

APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED TRAINER ALLAN FORAN

Appeal Panel:	Mr R. Beasley SC, Principal Member; Mr C. Tuck; Mr J. Murphy
Appearances:	Racing NSW: Ms K. Campbell, Legal Counsel Racing NSW Appellant: Himself
Date of Hearing:	12 and 27 April 2023
Date of Reasons:	10 May 2023
Rule involved:	AR231(1)(b)(iii) – Failure to get veterinary care when veterinary care was necessary

REASONS FOR DECISION

The Panel

Introduction

1. On 4 January 2023, licensed trainer Mr Allan Foran (the Appellant) was charged with two breaches of the Australian Rules of Racing. Charge 1 related to an alleged breach of AR231(1)(b)(iii), which is in the following terms:

AR231(1) A person must not:

...

- (b) if the person is in charge of a horse – fail at any time:

...

- (iii) to provide veterinary treatment to the horse where such treatment is necessary for the horse.

2. The particulars of the charge related to a two-year-old Bay Filly called Gracie that the Appellant had purchased on 8 or 9 October 2022. The particulars were as follows:

“After Gracie suffered a puncture wound to its near hind foot on 28 October 2022 and, despite Mr Foran’s attempts to treat the injury, showed signs of infection and lameness between Monday 7 November 2022 and Sunday 13 November 2022, Mr Foran did fail to provide

Gracie with veterinary treatment during such period when veterinary treatment was necessary to diagnose the filly's injury and provide the required appropriate treatment."

3. The Appellant pleaded not guilty to breach of the rule but was found guilty. The Stewards considered the appropriate starting point for penalty was a 6-month disqualification, which they subsequently reduced to 5 months taking into account certain mitigating factors.
4. Mr Foran was also charged with failure to keep proper records of medications and treatments to horses in breach of AR104(1). He pleaded guilty to this breach and a \$500 fine was imposed.
5. This appeal concerns only Charge 1, where the Appellant challenges both the finding of breach, and the severity of the penalty imposed.
6. The Appellant represented himself on appeal. Racing NSW was represented by Ms K. Campbell, Legal Counsel for Racing NSW. Oral evidence was also given by Dr P. Curl, the Chief Veterinarian for Racing NSW. An Appeal Book containing transcript of the Stewards' Inquiry and various exhibits from that Inquiry was also tendered in evidence.

Facts

7. The following facts were either not controversial, or are findings that the Panel has made after considering the evidence:
 - (a) Gracie arrived at the Appellant's stables on about 11 October 2022.
 - (b) The horse was found to have trod on a nail on 28 October 2022. The nail fell out of the horse's left hind hoof when it was being cleaned by licensed stable hand Angela Taylor. The horse was "limping real bad" at this time: Ex 7, L60-65.

- (c) The nail was bent and there was no way of detecting with the naked eye how far it had penetrated into the hoof, or where: Ex 7, L110. The injury was “not obvious to the naked eye”: evidence of Dr Hann, T8, L340-355.
- (d) The Appellant gave the horse a tetanus vaccination on 28 October which was purchased from Dr Hann, a veterinarian: Ex 8. He also administered the anti-inflammatory “Bute”. The horse’s hoof was also poulticed with Epsom salts.
- (e) There appeared to be some improvement in the horse between 28 October 2022 and 3 November 2022. The horse, however, became sore again at least by 3 November 2022: Ex 4, L203-215. The horse by this time had a “puffy fetlock” and some lameness: Ex 4, L901. The Appellant thought the horse had an infection. He purchased some penicillin (Propercillin) from Dr A. Bryant (a vet) on 3 November 2022: Ex 5. On the balance of probabilities, we find that when he purchased the penicillin Dr Bryant advised the Appellant to get back to him if the horse had not improved after “4 or 5 days”: Ex 5 and Ex 6, L191-195. Even if this was not said by Dr Bryant, it would only have been common sense for the Appellant to get back to the vet if the apparent infection showed no signs of improvement.
- (f) On about 7 November 2022, after administration of penicillin that day, the horse had a very bad reaction, seemingly to the administration of the antibiotic. The horse ran wild and did an entire lap of the track: Ex 7, L236. It hit a gate. It was described as having gone “crazy”: Ex 7, L227. Following this reaction, whilst the horse calmed down, it was extremely lame. Ms Taylor said the horse “couldn’t even walk on it after that”: Ex 7, L180-186. The horse “had to be dragged to the box”: Ex 7, L251. The horse “couldn’t walk on her foot”: Ex 7, L268. According to Ms Taylor and the Appellant, the infection appeared to have “burst out the back of the hoof” on this day or “busted out of the coronet”: Ex 7, L325-329; T13 L555.
- (g) There was no time following 7 November that the horse was not extremely lame. “She wouldn’t walk on her foot from then on.”: Ex 7, L290-291.

