as against 4 or 5 here. There is no significantly distinguishing feature of these cases, other than that there were several years between Mr McNair's offence and his last relevant offending.
- 30 23. It is important that differently constituted appeal panels attempt to reach consistent decisions to similar breaches or the rules where similar circumstances exist.
24. Further, this Panel should have particular regard to the decisions of the Tribunal, which is a higher authority. Mr McNair was penalised by way of a \$10,000 fine.

25. The offending here, which involves an objectively serious breach of the rules, is unfortunate. Mr Waller runs a stable of high standards generally. The breach here involved no intent. It also involved no apparent carelessness. Some message of general deterrence must be factored into the penalty however, as must Mr Waller's prior record of breaches of AR 178. In the Panel's majority view (Beasley and Fletcher), the appropriate penalty is a fine of \$5,000. Mr Carlton would have imposed a penalty of \$10,000.

26. The orders of the Panel are:

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- (1) Appeal against severity of penalty upheld.
- (2) Penalty of a \$30,000 fine set aside.
- (3) In lieu of that penalty a monetary penalty of \$5,000 is imposed (by majority).
- (4) Appeal deposit is refunded.
