

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

### **APPEAL OF MARK OSTINI APPEAL OF MITCHELL FAULKNER**

Appeal Panel: Mr R Beasley SC, Principal Member; Mr A King; Mr J Nicholson

For the Stewards: Mr M Van Gestel, Chairman of Stewards

For the Appellants: Ms J Stevens, Solicitor

Date of hearing: 18 November 2020

### **REASONS FOR DECISION**

**Date of Reasons: 16 December 2020**

#### **The Panel**

##### **Introduction and Charges**

1. This appeal against severity of penalty involves the unfortunate circumstances of the death of the racehorse “Leshem” at Armidale on 8 July 2020.
2. Leshem died shortly after the licensed stable-hand Mitchell Faulkner administered an intravenous drip to the horse which contained (amongst other substances) the product “Arthropen Vet 250”. That drip was administered on the instructions of the horse’s trainer, Mark Ostini.
3. The circumstances of the administration of the drip, and the death of the horse, led to a Stewards’ Inquiry, and with both appellants being charged with breaches of the Australian Rules of Racing. The appellant Mr Ostini was charged with a breach of AR 228(b), which provides that a “person must not engage in misconduct, improper conduct or unseemly behaviour”. The particulars of the charge were as follows:

*“The details of the charge being that you licensed trainer Mr Mark Ostini, on 8 July 2020, without veterinary advice, did authorise Mr Mitchell Faulkner to administer a drip to the racehorse Leshem, which was engaged to race at Scone on 10 July 2020, from a bag which contained a cocktail of substances and during the course of administration had added to it the product pentosan, namely Arthropen Vet 250, which was contrary to labelled and advertised instruction, which was capable of being detrimental of the welfare of the horse and during the course of administration Leshem suffered an anaphylactic reaction and died.”*

4. The appellant Mr Faulkner was also charged with a breach of AR 228(b), which was particularised as follows: *“The details of the charge being that you, licensed stablehand Mr Mitchell Faulkner, being a stablehand applicant at the relevant time, did advise trainer Mr Mark Ostini to use a cocktail of substances that were included into a drip, which you did administer and during such administration you did add the product pentosan, namely Arthropen Vet 250, contrary to labelled and advertised instruction, to the racehorse Leshem, which was engaged to race at Scone on 10 July 2020 and during such administration Leshem suffered an anaphylactic reaction and died.”*
5. Mr Ostini was also charged with a breach of AR 252(1) which provides that a *“person must not have in his or her possession or on his or her premises any medication, substance or preparation which has not been registered, labelled, prescribed, dispensed or obtained in accordance with applicable Commonwealth and State legislation”*. The particulars of this charge were that Mr Ostini had in his *“possession the product Arthropen Vet 250 injection, which was not prescribed to you by a veterinarian for your stable use or for any horse in your care, which places you in breach of the relevant legislation”*.
6. Mr Faulkner was also charged with a breach of AR256(1)(a)(iii), which provides that *“a person must not: (a) supply.... (iii) a substance or preparation that is not permitted to be in a person’s possession or on a person’s premises in accordance with AR 252(1)”*. The particulars of this charge were that Mr Faulkner:  
  
*“being a stablehand applicant at the relevant time, did supply the product Arthropen Vet 250 to licensed trainer Mark Ostini when that product was prescribed to a harness*

*racings horse, namely Lumos, which was trained by you and should not have been in the possession of Mark Ostini”.*

7. The appellants pleaded guilty to the charges brought against them. As for Mr Ostini, the Stewards were of the view that that base penalty for his breach of AR 228(b) was a disqualification of his licence to train of 18 months. This penalty was reduced to 12 months after the Stewards took into account Mr Ostini’s good record over 20 years, and his early plea of guilty. For the breach of AR 252(1), a penalty of a three-month disqualification was imposed, to be served concurrently with the other penalty.
8. For the breach of AR 228(b), Mr Faulkner was also penalised with a disqualification of 12 months (reduced from a base penalty of 18 months having taken into account his plea and good record). He was penalised with a disqualification of 6 months for the breach of AR 256(a)(iii), also to be served concurrently with the penalty imposed for the breach of AR 228(b).
9. The appellants have appealed against the severity of the penalties imposed upon them. At one point there was a challenge to the finding of breach of AR 252(1) and AR 256(a)(iii), but ultimately guilty pleas were confirmed. The appellants were represented on appeal by Ms J Stevens, Solicitor. Mr M Van Gestel, the Chairman of Stewards for Racing NSW, appeared for the Stewards.
10. Both appellants lodged statements of evidence with the Panel, and gave sworn evidence. The transcript of the Stewards’ Inquiry was also admitted into evidence, as were the exhibits of that Inquiry. Further, a report dated 27 September 2020 of Dr T Koenig, the Chief Veterinarian of Racing NSW, was tendered on the appeal (exhibit “B”), and Dr Koenig also gave sworn evidence.

