APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED TRAINER MR GORDON YORKE

Appeal Panel:	**Mr R. Beasley SC, Principal Member; Mr J. Murphy; Mr P Innes**
Appearances:	**Racing New South Wales: Mr S.G. Railton, Deputy Chief of Stewards** **Appellant: Mr M. Callanan, Solicitor**
Date of Hearing	**26 August 2022**
Date of Reasons and Orders:	**7 September 2022**
Rules involved:	**AR 231(1)(a) – Cruelty** **AR 231(1)(b)(ii) and (iii) – Care and welfare of horses**
Outcome:	**Appeal dismissed as to finding of breach.**

REASONS FOR DECISION

Mr R Beasley SC, Presiding Member

Introduction

1. On 26 April 2022 Licensed Trainer Mr Gordon Yorke ("the Appellant") was charged with three breaches of the Australian Rules of Racing ("the Rules") as follows:

> **Charge 1**: AR 231 Care and welfare of Horses
>
> (1) A person must not:
>
> (a) Commit or commission an act of cruelty to a horse or be in possession of any article or thing which in the opinion of the Stewards is capable of inflicting cruelty to a horse.
>
> **Particulars**
>
> The details of the charge being that:

(a) at the relevant time he was a licensed trainer with Racing New South Wales for the 2020/2021 Racing Season;

(b) on the afternoon of 20 October 2020 he did commit an act of cruelty to the unnamed 2016 Atlante x Laebeel (NZ) Mare by placing his right arm up to at least his elbow into the rectum of the horse without use of protective gloves or appropriate lubricant and without seeking veterinary advice or care, when he was not appropriately qualified or licensed to perform such act;

(c) such actions resulted in the Mare, which had been displaying symptoms of colic from the afternoon of 19 October 2020, being mistreated.

Charge 2: AR 231

(1) A person must not:

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

…

(ii) to take such reasonable steps as are necessary to alleviate any pain inflicted upon a horse or being suffered by the horse.

The details of the charge being that:

(a) At the relevant time he was a licensed trainer with Racing New South Wales for the 2020/2021 Racing Season;

(b) From the time the unnamed 2016 Atlante x Laebeel (NZ) Mare displayed symptoms of colic on the afternoon of 19 October 2020 until its death on the afternoon of 21 October 2020, as the person in charge of the horse, he did fail to take such reasonable steps as were necessary to alleviate any pain being suffered by the horse.

Charge 3: AR 231

(1) A person must not:

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

…

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

The details of the charge being that:

(a) at the relevant time he was a licensed trainer with Racing New South Wales for the 2020/2021 Racing Season;

(c) from the time the unnamed 2016 Atlante x Laebeel (NZ) Mare displayed symptoms of colic on the afternoon of 19 October 2020 until its death on the afternoon of 21 October 2020, as the person in charge of the horse, he did fail to provide appropriate veterinary treatment to that horse when such treatment was necessary."

2. The charges followed from an investigation conducted by Racing New South Wales investigators, and a subsequent Stewards' Inquiry that was conducted on 22 March 2022.

3. The Appellant pleaded not guilty to each charge, but on 8 July 2022 was found guilty by the Stewards who imposed the following penalties:

Charge 1: 9 months disqualification.
Charge 2: 6 months disqualification.
Charge 3: 6 months disqualification.

4. The Stewards determined that the disqualifications should be served concurrently with the 9 months disqualification commencing on 8 July 2022, and to expire on 8 April 2023.

5. The Appellant has appealed to the Panel against the finding of breach of the Rules and the severity of the penalties imposed. The Appellant was represented with leave on the Appeal hearing by Mr M. Callanan, Solicitor. The Stewards were represented by Mr S. Railton, the Deputy Chairman of Stewards for Racing New South Wales.

6. The only oral evidence called at the Appeal Hearing was from Dr Brett Jones, a registered veterinarian who is known to the Appellant. The other evidence consisted of the transcript from the Stewards' Inquiry and the Exhibits from that Inquiry (which retain the Exhibit number they had at the Inquiry on Appeal.

Principal Issues to Resolve

7. In relation to Charge 1, the key issue in dispute was whether the conduct particularised in Particular (b) (**the procedure**) should properly be considered an act of "cruelty" as that term should be construed in the Rules. For Charges 2 and 3, the principal (but not only) issue was whether the Appellant was "the person in charge of" the horse.

Findings of Fact

8. The business called "Clovelea Thoroughbreds" (**Clovelea**) is part-owned by Mr W. Ross (50%); Mr S. McCullum (a licensed rider; 25%) and Ms L. McCullum (a licensed trainer; 25%).

9. Ms McCullum was the trainer for Cloverlea until 23 July 2020. On that day she was disqualified. Her licence to train was restored on a restricted basis on 12 December 2020.

