

RACING APPEAL PANEL OF NSW

APPEAL OF DAVID VANDYKE

PANEL: Mr R Beasley SC, Principal Member; Mr R Clugston; Mr J Fletcher

Appearances Racing NSW: Mr M Van Gestel, Chairman of Stewards

Mr Vandyke: Mr W Pasterfield, solicitor

REASONS FOR DECISION

INTRODUCTION

1. The appellant is a licensed trainer, who trains the racehorse Yankee Rose (“the horse”). The horse ran second in the Group 1 Flight Stakes run at Randwick Racecourse on 1 October 2016.
2. A post-race urine sample taken from the horse returned a positive result for the prohibited substance ketorolac. Ketorolac is an “*analgesic, anti-inflammatory agent and antipyretic*” and as such a prohibited substance pursuant to AR178B(2).
3. On 20 January 2017, the appellant pleaded guilty to a breach of AR 175(h)(ii) (“the administration charge”) which is in the following terms:

AR 175. *The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:*

.....

- (h) *any person who administers, or causes to be administered, to a horse any prohibited substance...*
- (ii) *which is detected in any sample taken from such horse prior to or following the running of any race.*

4. The particulars of the charge were that “...licensed trainer Mr David Vandyke, the trainer of the racehorse Yankee Rose, did cause to be administered the prohibited substance ketorolac to the racehorse Yankee Rose which was detected in post-race urine sample number N190619 taken from Yankee Rose following that filly running and being placed second in the Group 1 Flight Stakes conducted at Royal Randwick Racecourse on 1 October 2016 as you engaged veterinarian Dr David Garth to administer the prohibited substance ketorolac and :

- a. *Ketorolac is a prohibited substance pursuant to AR178B(1) as it is capable of causing an action and effect on the musculo-skeletal system;*
- b. *Ketorolac is a prohibited substance pursuant to AR 178B(2) as it is categorised as an analgesic, anti-inflammatory agent and antipyretic.”*

5. The appellant also pleaded guilty to a breach of AR 178 (‘the presentation charge’), which is in the following terms:

AR178: *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.*

6. The particulars of the presentation charge were substantially similar to the particulars of the administration charge.

7. After assessing penalty, the Stewards penalised the appellant for the administration charge by way of a fine of \$25,000, and for the presentation charge by way of a fine of \$20,000. Having regard to the totality of the conduct however, the Stewards imposed a total fine for both offences of \$25,000. Dr Garth, who pleaded guilty to an administration charge in relation to the positive sample for Yankee Rose, was fined the sum of \$15,000. He filed an appeal, but subsequently was granted leave to withdraw it. Mr Vandyke has appealed to this Panel against the severity of sentence

imposed. Leave was granted for Mr Vandyke to be represented by Mr W Paterfield, solicitor. Racing NSW was represented by the Chief Steward, Mr M Van Gestel.

FACTS

8. At about 3pm on 23 September 2016, Dr Garth injected 40mls of a drug called Toradol into each fetlock of the horse. Toradol contains ketorolac.
9. There was no dispute on appeal that ketorolac is a prohibited substance under the Rules for the reasons identified in particulars a and b to the charges. There was no challenge to the evidence given about this by Dr Craig Suann, the Senior Official Veterinarian for Racing NSW: see T4 L188 – T5 L203 of Exhibit A (the appeal book, containing transcript of the Stewards' Inquiry, and all exhibits from that Inquiry).
10. Toradol is not a registered veterinary product. It is a drug used for human pain control: T4 L195 – T5 L203; T14 L656-659.
11. Dr Garth's evidence was that he told Mr Vandyke prior to the horse being injected by Toradol that it was not a registered veterinary product, but was a human registered product: T15 L702-710.
12. Mr Vandyke agreed that Dr Garth told him that Toradol was used in "human medicine". He did not recall being told it was not a registered veterinary product: T20 L 963-969. He allowed the horse to be injected with Toradol in the manner it was, and when it was, as he had the "*utmost faith in Dr Garth's ability to prescribe and administer treatments*": T20 L 962-969; T 21 L 1009.
13. Mr Vandyke elaborated on this in oral evidence before the Panel. He reiterated that he had complete faith in Dr Garth. This was in relation to the seven clear days remaining before the race when the horse was treated with the Toradol injections, and in relation to the use of that product in the first place. Mr Vandyke said that in his own mind, the fact that Toradol was used on humans gave him more not less comfort, and did not set off in his mind any need to gain a second opinion, or do

further checking about the substance. He thought that by using a licenced vet he had done everything he could to prevent a breach of the Rules.

14. The amount of ketorolac detected in the horse's urine following the race was a very small amount, described by Dr A Cawley, the Science Manager of the Australian Racing Forensic Laboratory, as "trace levels": T25 L 1210-1220.
15. What might be the only scientific paper on the use of ketorolac in horses was part of the appeal bundle (exhibit 19 of the Stewards' Inquiry). The paper "*Pharmacokinetic Properties of Ketorolac in the Horse*" was published in Sweden in 1994. Of note the paper indicated that "[d]etectable levels (>2ng/ml) of ketorolac were present for 24h in plasma and in urine for at least 7 days after administration." This finding would be a warning that ketorolac might need to be administered prior to seven clear days for it to not be detectable in a horse's urine on race day.

Parties submissions

Appellant

16. Mr Pasterfield submitted that on the facts of this appeal, a much lower fine was warranted. In making that submission, he relied principally on the following matters:
 - (a) Mr Vandyke had placed his trust in Dr Garth. The Toradol injections were administered on Dr Garth's advice. Dr Garth is a licensed vet: See LR 82C, brought in on 28 August 2015. As such, Mr Vandyke was entitled to put his faith in him as to the nature of the treatment, and the period of time before race day to prevent detection.
 - (b) It was not rational to take into account, as the Stewards had done in penalising Mr Vandyke, that the race was a Group 1 Race (see page 2 of the Stewards' Report). In Mr Pasterfield's submission, the offending is the same whether in a minor race, or a race of Group 1 status.