- (h) Arrangements were made for Dr Hann to come to the Appellant's stables on 14 November 2022, not to treat the horse's foot, but because the farrier did not want to shoe the horse without it being sedated as the horse was unbroken: Ex 4, L75-77.
- (i) Upon examining the horse, Dr Hann could see the horse was very lame (4/5): Ex 1. He arranged for X-rays to be taken which showed a nail penetration in the "sulcus (just lateral and plantar to the point of the frog)" with pussy discharge: Ex 1. He felt the horse had a very poor prognosis given the length of infection, and the horse was euthanized on 15 November 2022.

Expert Evidence

- 8. By 14 November 2022 when the horse was X-rayed, Dr Hann was of the view that the horse had a "very, very low" chance of being successfully treated. Dr Bensely, another veterinarian that gave evidence before the Stewards, emphasised that "early intervention is paramount for a good outcome" in relation to injuries of this kind: Ex 4, L735. The fact that the horse was being treated with an anti-inflammatory (Bute) but was still lame indicated to Dr Bensely that there was a "more serious process underlying": Ex 4, L750-757.
- 9. Dr Curl, the Chief Veterinarian of Racing NSW, who gave evidence on the second day of the hearing, said that he agreed with Dr Hann's view that the longer an infection of this kind goes on, the poorer the prognosis is.
- 10. Dr Curl's view was that any penetration to the foot from something like a nail can be very serious and life-threatening because of the important structures like bone and tendons that can become infected from such an injury. He accepted, however, on this occasion that whilst he would generally recommend a sterile probe being inserted into the hole caused by a nail to determine how deep the nail had gone in, there was no obvious hole or entry point visible to the naked eye. Dr Curl was also of the view that it was reasonable to treat the horse with penicillin on 3 November, however, from 7 November the horse clearly required urgent veterinary care. The horse was clearly in a great deal of pain from at least 7 November onwards, and there was no evidence to indicate that the clear signs of infection were improving. To the contrary, the horse

was extremely lame from 7 November. In his view, it was not reasonable for veterinary care to not be immediately obtained from that point on.

Resolution

11. The Appellant on a number of occasions told the Stewards that, in hindsight, he should have contacted a vet before he did: e.g. Ex 4, L480; Ex 4 L729. He also told them that he was “starting to think there’s something a bit serious” from the time he started to use the penicillin on the horse on 3 November: Ex 4, L533.
12. As things stood on 7 November 2022, the horse had suffered an extremely bad reaction to the administration of the penicillin. It had wildly run a lap of the track on what was already a sore foot. It may have been that the Appellant genuinely thought the horse would make a full recovery, but the fact is that at least from 7 November the horse was extremely lame. This horse was obviously in a great deal of pain. There was no reasonable basis for the Appellant to conclude in those circumstances that the horse would either recover, or that the penicillin he was administering was being effective. Whilst he didn’t know how far the nail had penetrated into the horse’s hoof, there was a risk that it had penetrated deeply, as turned out to be the case.
13. AR231(1)(b)(iii) should be interpreted, in our view, such that if veterinary treatment is necessary for a horse, the only defence to such a breach would be where a person honestly (subjectively) and reasonably (objectively) thought that such treatment was not necessary. In our view, it was unreasonable for the Appellant not to immediately call a vet after the horse had suffered the extreme reaction it did to the administration of penicillin on 7 November 2022. The horse was obviously extremely lame from this point, it was obvious to the Appellant that it had an infection that he himself thought was of some seriousness. He had to call a vet on 7 November 2022 to urgently examine the horse. His failure to do so, in our view, is a clear breach of the rule.
14. Accordingly, the appeal against the finding of breach of AR231(1)(b)(iii) is dismissed, and the finding of breach confirmed.