### **Findings of Fact**

11. The allegations of fact set out in the particulars of each charge are accepted by the appellants, and hence by the Panel. One significant matter of fact that was in issue was whether it had been established that the administration of Arthorpen Vet 250 in the IV drip was the cause of the horse’s death, or whether some other process was involved. That is a matter that must be resolved by the Panel on the basis of expert evidence.

12. The circumstances of the administration of the Arthropen and other substances to the horse are set out in the evidence given at the Stewards' Inquiry by the appellants, and in their statements: see T 3 L 119-129; Statement of Mr Faulkner at [15]. Along with vitamin C, B12, folic acid, Iron and DSMO, the Arthropen was administered to the horse by intravenous drip. The horse suffered an almost immediate reaction, and died quickly thereafter.
13. In a veterinary report dated 9 July 2020 (exhibit 2A), Dr C Paltridge expressed the view that the likely cause of the horse's death was "an anaphylactoid reaction to a supplement or drug that was administered in" the drip.
14. Dr Koenig's evidence, which the Panel accepts, was as follows:
  - (a) Arthropen Vet 250 is a product registered for intramuscular and intraarticular administration in horses, not for intravenous administration.
  - (b) The manufacturer of Arthropen has published warnings concerning the risk of anaphylaxis following intravenous administration of the substance. This is rare, but is nevertheless a known risk.
  - (c) Arthropen is commonly administered to horses to treat non-infectious joint inflammation, joint disease, and osteoarthritis.
  - (d) Arthropen requires a prescription from a licensed veterinarian.
  - (e) The risk of anaphylaxis is not included on the label for the product. That label though clearly indicates it is to be administered by "intramuscular or intra-articular injection".
  - (f) Dr Koenig is aware of no safety information concerning the IV administration of Arthropen with other substances such as those included in the drip administered to Leshem. As such, the practice of administering an IV drip of the kind administered to this horse could not be endorsed by a vet. The administration of the substance was also an "off-label" (not consistent with the labelled instructions) administration, which requires the advice and professional judgment of a vet.
15. On the balance of probabilities, Dr Koenig's opinion was that the IV administration of Arthropen was the cause of the horse's death.

16. The Panel accepts the opinion of Dr Koenig, and is also of the view that the likely cause of Leshem's sudden death following the administration of the IV drip was the inclusion of the Arthropen in that drip. We are comfortably satisfied of this, to the *Briginshaw* standard.
17. The balance of the facts relevant to sentencing are more easily made or accepted. The most relevant matters to consider are these:
  - (a) Neither appellant intended to harm the horse. We accept that this was the last thing that was intended. All that was intended was to administer a substance to the horse beneficial to its health and performance.
  - (b) Neither appellant was aware of the warnings given of possible anaphylaxis following IV administration of Arthropen Vet 250. However, they should have been.
  - (c) While Mr Faulkner was provided with some form of reassurance about using this product in the manner he did by a vet, that does not in any way excuse that the product is not intended for IV use, and veterinary prescription and proper advice was required.
18. The appellants have good records. They engaged in improper conduct, but not in conduct with the intent of either cheating, or of deliberately harming the horse. The Panel has considered the matters put forward by them as to the impact a long disqualification will have, including financial hardship. Those matters are accepted, but are common to almost all circumstances where licensed persons are disqualified.

