

**RACING NEW SOUTH WALES APPEAL PANEL**

**IN THE MATTER OF THE APPEAL OF LUKE BERGER**

Appeal Panel: **Mr R Beasley SC – Principal Member**  
**Ms J Foley**  
**Mr J Murphy**

Appearances: **Racing NSW: Mr Marc Van Gestel, Chairman of Stewards**

**Appellant: Self**

Date of Hearing and **14 August 2020**

Orders:

Date of Reasons: **17 August 2020 (orders made 14 August)**

**REASONS FOR DECISION**

1. On 9 July 2020, (then) licensed trainer Luke Berger pleaded guilty to a breach of AR 245(1)(a) of the Australian Rules of Racing (the Rules), following a Stewards' Inquiry. That rule is in the following terms:

*A person must not administer a prohibited substance on Prohibited list A/Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of race.*

2. The relevant circumstances were that a pre-race blood sample was taken from the horse *Oh Why* prior to it running in the Country Cup at Scone on 15 May 2020. Laboratory analysis of the sample detected the substance *flunixin*. As evidenced by the report dated 25 June 2020 of Dr T Koenig that was provided to the Hunter North West Racing Association Stewards, flunixin is a prohibited substance under the Rules (see Exhibit K). It is a non-steroidal anti-inflammatory drug generally used to treat muscular-skeletal disorders in horses. It had been administered by the appellant five days prior to race day.

3. The Stewards were of the view that an appropriate base penalty was a fine in the sum of \$5000. Having taken into account Mr Berger's admission in relation to the administration of the drug, his early plea, and the low level of the drug detected, the ultimate penalty imposed was a fine of \$4000. Oh Why, which finished 15<sup>th</sup> of 15 in the race, was disqualified under AR 240(1). Mr Berger has now appealed to the Panel against the severity of the penalty imposed. He represented himself at the Appeal hearing, with the Stewards represented by the Chairman of Stewards, Mr M Van Gestel.
4. As submitted by Mr Van Gestel, a breach of AR 245(1)(a) is a serious infringement of the rules. Any time a horse runs in a race with a prohibited substance in its system, the racing industry is inevitably damaged once that substance is detected. A key purpose of the penalty provisions in the rules is to ensure that a message is sent to the public that such breaches are not tolerated by the officials, and to uphold the integrity and image of the sport.
5. That said, this was a very long way short of the most serious breach of this rule – a matter seemingly reflected in the fine imposed by the Stewards. Ordinarily, a breach of this rule would result in suspension, or even disqualification. The appellant said he relied on veterinary advice, which the Panel accepts. The drug was provided five days before the race. The appellant thought it would be out of the horse's system by race day. It was not intended to have, and clearly did not have, any kind of performance enhancing effect (which in any event would have resulted in a different charge). This was a mistake, not dishonesty or an attempt to cheat.
6. Bearing in mind the appellant's cooperation and plea, his personal circumstances (he does not currently have a licence to train), and the objective facts concerning the offending here, were of the view that while the penalty imposed by Stewards was reasonable, a more appropriate penalty is a fine in the sum of \$2,500.
7. The orders of the Panel are:
  1. Appeal against severity of penalty allowed.

2. Penalty of a fine in the amount of \$4,000 set aside.
3. In lieu of that penalty, a fine in the sum of \$2,500 is imposed.
4. Appeal deposit to be refunded.