10. There is no dispute that from about 7 October 2020 until about 30 December 2020 the Appellant took over training duties for Clovelea, given Ms McCullum's disqualification. The Appellant agreed when questioned at the Stewards' Inquiry that he was the trainer for Clovelea from about 7 October 2020 to the end of December: see, for example, T-10.465-.484. There was a disagreement as to whether the Appellant was paid for his services, or what he was paid, but there is no need for the Panel to resolve any dispute concerning that. He was, by his own admission, the trainer for Clovelea: see again, for example T-42.2074-.2079.

11. There is also no dispute that the horse described in the Charges entered the Clovelea Stable on 19 October 2020 (having arrived from New Zealand) and that she died at the Stables on 21 October 2020. Equally, there is no dispute that throughout this period the horse was exhibiting symptoms of the condition referred to as "colic," and that she was in considerable pain during this period.

12. The Appellant agrees that he performed the procedure that is described in the particulars to Charge 1. He denies not using lubricant (saying he used a form of oil)

and he agrees he called a veterinarian about the horse's condition (Dr Fielding) in the early evening of 20 October 2020. He disputes, however, that he was the horse's trainer.

13. In rejecting the idea that he was the horse's trainer, he seems to be relying on not being told about the horse's arrival, as well as asserting he had not filled out any Stable Return concerning the horse.

14. I am comfortably satisfied that the Appellant was the trainer of the horse. Although the details of his engagement for Clovelea were arguably scant, there is no doubt that he was to be the trainer of the Clovelea Stables' horses. One such horse was the deceased Mare. Whether or not the Appellant knew the horse was arriving at the Stables on 19 October 2020, and whether or not he had lodged a Stable Return before the horse died, is in my view immaterial. He had agreed to train all the Clovelea horses. He accepted this in his evidence. The deceased horse became such a horse when she arrived at the Stables on 19 October 2020.

15. I am comfortably satisfied then that the Appellant was:

    (a) the trainer of the horse; and as such,

    (b) relevantly, "the person in charge of the horse" from when it entered the Stables on 19 October 2020 until she died on 21 October 2020.

16. I now turn to resolving the Appeals in relation to the three findings of breach, in light of my findings that the Appellant was the horse's trainer and, relevantly, "in charge" of her.

Charge 1 – Cruelty Charge

Factual findings

17. The Appellant accepts that he performed the procedure particularised in (b) of Charge 1. He agrees he did not use gloves. He says he did use a form of lubricant (oil) and that a form of pain-relieving medication was used on the horse (colloquially called "Ace").

18. The expert evidence established that the procedure performed by the Appellant should only be performed by a veterinarian, and under sedation. While the Appellant is a very experienced horse person, he is not a veterinarian. Relevant parts of the evidence of Dr T. Koenig, the then Chief Veterinarian for Racing New South Wales, are as follows:

T. Koenig: "… so there's a lot of elements to this procedure and, in the absence of a proper veterinary examination, taking into consideration the vital signs of the animal, so heart rate, respiratory rate, temperature, gut sounds, you know, a proper physical examination to try and ascertain the condition of the horse and what pathology may or may not be present, it's very hard to make any comment as to the appropriateness of the treatment afforded without proper veterinary examination … and Acepromazine is certainly not the tranquiliser or sedative of choice in cases such as this, as it has fairly considerable haemodynamic deleterious effects or negative effects on the horse's cardiovascular system … We don't have any information as to the horse's gastrointestinal tract and its integrity. It's very hard for me to make any comment, other than to say that, is the treatment appropriate? Well, under the circumstances, no, because a proper veterinary examination has not occurred … So a rectal examination, the introduction of an arm into the rectum, is in fact a diagnostic procedure in the first instance, not a treatment. So we undertake in many cases of colic, where it's safe to do so and often under sedation and in a crush or in circumstances that allow for the safe examination of the horse , because a rectal examination is inherently not without significant risk to the horse and potentially can be fatal … I would have to make the assessment and hypothesize that this horse either had a pelvic flexure impaction or a right dorsal displacement of the colon. Both those things could typically be palpated by a rectal examination, but not treated by a rectal examination … We're actually talking about matters that in the legislation of what are specifically referred to as restricted acts of veterinary science and these acts of veterinary science are only to be undertaken by licensed and qualified veterinary surgeons and that necessitates a licence in the State of New South Wales with the New South Wales Veterinary Practitioners Board." (See generally T-50.2447-T-53.2630.

19. Dr Fielding gave similar evidence:

Chairman: "We can soon check that out. In relation to the procedure or practice or what he did as far as doing a rectal examination, what would have been your reaction to that?"

R. Fielding: "I would have advised strenuously against it. It's not a procedure that should be carried out by inexperienced people."

