

RACING NEW SOUTH WALES

APPEAL PANEL

Thursday, 3 November 2016

MR R BEASLEY SC — PRINCIPAL MEMBER
MR T CARLTON
MR J FLETCHER

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IN THE MATTER OF THE APPEAL OF
JEREMY SMITH

APPEARANCES:

MR SMITH: MR B MACKIE, SOLICITOR

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RACING NSW: MR M VAN GESTEL, CHAIRMAN OF STEWARDS

REASONS FOR DECISION

PRINCIPAL MEMBER:

1. There are two appeals today before the Panel concerning Mr Jeremy Smith.
- 30 2. Both relate to penalties imposed by the Stewards following Mr Smith's pleas of guilty to charges brought under AR 175(q). That rule is relevantly in the following terms:

The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(q) Any person who in their opinion is guilty of any misconduct, improper conduct or unseemly behaviour

- 40 3. The particulars of the first charge against Mr Smith are as follows:

“You, licensed trainer Mr Jeremy Smith, did at or around 5pm on Tuesday, 12 April 2016 improperly conduct yourself in that, after driving a car and following Mr Michael Dwyer to application around Beaumont Street in Newcastle, you did assault Mr Dwyer by striking him on a number of occasions with your fists, resulting in Mr Dwyer sustaining abrasions and lacerations.”

For this offence, which we will call the assault offence in these reasons, Mr Smith was disqualified for a period of four months.

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4. The particulars of the second charge against Mr Smith were as follows:

“...the improper conduct being that you, licensed trainer Mr Jeremy Smith did cause Miss Renee Broadhead to administer an unregistered product to Bolwarra Ben on Monday, 15 August 2016 an unregistered product contained in an unlabelled vial, which results in Bolwarra Ben suffering an adverse reaction to the substance, which included an elevated heart rate, known as tachycardia, elevated temperature, sweating and muscle spasms, all of which required veterinary treatment.”

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For this offence, which we will call the administration offence, Mr Smith received a \$500 fine for a breach of AR 80E (not the subject of this appeal) and a two month disqualification for a breach of AR 175(q).

5. Mr Smith’s appeal is in relation to the severity of the penalties imposed and in relation to the fact that the penalties are currently to be served cumulatively. Mr Smith is today represented by Mr B Mackie, solicitor, and Racing NSW was represented by Mr Marc Van Gestel, the Chairman of Stewards. The Panel will deal first with the assault matter.

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6. On 12 April 2016 Mr Smith, a licensed trainer and stablehand, was involved in a fight with another licensed person - Mr M Dwyer.
7. Mr Smith and Mr Dwyer have stables at Broadmeadow near the Newcastle Racecourse. After the Wyong races that day, Mr Dwyer was driving his horse float near the stables. Mr Smith was leading his horse in the street. Mr Dwyer drove at or near Mr Smith. Mr Dwyer sounded his horn, perhaps by accident. He drove on and it seems he sounded his horn at least twice more - see paragraph 7 in the statement of Mark Spackman, which was an exhibit in the

Stewards inquiry and is part of exhibit A on this appeal, which constitutes all the transcript and exhibits from the Stewards' inquiry.

8. Mr Smith became very angry at Mr Dwyer's conduct. He got in his vehicle and drove quickly to a public street where Mr Dwyer was also then driving. There is a dispute as to whether Mr Smith pulled his vehicle in front of Mr Dwyer's to stop it or whether Mr Dwyer had already stopped. Nothing of significance turns on this. After getting out of his vehicle, Mr Smith agrees that he threw several punches at Mr Dwyer and connected him in the head region. He at least in part pulled Mr Dwyer out of his car. There was wrestle on the ground. The exact number of punches is unclear. It was probably at least six. Mr Dwyer sustained injuries, although none appear to be long term or incapacitating. The fight was in public and witnessed by one or more members of the public.
9. Mr Smith was subsequently charged with assault occasioning bodily harm. He pleaded guilty. He was convicted and penalised by way of \$500 fine and an 18 month good behaviour bond. He also had previously agreed to an apprehended violence order being imposed against him in relation to Mr Dwyer for a period of six months.
10. Mr Van Gestel submits and the Panel accepts that Mr Smith's actions in assaulting Mr Dwyer fall well short of what would be expected of a licensed person in the thoroughbred racing industry. Violent acts committed in public have the potential to and do damage the image of racing and are clearly improper conduct within the meaning of AR 175(q).
11. Mr Van Gestel submitted that the most aggravating circumstances here included:
- (1) Mr Smith's conscious decision to chase Mr Dwyer in his car before assaulting him.
 - (2) The fact that the event happened in public and that the horse float would have identified the persons involved as participants in the racing industry.
 - (3) The relatively serious nature of the assault, being one where injury was caused.

12. Mr Mackie identified a number of mitigating factors, some of which Mr Van Gestel properly also conceded.
13. While there is no excuse for Mr Smith's conduct, the Panel notes that he makes none. He has pleaded guilty to a breach of the racing rules and to a criminal charge. From his evidence today it is clear that he has a full and proper understanding of his conduct and for the need for it to never occur again. He has sought expert help in this regard. He has made frank admissions and the Panel accepts his contrition and he has no relevant record. Further, the Panel accepts the penalty imposed by Stewards will cause him great financial hardship. He supports both his de facto partner and two primary school aged children. His employment throughout his life (he is currently 34) has always been through the racing industry.
14. The main issue in this appeal is whether Mr Smith should be disqualified or whether his penalty should be a suspension. A disqualification obviously has more serious consequences - see AR 182 and 183B.
15. Both Mr Van Gestel and Mr Mackie assisted the Panel with submissions regarding the penalties imposed on licensed persons who have committed assaults. Most have resulted in disqualifications. That was not so in the case of Bailey, but a reading of that decision by the Tribunal was that the long delay between offending and the final hearing was at least a factor in a suspension being imposed in that matter rather than a disqualification.
16. The Panel has consider all the evidence, the submissions and the penalties in prior cases. We have to weigh up the individual circumstances of Mr Smith with the objective seriousness of his offending, while also keeping in mind the principal of consistency in sentencing.
17. Public acts of violence by licensed persons are matters that can cause great harm to the image of racing. Mr Smith was the main instigator of a very nasty assault which occurred in public. There is a need to deter such conduct and to

impose a penalty that reflects the seriousness of the offence and that upholds the image of racing. In the Panel's view the appropriate penalty in this matter is a disqualification, not a suspension.

