

RACING APPEAL PANEL NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF LICENSED FOREMAN S THOMPSON

Heard at Racing NSW Offices on Friday 10 January 2020

APPEAL PANEL: Convenor: Mr T Hale SC,
Mr T King
Mr J Murphy

APPEARANCES: Mr Marc Van Gestel for the Stewards
Ms Helen Christinson for Appellant S Thompson

REASONS FOR DECISION

1. Steven Thompson (the appellant) is a licensed foreman based in Coffs Harbour. Amongst other things he rides track work. He works for his partner Ms Cathleen Rode.
2. On 9 September 2019 the appellant was riding track work. After track work he was required by the Stewards to provide a urine sample. It was sent for analysis to the Australian Racing Forensic Laboratory (ARFL). On 2 October 2019 the ARFL certified that the sample contained the banned substance 11nor-delta9- tetrahydrocannabinol9-carboxylic acid at a concentration above 15µg/L. For convenience the substance will be referred to as THC or cannabis
3. AR136(1)(c)(i) provides:
Unless otherwise stated in these Australian Rules, the following substances and/or their metabolites, artefacts and isomers are specified as banned substances in riders when detected in a urine sample at a concentration above the respective threshold level:
(c) all Cannabinoids, including but not limited to:
(i) 11-Nor-delta-9-tetrahydrocannabino-9-carboxylic acid
(15µg/L)

4. AR139(1) provides:
 - A rider breaches these Australian Rules if-
 - (a) a banned substance under AR136(1) is detected in a sample taken from the rider
5. On 24 October 2019 a committee of the Stewards (Mr M.A. Holloway and Mr R.W. Loughlin) conducted an inquiry into the circumstances of the analysis. This led to the appellant being charged with a breach of AR 139(1)(a), to which he pleaded guilty. The Stewards suspended the appellant's foreperson's license for a period of 12 months. The suspension was to commence on Wednesday 2 October 2019, the day on which the appellant was stood down from foreperson duties. It is to expire on Friday 2 October 2020.
6. The appellant was advised that should he complete a satisfactory level of drug counselling and provide a urine sample clear of prohibited substances, he would be permitted to resume ground-work duties on Saturday 2 April 2020 and trackwork duties on Saturday 2 July 2020.

Appeal

7. The appellant appeals against the severity of penalty pursuant to s. 42 of the *Thoroughbred Racing Act 1996*. The appeal is by way of a rehearing.

Representation

8. At the hearing before this Panel, Mr Marc Van Gestel, Chairman of Stewards appeared for the Stewards. With leave, Ms Helen Christinson, solicitor, appeared for the appellant

Particulars of the charge

9. The particulars of the charge are:

Licensed foreperson Mr Steven Thompson, you are hereby charged with a breach of AR139(1)(a)

***AR139(1) A rider breaches these Australian Rules if:
(a) a banned substance under AR 136(1) is detected in a sample taken from the rider.***

The particulars of the charge being that, after riding trackwork at Coffs Harbour Racecourse on Monday, 9 September 2019, you, licensed foreperson, Mr Steven Thompson, did provide a sample of your urine, which upon analysis was found to contain a substance banned by AR136(1), namely 11nor-delta9-tetrahydrocannabinol9-carboxylic acid at metabolite of cannabis at a concentration above 15 micrograms per litre.

Evidence

10. The Panel received into evidence a bundle of materials that were before the Stewards, together with certain additional material. The appellant gave oral evidence. Also in evidence was an expert report from Professor R Weatherby tendered by the appellant and an expert report in reply from Dr Adam Cawley tendered by the Stewards. They also gave oral evidence. Both experts gave evidence about the conclusions that might be drawn from the test results.

The Appellant's case

11. The appellant pleaded guilty to a breach of AR139(1). He did not dispute that a banned substance, namely THC or cannabis metabolites, was detected in the sample taken from him on 9 September 2019. His case was that he did not knowingly ingest the banned substance. His evidence is that on the previous day, 8 September, he ate 5 to 7 biscuits which he later learnt contained cannabis oil. He said he did not know this at the time.
12. He said that the circumstances in which he ate the biscuits on 8 September is as follows:
 - a. At about 10 am on Sunday 8 September the appellant met up with Stephen Leonard, who had horses with the appellant and his partner. Mr Leonard asked him if he would like to go fishing that day. The appellant's evidence before the Stewards was this:
(T 6-7)
Stephen Leonard ...said to me, "Would you like to go fishing, Steve" and I said, "Where at" and he said, "Oh, I've got a friend whose

got a boat at Woolli" and I said, "Oh, yeah, no worries. I'd like to go fishing." I asked Cath. Cath said, "Yeah, you can have the afternoon off." So away we went.