Chairman: "Does that practice have the potential to be fatal or cause the horse--?"

R. Fielding: "Yes, it can cause rupture of the rectum, displacement of the rectum."

Chairman: "Is that a procedure, when carried out by a vet, that's carried with gloves and lubricant?"

R. Fielding: "Yes, and sedation."

Chairman: "And sedation?"

R. Fielding: Well, under, sorry, if we're examining a colic, if we're doing an internal examination to a horse like that, it would be very heavily sedated as we do the examination and we'll also be using, in a lot of cases, ultrasound equipment as well." (T-57.2816-.2838).

20. It can be noted at this stage that Dr Fielding did have a memory of receiving a call from the Appellant while he was at a Harness Race meeting at Albury in the early evening of 20 October 2020. Because he was engaged at that meet, he was not able to attend on the horse. His evidence was that he *"probably gave him* [the Appellant] *the number of another local veterinarian that may have been able to assist or advised him that, you know, the horse should go up to Charles Sturt University Clinical Centre or the other option we have for referral is Goulburn Valley Equine Centre"*: T-55.2737-T-56.2741.

21. In his oral evidence, Dr Jones also indicated that the procedure performed by the Appellant should not be performed by a non-veterinarian.

22. It seems clear enough from the evidence that the Appellant felt he was sufficiently expert to undertake the procedure on the horse that he did. He described it as "back-raking," a procedure of removing manure from the horse in order to alleviate a blockage.

23. There was no suggestion made by Mr Railton that the Appellant was trying to harm the horse. It seems accepted by the Stewards that the Appellant was trying to help the horse, and I make that finding.

24. Further, while the procedure performed by the Appellant clearly did not help the horse in any way, there is insufficient evidence to make any finding that the procedure performed by the Appellant was causative of the horse's death. The combined evidence of Dr Fielding and Dr Koenig leads to the conclusion that it was likely that

the cause of death was "an internal catastrophe of some sort in the colon" and that whilst a "rectal tear" could not be ruled out, it was *"more than likely that there was already significant compromise to the bowel that was leading to leakage … and the ultimate demise of the horse was secondary to something like endotoxemia"*: T-59.2920-.2924 and T-61.3004-.3009.

25. However, although actual injury to the horse from the procedure performed by the Appellant is not made out on the evidence, the only available factual findings, in my view, on the basis of the expert veterinary evidence are as follows:

    (i) The Appellant should not have performed the procedure the subject of Charge 1.

    (ii) That procedure should only be performed by a veterinarian in the manner described by Dr Koenig and Dr Fielding.

    (iii) One reason that a veterinarian should only perform the procedure is because of the risk to the horse's health from non-veterinarians performing such a procedure in the circumstances that the Appellant did.

26. The Appellant agrees he performed the procedure on the afternoon of 20 October, a few hours before he called Dr Fielding. The Appellant's evidence was that he was prevented from contacting a vet prior to performing the procedure. He says he was told getting a vet was "too expensive": T43.2100-2103. He says this instruction came from Mr McCullum: T-43.2115-2110. This was denied by Mr McCullum, who said that the Appellant told him that a vet wasn't necessary and that he "knows heaps of stuff and that's a waste of money": T-66.3263.

27. Resolving this dispute in the absence of hearing oral evidence is not a straightforward task. Fortunately, in my view it is unnecessary to entirely resolve it. The Appellant was the horse's trainer. He was in charge of the horse. He performed the procedure. He recorded that procedure in his treatment book. It was the Appellant who took responsibility for calling Dr Fielding. He described to Dr Fielding the procedure he had performed. In my view the evidence falls a long way short of the Appellant being in position where he was forced to perform the procedure on the horse. He was not. I

consider it likely that he felt that he was not only appropriately capable to perform the procedure himself, but that it would help the horse. When the procedure did not help the horse's condition; that was when the Appellant called the veterinarian for assistance. The fact that the Appellant made that call to obtain the assistance of a veterinarian seems inconsistent with the Appellant being prevented from obtaining veterinary care for the horse prior to this, as he claims. It seems far more consistent with the Appellant believing he could alleviate the horse's condition or suffering by performing the procedure he did, and only when that did not appear to improve the horse's condition did he then decide that he should call a veterinarian.

Definition of "Cruelty" and Resolution of Charge 1

28. The word "cruelty" is defined in the Rules to include "any act or omission as a consequence of which a horse is mistreated": AR 2. The word is not otherwise defined, nor is "mistreatment" defined.

29. The Macquarie Dictionary definition of "cruelty" is "the state or quality of being cruel; cruel disposition or conduct; a cruel act. "Cruel" is defined as "disposition to inflict suffering; indifferent to, or taking pleasure in, the pain or distress of another; hard hearted; pitiless. Causing, or marked by, great pain or distress."

