

## **RACING APPEAL PANEL NEW SOUTH WALES**

### **IN THE MATTER OF THE APPEAL OF LICENSED TRAINER MR RUSSELL GREEN**

Appeal Panel: **Mr R. Beasley SC – Principal Member; Mr J. Nicholson; Mr C. Tuck**

Date of Hearing: **On Papers**

Date of Decision: **26 February 2019**

Representatives: **Mr Green – Mr P. O’Sullivan, Solicitor**  
**Racing NSW – Mr Mark Van Gestel, Chairman of Stewards**

### **REASONS FOR DECISION**

#### **The Panel**

1. The racehorse Keepcalmandcarryon (“the horse”) finished first past the post in the Benchmark 55 handicap conducted at Cowra racecourse on 23 June 2018 (“the race”). The horse was trained by licensed trainer Mr Russell Green, the Appellant.
2. A urine sample was taken from the horse after the race. The prohibited substances 2-(1) Hydroxyethyl Promazine Sulphoxide and 4-Hydroxy Xylazine were subsequently detected in the sample. Stewards therefore conducted an inquiry into the positive sample on 21 September 2018.
3. At the Stewards’ Inquiry, the evidence was that the prohibited substances were analgesic or sedative in nature, and had been administered to the horse perhaps 3 days prior to the race.
4. At the inquiry, the Appellant was charged with, and pleaded guilty to, a breach of AR175(h)(ii) of the Australian Rules of Racing, which is in the following terms:

“AR175 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.

5. The Appellant was also charged with, and pleaded guilty to, a breach of AR178, which is in the following terms:

“AR178 Subject to AR178G, 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 is in charge of such horse at any relevant time may be penalised.”

6. The Appellant was penalised by way of a 6 month suspension of his licence for the breach of AR175(h)(ii), and 4 months for the breach of AR178. The Stewards’ report of Friday 21 September 2018 states that the “Stewards rule that both penalties be served cumulatively”, but this appears to be a typographical error, as it was also noted that the Appellant would be eligible to resume training on 20 March 2019 (that is, 6 months from 21 September 2018).
7. The Appellant has appealed to this Panel and has sought to change his plea from guilty to not guilty in relation to the charge brought under AR 175(h)(ii). The Appellant has also appealed against the severity of the penalties imposed. Rather than having an oral hearing, the Appellant’s legal advisor Mr Paul O’Sullivan sought for the matter to be dealt with on the papers. This was agreed to. Mr O’Sullivan, and Mr Van Gestel (Chairman of Stewards) both provided the Panel with written submissions.
8. The change in plea seems to have resulted from a finding by the Racing Appeals Tribunal that Stewards were not empowered to penalise licensed persons under AR175. Since the Appellant lodged his appeal, however, in *Kavanagh v Racing NSW* [2019] NSWSC 40, Fagan J rejected a ground of challenge by the plaintiff

based on the assertion that the Stewards were not empowered to impose penalties under AR175 for want of proper delegation of power: see Judgment at [74]-[87]. Given that there are no other reasons provided to the Panel to suggest the finding of breach of AR175(h)(ii) should not be upheld, the finding of breach of both rules is confirmed, and the appeal dismissed.

9. As to penalty, in their written submissions to the Panel the Stewards have advised that the Appellant has two prior convictions in 2016 for breaches of AR178. He was fined on both occasions. Further, the Appellant's licence to train was suspended for three months from 7 October 2017 to 7 January 2018 for a breach of AR178E concerning the administration of a drench to a horse on a race day.
10. It is clear also from the evidence at the Stewards' Inquiry (Dr Cawley and Dr Koenig) that the level of the prohibited substances in the Horse's urine was "high": see T11.539.
11. As was said by the Tribunal in *Rogerson* [1998]:

"...breaches of AR178 should ordinarily be met with penalties of disqualification or at least suspension, and fines should be reserved only for those cases where special circumstances would dictate."

Given the Appellant's record, the high levels of the prohibited substances in the Horse's urine sample, and factoring in that the horse finished first past the post but had to be subsequently disqualified under AR177, we are of the opinion that a penalty of a suspension of 6 months for the breach of AR175(h)(ii) is appropriate. We are also of the opinion that a penalty of a four month suspension is appropriate for the breach of AR178. A principal purpose of the Rules and their penalty provisions is to uphold the interests, integrity and image of racing. The image and integrity of racing is always damaged when a horse returns a positive post-race sample for prohibited substances. This is aggravated further if the horse has finished in first place. Generally then, only a suspension or disqualification will be appropriate for a breach of a rule like AR 175(h)(ii) or AR 178. In some cases a fine will be the appropriate penalty, but not in this case for the reasons mentioned above. Like the Stewards, we consider that the penalties should be served concurrently, and

so the Appellant will be free to resume training on 20 March 2019. The appeal against severity of penalty, however, must be dismissed.

12. One final matter we have noted from the transcript of the Stewards' Inquiry is the warning given by the Chairman of the Inquiry to the Appellant concerning what might happen should the Appellant decide to appeal. The Chairman said the following at T35.1700-.1702:

“Any modification or change to that penalty would have to come through the Appeal Panel. If they are of a mind to do that, bearing in mind that they may be of a mind to increase the penalty. That’s the Appeals Panel. You appeal and the case is reheard and they have the power to keep the penalty as it is, increase the penalty or reduce the penalty, but that’s something you have to weigh up.”

13. Without wishing to be overly critical of the Chairman, the Panel does have a concern that statements like that might possibly be construed by a licensed person considering an appeal as a discouragement from taking up their appeal rights. It is technically true that the Appeal Panel can increase a penalty, but it can only properly do so if forewarning is given to an appellant prior to the Panel imposing any orders on an appeal. In the circumstances, while it is no doubt appropriate for Stewards to advise licensed persons of any appeal rights they have, it may be unwise to emphasise that the Panel can increase a penalty imposed by Stewards. That is a very, very rare occurrence.

14. The Panel makes the following orders:

- (1) Appeals against findings of breach of AR175(h)(ii) and AR178 dismissed.
- (2) Finding of breach of AR175(h)(ii) and AR178 confirmed.
- (3) Appeal against severity of penalty imposed dismissed.
- (4) Penalty of a 6 month suspension for breach of AR175(h)(ii) confirmed, and penalty of a 4 month suspension for breach of AR178 confirmed. Such penalties commenced on 21 September 2018 and expire on 20 March 2019 on which day the Appellant may resume training.

(5) Appeal deposit forfeited.