Penalty

15. The purpose of imposing penalties for breaches of the Rules has been stated many times. They are entirely protective in nature. They are not to punish the person who has breached the Rules. Part of the protection of the sport is to ensure that any penalty has an aspect of both general deterrence and, where relevant, specific deterrence.
16. The Appellant has been a trainer for over 20 years. He has not been charged with a breach of this rule or a similar rule before. We accept that he had no intent to be cruel to the horse (which he was not charged with in any event). The Panel also accepts that he genuinely thought the treatment he provided to the horse was appropriate. That is, he thought the horse would recover from the administration of the penicillin. He was obviously not aware of the seriousness of the injury. There is also no evidence that had the Appellant acted more urgently, the horse would have had good prospects of recovery. Clearly, however, by his delay its prognosis became progressively poorer.
17. The Stewards considered that the appropriate penalty was a 6-month disqualification which they reduced to 5 months by taking into account various of the mitigating factors referred to above. In deciding on what we consider is the appropriate penalty, we have had regard to three prior decisions for breach of this rule provided to us by Ms Campbell. The first was an appeal of licensed trainer Mr Craig Curtis, who is a South Australian trainer. He ignored the advice of a veterinarian to euthanize a horse who had broken its leg. He treated the horse for 6 weeks and it ended up in an emaciated condition and had to be euthanized. The horse had been given inadequate pain relief during this period. He was suspended for 9 months.
18. In the *Appeal of Gordon York* (RAP, 7 September 2022) the appellant in that case performed a procedure on a horse that he was not qualified to perform and that should only be performed by a licensed veterinarian. While the horse did not die because of that procedure, it died in circumstances where it suffered a great deal of pain, and a vet had not been called to treat it when they should have been. In a majority decision, Mr York received a 9-month disqualification.

19. The *Appeal of Daniel Riley* (RAP, 16 January 2020) involved a trainer who ignored instructions from Stewards to take measures to improve the condition of a horse in his care which was clearly malnourished. He took no such measures and the horse ultimately had to be euthanized. He was penalised with a 9-month disqualification for breach of AR231(1)(b)(iii) which was not overturned on appeal.
20. We consider each of these matters to involve conduct more blameworthy than the Appellant's conduct. The Appellant's breach of the rule is serious. He made a bad error, but it was an error. There was nothing like malicious intent or recklessness in his conduct. He purchased penicillin treatment for the horse, and genuinely believed that the horse would recover. It had no obvious injury to the naked eye, although by 7 November 2022 it should have been obvious that something serious was wrong given the extent of the horse's lameness. In any event, we consider a 6-month starting point for disqualification to be slightly on the high side based on the facts here when compared to the three appeals referred to above.
21. Taking all matters into account, we are of the view that the appropriate penalty is a 3-month disqualification in lieu of a 5-month disqualification.
22. The orders of the Panel are as follows:
 - (1) Appeal against finding of breach of AR231(1)(b)(iii) dismissed.
 - (2) Finding of breach of AR231(1)(b)(iii) confirmed.
 - (3) Finding of breach of AR104(1) confirmed. The penalty of a fine of \$500 for this breach is confirmed.
 - (4) Appeal in relation to penalty imposed for breach of AR231(1)(b)(iii) upheld.
 - (5) In lieu of a 5-month disqualification, the Appellant is disqualified for 3 months. That disqualification is deferred under AR283(7) for 7 days from the date of these Reasons (although the Appellant may not start a horse in a race

during this period). The disqualification therefore starts on 17 May 2023 and expires on 17 August 2023, on which day the Appellant may re-apply for his licence. (Note: the appellant may elect for the disqualification to commence immediately or in less than the 7 day deferral period, with a corresponding change to the date of the expiry of the disqualification).

- (6) Appeal deposit forfeited.