18. However, in light of the matters put in mitigation, particularly the steps Mr Smith has taken to rehabilitate himself, we consider that a three month disqualification in lieu of the four month disqualification is the appropriate penalty.

19. Administration offence

10 The circumstances of what we will call the administration offence are as follows:

Mr Smith leased and trained a racehorse called Bolwarra Ben. On 15 August 2016 that horse became unwell. Prior to this occurring, at Mr Smith's instigation, the horse had been injected by Renee Broadhead with a clear substance from an unmarked, unlabelled vial.

20 The substance was not a registered veterinary product. Mr Smith knew this. He purchased it from a person know to him from the trotting industry, Mr Jason Proctor. Mr Proctor is not a vet. He is a trotting trainer and he performs
20 acupuncture on horses.

21. Mr Proctor said that the vials he sold Mr Smith contained hyaluronic acid which he called "HA". There is evidence (exhibit 15) before the Stewards (which forms part of exhibit A on this appeal) that hyaluronic acid can be used in the treatment of lameness. The evidence of the Chief Veterinarian of Racing NSW, Dr Craig Suann, is that:

30 *"HA is indicated for the intravenous or intra-articular treatment of lameness in horses associated with non-infectious acute synovitis, possibly associated with early equine degenerative joint disease.*

...HA and its polymers when contained in products for injection for the treatment of animals is scheduled as Schedule 4 in the Australian Poisons Standard. Therefore, any product for injection for use in horses containing HA must be registered with Australian Pesticides and Veterinary Medicines Authority with a manufacturer's label on the container (vial) conforming to the requirements of the APVMA, including

the words PRESCRIPTION ANIMAL REMEDY, KEEP OUT OF REACH OF CHILDREN, FOR ANIMAL TREATMENT ONLY.”

22. Mr Smith bought the vial to treat the horse for a joint condition and did not mean to harm the horse. He thought it contained what Mr Proctor told him. He, however, knew that he was breaching the rules by purchasing and possessing unregistered products.
23. As things transpired the vial injected into the horse was found after testing to contain procaine, a local anaesthetic.
24. Administration of this had very adverse effects on Bolwarra Ben's health. Those adverse effects were detailed in statements of the vets that treated the horse.
25. Dr Trish Nicholls, who first treated the horse, noted that the symptoms included marked muscle twitching, tachycardia with a heart rate of 60 beats per minute, moderate perspiration, a mildly elevated temperature and an anxious demeanour. These symptoms persisted for some time.
26. The Panel accepts that Mr Smith did not mean to harm the horse in any way. However, he knowingly breach the rules and took a huge risk by having a product administered to a horse in circumstances where he had no proper or appropriate means of knowing:
- (1) what it contained;
 - (2) how it was made or manufactured.
27. The administration of such a substance to the Bolwarra Ben, which caused harm and distress to the animal, is conduct damaging to the image racing. The Panel accepts Mr Smith has been frank about his conduct and is contrite, but his only real excuse is that it was more expensive for him to buy registered products from vets than the vial he purchased from Mr Proctor.
28. The penalty imposed on Mr Smith was a two month disqualification. We are told that Mr Proctor was - by another body - originally penalised for distributing HA by

way of a nine month disqualification, but on appeal his penalty was altered to a 12 month suspension.

29. The penalty to be imposed on Mr Smith here must reflect the objective seriousness of the offence and support the principles of specific and general deterrence. As for specific deterrence, based on his plea and frank admissions, the Panel is relatively confident Mr Smith will not repeat his offending. He kept records at the time and he did not try and hide his breach of the rules. When the horse became unwell expert treatment was sought for it. Further, we have again taken into account the financial hardship of disqualification or suspension of Mr Smith for the reasons mentioned in the assault appeal. Additionally, while this was a known breach of the rules, no element of cheating was involved and no race affected.
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30. There is little to go on by way of precedent. Doing the best we can and taking all matters into account, the Panel is of the view the penalty that should be imposed is a two month suspension in lieu of the two months disqualification.
31. Dealing with both matters now, in relation to the issue of concurrent and cumulative penalties, we cannot see how the penalties here can be properly ordered to be served concurrently. They involve the same rule, but are otherwise entirely different offences involving completely different fact scenarios.
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32. The orders of the Panel are as follows. In relation to the assault appeal:
- (1) Appeal against penalty allowed in part.
 - (2) In lieu of a four month disqualification a penalty of a three months disqualification is imposed. The disqualification is to commence on 4 November 2016 and will expire at midnight on 3 February 2017.
 - (3) Appeal deposit to be refunded.
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In relation to the administration offence:

- (1) Appeal against penalty allowed in part.

- (2) In lieu of the disqualification of two months a penalty of a two month suspension is to be imposed. That suspension is to commence on 4 February 2017 and will expire at midnight on 3 April 2017.
- (3) Appeal deposit to be refunded.