- b. The appellant and Mr Leonard collected the friend in Woolgoolga. The appellant said:

So we get to Woolgoolga. We pulled off there, picked up this South African gentleman. I can't even remember his name, Uro or Uno, whatever his name was and, as he got into the car, he said to Mr Leonard at the time, "There's your biscuits."

- c. On the way to Woolli the South African lit up "a joint", which was something that the appellant said that he strongly disagreed with. The appellant said:

So away we went. So we gets to Woolli on the highway, turn off to Woolli and the South African guy lights up cigarette, which I thought was cigarette at the time, but it was joint and he's puffing away, puffing away and I've gone,

300 "What?" Then passed it to Mr Leonard and he smoked until we got to Woolli and then I said, "Here, Stephen, what did you do that for?" He said, "Oh, it won't hurt you", ra, ra, ra, carrying on like a pork chop.

- d. The appellant said he was so concerned about this behaviour that when they got to Woolli he did not go on the boat with Mr Leonard and the South African. He said that he stayed behind and fished off the rocks. While they were away he became hungry and ate a number of the biscuits that the South African had given Mr Leonard. He said:

So they proceeded to go fishing. So I got the shits and I said, "I'm not going in your boat. I'll go off the rocks." So was on the - what do you call it - rock wall and I was lure fishing there, catching a few tailor and the other was a groper and with that I said, "Oh, bugger this." I've done it for about, I suppose, maybe two hours and I walked back because I was starving. I've had nothing to eat. So I walked back to the ute, where the ute was, grabbed some more lures, undone the esky, put the fish in, grabbed a can of coke and then I seen the biscuits. So then I had five or six, maybe six or seven of the biscuits. They did look like

- what do they call them - ginger nut biscuits. You know what I'm talking about.

- e. The appellant said that he didn't feel any effects from the biscuits. Before this Panel, he said that that while waiting for the others to return he also had three cans of beer; Toohey's New. He said that a had a bit of a buzz from that. He did not mention this before the Stewards.
- f. On the way home in the car he expressed his concern to Mr Leonard about having been subjected to the marijuana smoke on the way over:

I've said to Mr Leonard on the way home, "If I get into any trouble over this, you're gone, mate" and he said, "No" as if - he said (inaudible). "Yeah, righto".

- g. The appellant said that after he had been informed of the results of the analysis of the sample that he had given on 9 September, he telephoned Mr Leonard and the following conversation took place (T7):

I rung up Mr Leonard, which I couldn't get in touch for a day and a half, maybe two days and he rung and said, "What's your problem? What's your problem" and I said, "I've gone a positive swab." He said, "What's this? Mate, did the smoke get stuffed up you?" I said, "No" and he said, "Oh, shit, you didn't eat them biscuits?" I said, "I said I did eat them biscuits." "Oh", he said, "Mate, they were full of' - what do you call it - "marijuana oil", whatever.

At T16 he said:

As I said, mate, I'm guilty as charged. Like I can't say I didn't do it because I did. I ate the biscuits and he's raised it two days later when I did get into him. He said, "Oh, you" - you know. I said, "Yeah, I did" and he said, "Well, they were full of marijuana oil, mate." He said, "I'm sorry, I should have told you" and I said, "Well, bad luck now." I said, "I've been in trouble", I said, "And the only one really getting punished is Cathleen."

- h. The appellant said that this was the first occasion that he became aware that the biscuits contained cannabis oil. There is some difficulty with the chronology of this account since the testing certificate was dated 2 October 2019.

13. In her helpful and well considered submissions, Ms Christinson for the appellant submitted that in these circumstances, the Panel would be satisfied that the appellant inadvertently ingested the cannabis oil. In those circumstances he was without fault and that therefore the penalty imposed by the Stewards should be substantially reduced.
14. For his part, Mr Van Gestel submitted that the Panel should not believe the appellant's account. Accordingly, he submitted the penalty imposed by the Stewards was appropriate and that the appeal against severity should be dismissed.
15. The principal issue in the appeal is whether or not this Panel accepts the appellant's explanation as to why his sample tested positive.