- (c) Mr Vandyke's prior record had been unfairly taken into account by the Stewards. His breach of AR 178 in July 2015 (for which Mr Vandyke received a fine of \$12,000) needed to be considered in context. The horse Queen Tara had returned a positive urine sample for ipratropium as a result of Mr Vandyke's instructions not being followed by people in charge of his Randwick Stables (a matter in relation to which Mr Vandyke gave sworn evidence).
- (d) The fine imposed on Dr Garth was \$15,000. Given his status as a licensed vet, and given that the horse was treated on his advice, the fine imposed on Mr Vandyke should be no more than the fine imposed on Dr Garth.
- (e) As a result of the horse being disqualified in a high profile race, and the publicity surrounding it, Mr Vandyke had already suffered a blow to his reputation.

Stewards' submission

17. Mr Van Gestel submitted that it is relevant for the Panel to take into account that the horse returned a positive urine sample for a prohibited substance in a Group 1 race. Such races attract more publicity, and when they are affected by the involvement of prohibited substances, more damage may be done to the image and reputation of racing.
18. Whatever the circumstances were in relation to Mr Vandyke's breach of AR 178 in July 2015, that was a finding of guilt (based on a guilty plea) that the Panel must take into account when deciding on penalty.
19. In Mr Van Gestel's submission, the appellant had not been penalised harshly, but rather appropriately. Persons found guilty of an administration charge under AR175(h)(ii) and a presentation charge under AR 178 are frequently penalised by way of suspension or disqualification. Mr Vandyke had been fined because of the low level of ketorolac detected, and the fact that there was clearly no intention to breach the Rule. Mr Van Gestel was however concerned that the treatment provided to the horse here may have been an attempt to "get around" AR 64M, which

prohibits a horse from participating in a race for 8 clear days following the administration of a corticosteroid.

20. Mr Van Gestel considered that the offence was aggravated by the fact that the appellant knew that Toradol was a human medicine. That should have sounded some “alarm bells”, and Mr Vandyke should have sought the kind of second veterinary opinion he had sought from another vet prior to bringing the horse to Sydney for the race: T20 L 980 – 995.
21. The reason that Dr Garth had received a lesser fine to Mr Vandyke rested on two matters. First, Dr Garth’s lack of relevant record. Secondly, it is Mr Vandyke, as the licensed trainer of the horse, who must take ultimate responsibility for it.
22. The fine imposed on Mr Vandyke was not excessive when compared to, as an example, the fine imposed on Mr C Waller for a presentation offence relating to the horse Junoob which was first across the line in the Group 1 Metropolitan Hcp in 2014. That was an administration offence (where again no intent to breach the Rules was involved) for which Mr Waller was fined the sum of \$40,000.

Resolution by Panel

23. The Panel is in general agreement with the Stewards concerning the submissions made about a Group 1 Race being an aggravating factor for offences involving administration of, or presentation with, prohibited substances. The publicity surrounding positive samples from such races amplifies the damage done by racing from the involvement of drugs.
24. The Panel accepts that Mr Vandyke’s state of mind was one that he felt he could trust Dr Garth, although we do take the view that he should have made more queries than he did once told Toradol was a human medicine. That piece of information should not in our view have offered Mr Vandyke comfort. Dr Suann’s evidence was that based on his inquiries, Toradol was not commonly (if at all) used on horses, and was not “*warranted vet practice*”: T 19 L 900 – 905. The Panel

considers Mr Vandyke should have been concerned that human medicine, rather than a registered veterinary product, was being injected into the fetlock joints of the horse 7 days prior to a race.

25. The Panel accepts Mr Vandyke's evidence concerning his prior breach of AR 178, but it must be taken into account when assessing penalty.
26. We are also of the view that Mr Vandyke must in this case bear at least equal (and not less) responsibility to Dr Garth in relation to the administration charge.
27. Taking all the matters into account that we must in relation to sentencing, including objective and specific deterrence, the impact of drug offending on the image of racing, and the subjective matters of mitigation relevant to the appellant, we do not disagree with the Stewards in relation to their decision to fine Mr Vandyke, rather than to suspend or disqualify his license. The amount of prohibited substance detected was slight, and it may have been, with one or two more days, that ketorolac would not have been detected.
28. We do not agree, however, with the submission that the penalties imposed by the Stewards in this matter were excessive. The detection of a prohibited substance in a horse following any race is a serious matter. The offences Mr Vandyke has pleaded guilty to are objectively serious. The horse has been disqualified, penalising its owners. The image of racing is damaged when a horse is disqualified following a Group 1 Race in circumstances like those here. Certainly fault lies with the vet – which is why he was found guilty of a breach of AR 175(h)(ii) and fined – but responsibility rests with the trainer as well. This is particularly so when the substance used was to the trainer's knowledge one used for humans.
29. The Panel considers that a fine of \$25,000 for the administration charge (the more serious of the two charges) is appropriate, and consistent with recent precedent. We consider a fine of \$20,000 for the presentation charge is also appropriate.

30. Like the Stewards, in all the circumstances, we would impose a total fine for both breaches of \$25,000.

31. The Panels orders are as follows:

- (a) Appeal against severity of sentence dismissed.
- (b) Penalty of a fine in the amount of \$25,000 for the breach of AR 175(h)(ii) confirmed.
- (c) Penalty of a fine in the amount of \$20,000 for the breach of AR 178 confirmed.
- (d) Total penalty of a fine of \$25,000 confirmed.
- (e) Appeal deposit forfeited .