30. "Mistreatment" is defined as "to treat badly or wrongly."

31. Dictionary definitions are by no means necessarily the intended definition for a word used in either legislation or the rules of a sport such as racing. They do offer some guidance, however. Words and phrases in the Rules should be construed in their proper context, and with regard to the objects the Rules. There is no doubt that one of the key objectives of the penalty provisions of the Rules is the protection of the sport. The Rules are in place to demonstrate to the public that there are certain types of conduct that Racing will not condone; and that it will take steps to ensure the integrity of the sport is upheld, and to deter such conduct.

32. With that objective in mind, the word "mistreatment" as part of the word "cruelty" in AR 231(1)(a) is apt to include conduct that includes a non-qualified person performing an invasive and risky procedure on a horse that should only be performed by a veterinarian.

33. The horse in question here was clearly unwell, and in pain. The Appellant did not intend to deliberately inflict pain or injury on the horse by performing the procedure he did. He no doubt intended to either "cure" or improve the horse's condition. However, he nevertheless took it upon himself to perform what is a risky and invasive procedure on the horse that he is not qualified to perform. It is not to the point in the circumstances here that he did not intend to mistreat or injure the horse. It is not to the point that it is not established that the procedure performed by the Appellant caused the horse's death. What is primarily relevant is that the Appellant performed a risky and invasive procedure that he was simply not qualified to perform, despite his extensive experience with horses.

34. In my view, given the objectives of the Rules, the word "mistreatment" should be taken to include the circumstances described here – that is, when a person performs an invasive and risky procedure on a horse that should only be performed by a veterinarian.

35. I am comfortably satisfied that the Appellant "mistreated" the horse in a manner covered by the definition of "cruelty" in the Rules. The Appeal against breach of AR 231(1)(a) should be dismissed.

Charges 2 and 3

36. As referred to above, there is dispute about whether the Appellant said it was not necessary to obtain the services of a veterinarian for the horse, or whether Mr. McCullum told him not to contact a vet because it was too expensive.

37. I am satisfied that initially, the Appellant indicated sufficient confidence in his abilities to treat the horse, at least up until the time shortly before the call was made to Dr Fielding in the early evening of 20 October 2020.

38. Further, as I have already found, the Appellant was the trainer of the horse and consequently the person relevantly "in charge of" the horse at the Clovelea Stables. As such the Appellant had an obligation to take reasonable steps to alleviate pain and to provide veterinary treatment as set out in AR 231(1)(b)(ii) and (iii), the subject of Charges 2 and 3.

39. The totality of the evidence here – which includes film taken of the horse in clear distress on the morning of 21 October 2020 – unarguably, in my view, establishes that it was obvious that this horse was in pain, probably from the time it entered the Stables on 19 October 2020.

40. In my view it is unarguable that it was also obvious that the horse was extremely unwell. The fact that the Appellant called Dr Fielding in the early evening of 20 October 2020 is unmistakable evidence that he understood that the horse was sufficiently unwell that it required veterinary care. It would have been obvious to any experienced horse person that the horse was at risk of dying at least from no later than the morning of 21 October until the time that the horse did in fact die.

41. While I accept that the Appellant thought he could assist the horse by performing the procedure that he did, and while I accept that other treatments and some form of pain medication was administered, it is crystal clear in my view that no reasonable steps were taken to either alleviate the horse's pain or to obtain veterinary care. No attempt was made, for example, to contact a vet prior to the Appellant performing the procedure that he did on the afternoon of 20 October 2020.

42. When a call was made to Dr Fielding early that evening, no further efforts were made to obtain a vet, despite the fact that Dr Fielding told the Appellant about what the other options were for obtaining veterinary services for the horse, such as taking it to Charles Sturt University. No attempt was made to contact Dr Fielding on the morning of 21 October 2020 when he said he was available: see T-58.2840-.2845. No reasonable steps were taken at any stage to alleviate the horse's pain.

43. I am comfortably satisfied, therefore, that the breaches of AR 231(1)(b)(ii) and (iii) have been made out, and the Appeals in relation to those charges should be dismissed.

Mr J Murphy and Mr P Innes:

44. We agree with the findings of the Principal Member outlined above, and with the Orders below.

Orders

(1) Appeals in relation to the findings of breach of AR 231(1)(a), AR 231(1)(b)(ii) and AR 231(1)(b)(iii) are dismissed.

(2) Finding of breach of AR 231(1)(a), AR 231(1)(b)(ii) and AR 231(1)(b)(iii) are confirmed.

(3) Appellant and the Stewards have until 5:00 pm on Friday 16 September 2022 to provide to the Panel any written submissions on the Penalty Appeal.