The Scientific Evidence

16. I have earlier referred to the scientific evidence given by Professor R Weatherby and Dr Adam Cawley about the conclusions that might be drawn from the test results. For the reasons I expressed during submissions, I do not see that this evidence is of great assistance. In summary, the effect of the evidence is that the test results are consistent with both the appellant having smoked cannabis the previous day and having eaten cannabis laced cookies the previous day. It is, however, inconsistent with passive inhalation of cannabis smoke in the car. Accordingly, the issue turns on whether or not the Panel accepts the appellant's explanation.
17. I should also add that the presence of the metabolite of cannabis in the sample on 9 September does not mean that the appellant was still affected by cannabis that day. Metabolite of cannabis is an inactive metabolite, but it indicates that cannabis had been ingested and, at the concentration of the metabolite detected, the cannabis ingested would have had an effect at the time it was ingested. Further, due to the lack of detail about the actual substance ingested it is difficult to determine the concentration or amount of cannabis ingested.

Consideration

18. Of particular relevance to whether the appellant's account should be accepted is the fact that he has on two previous occasions been found

guilty of the same offence with which he has charged on this occasion. Both concerned a sample taken after trackwork. Both concerned cannabis.

19. The first was in relation to a sample taken on 1 June 2010. In his evidence before the Stewards, the appellant said that: *"I did have a joint with a bloke. I hadn't seen him for 20 years."* He was suspended for 3 months from 22 June to 22 September 2010.

20. The second occasion was in relation to a sample taken on 31 January 2011. For this offence he was suspended for 6 months from 11 March 2011 to 11 September 2011. This breach was only 7 months after the first breach. In his evidence before the Stewards he described the circumstances of this offence at T9-10. He said that he was guilty of the breach by association. He said:

CHAIRMAN: And then seven months later at Grafton again there was another positive there. So you were using marijuana then, weren't you?

S THOMPSON: No, I wasn't using marijuana. I was guilty of association.

CHAIRMAN: How did that happen?

S THOMPSON: Well, Mr Roland Stone's birthday party. Justin Stone brought this cake. They were all just snorting coke and whatever else they were doing and me and another young lady called Alana, who worked for the - and she was an ambulance officer. We were sitting in the kitchen eating cakes and everything that was on the table and that's how that went. Well, Alana, I found out later, she went positive because she's an ambulance driver. So she threw her job in and moved back to Eden because she was that embarrassed about it.

He said that Mr Stone later told him that there was cannabis in the cake that he had been eating. Like the present circumstances, he said that he inadvertently ingested cannabis by eating the cake that was laced with it.

21. The appellant's evidence is that he does not smoke cannabis. He said at T 7 before the Stewards:

"Like I don't smoke it, mate. I've never smoked it." Right. Maybe when I was a kid I've tried it, you know. That's about it. That would be 30 to 40 years ago now.

His evidence before this Panel was to the same effect.

22. The appellant's evidence is that as an adult he has only ever smoked or ingested cannabis on three occasions. On each of those three occasions he was randomly tested after trackwork the next day by the Stewards and on each of those three occasions he tested positive to having the prescribed concentration of the substance in the sample he gave.
23. I do not accept the appellant's account of what occurred on 8 September 2019. It is not necessary for me to make a positive finding of what occurred, for example whether or not he smoked cannabis in the car with the others or in the boat. It is sufficient that I do not accept his evidence in mitigation that he advances. I do so for the following reasons.
24. Firstly, when taken with the facts concerning the other two convictions his evidence is inherently improbable.
25. Secondly, having regard to the circumstances of the second breach it is difficult to accept his evidence that after the smoking of cannabis in the car, the possibility never occurred to the appellant that the biscuits might also contain cannabis. This is particularly the case given the way in which they were handed to Mr Leonard by the South African: "*There's your biscuits*". In reaching that conclusion I am conscious of the evidence that people gave Mr Leonard meals from time to time.
26. Thirdly, I was not impressed by the manner in which the appellant gave his evidence. His evidence and the manner of giving that evidence did not give me confidence that he was a witness of truth. His evidence in relation to the matters in the preceding paragraph and the manner in which he gave that evidence is one example. His evidence of outrage when the other two in the car smoked the joint, I found difficult to accept. He had willingly smoked a joint with a friend in 2010. Why would he be so outraged by their behaviour that he refused to go in the boat with them? I did not find the appellant to be a credible witness.
27. In coming to this conclusion, I take into account the evidence that the appellant has been tested on other occasions and delivered clean samples. This simply means that on the occasions immediately before those samples were taken the appellant had not ingested cannabis.