### **Panel resolution**

19. Neither punishment nor hardship are at the forefront of the Panel's consideration in relation to penalty. As has been stated often, disciplinary proceedings for a sport such as racing are protective in nature. They are intended to protect the image and integrity of the racing industry: see *The Appeal of Callow*, RAP, 3/4/17 at [37]-[39].
20. Deterrence is also an important consideration, in that penalties are imposed to deter conduct that might jeopardise either safety or integrity, or that might damage the image of racing. A penalty also sends a message to the racing public and to the public at large that racing treats breaches of its rules – in this case, conduct that is “improper”

concerning the treatment and welfare of a horse – with utmost seriousness. The death of a horse following improper conduct is never less than a very serious matter and breach of the rules.

21. The Panel has borne these principles in mind when considering what penalty we consider is appropriate for the breaches of the rules involved here. At the forefront of our minds is that a horse has died in circumstances where a substance was administered to it in circumstances where it should not have been, and where that drug was not prescribed for that horse, but for another horse. That there was no intent to harm the horse is relevant, but neither excuses the conduct, nor alters the fact that the offending here is serious, and damaging to the image of the sport.
22. The improper conduct here involves the aggravating factors outlined above. While the Panel fully appreciates the need to protect the sport in imposing penalties for breaches of the rules, this is a rare appeal where we fundamentally differ from the Stewards in respect to the penalties imposed for the breaches of AR 228(b). We consider the 18-month base disqualification arrived at by them here for both appellants' breach of AR 228(b) to be not only more than we consider appropriate, but excessive. Nothing more need be said about why the appellants' conduct was improper, and should not have occurred. It was however conduct that involved no intent to harm, and took place in circumstances where the appellants did not understand they were taking a risk with the health of the horse. While they should have appreciated that risk, and an element of negligence is involved, the "improper conduct" here is not at the worst end of the scale. Their intent was that the horse would be administered with a therapeutic product, and subjectively they did not appreciate the (low) risk they were running that the horse would have the adverse reaction to the administration that it did. They are also entitled to have the penalty reflect to some degree their otherwise long years of good conduct. Neither appellant should be viewed as a person who would deliberately take risks with the welfare of horses. The Panel gained the contrary impression from hearing their evidence.
23. In our view, an appropriate base penalty for each breach of AR 228(b) is a 9-month disqualification. This in our view is still a significant penalty, and reflects the serious nature of the breach of the rules. Taking into account the appellants' cooperation and guilty plea, we would reduce that penalty to a 6-month disqualification.

24. For the breach of AR 252(1) involving Mr Ostini, we agree with the imposition of a 3-month disqualification, and that this should be served concurrently with the penalty imposed for the breach of AR 228(b).
25. In relation to the breach of AR 256(a)(iii) involving Mr Faulkner, we again see no reason to differ from the Stewards, and consider the 6-month disqualification appropriate. That penalty is to be served concurrently with the penalty imposed for the breach of AR 228(b).
26. The orders of the Panel in the appeal of Mark Ostini are as follows:
  - (1) Appeal against severity of penalty allowed in respect to the AR 228(b) charge.
  - (2) The penalty of a 12-month disqualification for breach of AR 228(b) is set aside, and in lieu a penalty of a 6-month disqualification is imposed.
  - (3) Appeal against penalty for breach of AR 252(1) is dismissed.
  - (4) The penalty of a 3-month disqualification for breach of AR 252(1) is confirmed.
  - (5) The penalties imposed are to be served concurrently. The appellant's licence to train is therefore disqualified for a period of 6-months. That penalty commenced on 16 September 2020, and expires on 16 March 2021, on which day the appellant may reapply for his licence.
  - (6) Appeal deposit to be refunded.
27. In the appeal of Mitchell Faulkner, the following orders are made:
  - (1) Appeal against severity of penalty allowed in respect to the AR 228(b) charge.
  - (2) The penalty of a 12-month disqualification for breach of AR 228(b) is set aside, and in lieu a penalty of a 6-month disqualification is imposed.

- (3) Appeal against penalty for breach of AR 256(a)(iii) is dismissed.
- (4) The penalty of a 6-month disqualification for breach of AR 2526(a)(iii) is confirmed.
- (5) The penalties imposed are to be served concurrently. The appellant's licence is therefore disqualified for a period of 6-months. That penalty commenced on 16 September 2020, and expires on 16 March 2021, on which day the appellant may reapply for his licence.
- (6) Appeal deposit to be refunded.