Decision

28. Having determined that the appellant's explanation for the positive sample should be rejected, it is necessary to determine what penalty should be imposed.
29. The Stewards imposed a penalty of 12 month's suspension commencing on Wednesday 2 October 2019, the day on which the appellant was stood down from foreperson duties and Friday 2 October 2020. This was, however, to be the subject of a partial stay. The Stewards held that if the appellant were to complete a satisfactory level of drug counselling and provide a urine sample clear of prohibited substances, he would be permitted to resume ground work duties on Saturday 2 April 2020 and trackwork duties on Saturday 2 July 2020.
30. To deal firstly with the twelve months period of suspension. This is the appellant's third offence. For the first offence he was suspended for 3 months. For the second he was suspended for 6 months. In my view 12 months suspension for the third offence is appropriate. In Exhibit E the Stewards provided a 43-page schedule of the penalties imposed for similar cannabis offences throughout Australia. A suspension of 12 months in the present circumstances is consistent with the penalties set out in the schedule.
31. The appellant points to the evidence of Professor R Weatherby to the effect that the existence of metabolite in the sample on 9 September does not mean that the appellant was affected by cannabis at the time he rode. Whether or not he was affected at that time he rode depends upon when he ingested the cannabis and the concentration in which he ingested it. The evidence does not establish those matters or the circumstances in which the cannabis was ingested. I have not accepted the appellant's account of what occurred. Accordingly, the evidence does not enable me to determine whether or not the appellant was affected at the time he rode. It does not follow that even if I were to find that the appellant was not affected at the time, he rode that I would consider this to be should add that it should not be a mitigating factor.

32. AR 136(1) is directed to riders. A rider is defined to include those riders who ride trackwork. The rule is for the protection of riders and horses. The dangers likely to arise from a rider under the influence of cannabis are obvious. The danger is not only to the affected rider and his or her horse but also that rider has the potential to be a danger to the other riders and horses at trackwork. The offence is a serious one. The penalty imposed should be sufficient to be a deterrent.

33. There was some debate about whether the period of suspension should date from 2 October 2019, which is what the Stewards determined or whether it should date from the date of the hearing of this appeal. On 11 November 2019 the appellant was granted a stay of the penalty pending determination of the appeal. However, AR 139(4) provides:

If a rider incurs a penalty or is prevented by the Stewards from riding under this rule, the rider cannot resume riding until the period of the penalty has expired and a sample from the rider free of any banned substance under AR 136(1) has been delivered, as directed by the Stewards.

Since then the appellant has failed to provide a sample free from the banned substance. As a consequence, he has not been permitted to ride since he was stood down, despite the terms of the stay. He has provided two samples; one on 13 November and one on 20 December. They each contained cannabis metabolite but below the cut off point. They were therefore not free of the metabolite. The evidence of Professor R Weatherby is that due to the half-life of the metabolite it remains in the body for some time.

34. Mr Van Gestel points to the fact that the appellant has had sufficient time and opportunity to provide a clean sample but has failed to do so. This is despite the Stewards' direction that he provide further samples. Therefore, he submits that the restriction on the appellant riding during the period of the stay is due to his own inaction. He submits that the Panel should approach the date of commencement of the penalty on the basis that the order of the Stewards has been stayed and that the commencement of the suspension should be from the date of the hearing of the appeal.

35. While there is force in this submission, the fact remains that the appellant has not been permitted to ride since he was stood down on 2 October 2019. He was stood down on that date as a consequence of the detection of the cannabis metabolite in the sample. For all practical purposes the appellant has served a suspension since that date.

36. Accordingly, I would confirm the order of the Stewards of 24 October 2019. The 12-month suspension is to commence on 2 October 2019.

37. The Stewards in effect order a stay of the suspension from 2 April 2020 in relation to ground work duties and 2 July 2020 in respect of trackwork. This is permitted under AR283(5) which provides:

Any person or body authorised by the Rules to penalise a person may in respect of any penalty imposed in relation to the conduct of a person and other than in relation to a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period not exceeding 2 years, on terms they think fit.

38. I agree with the intent of this stay, but I would word it slightly differently.

Orders

39. I would propose the following orders:

- 1) The appeal is dismissed.
- 2) The penalty imposed by the Stewards on 24 October 2019 is confirmed.
- 3) The appellant's foreperson's license is suspended for a period of 12 months commencing on Wednesday 2 October 2019 and expiring on Friday 2 October 2020, on which day he may recommence foreperson duties.
- 4) The suspension will be stayed:
 - i. From 2 April 2020 in respect of ground work duties, and;
 - ii. From 2 July 2020 in respect of trackwork duties,
On condition that the appellant:
 - (a) Provides a urine sample clear of prohibited substances 2 weeks prior to those two dates;

- (b) Promptly provides urine samples to the Stewards when requested by them to do so, which are clear of prohibited substances;
- (c) Does not otherwise breach the Rules of Racing;
- (d) Has prior to 2 April 2020 satisfied the Stewards that he has completed an appropriate level of drug counselling

5) The appeal deposit is forfeited.

40. MR T KING: I agree.

41. MR J MURPHY: I agree

Ends