

Appeal decision

Date: 22 April 2015

Code of racing: Harness

Appeal panel: Mr B Miller (chair), Mr P James and Mr D Kays

Appearances: Mr P O'Sullivan, solicitor, appeared on behalf of Mathew Neilson.

Mr D Farquharson, stipendiary steward, appeared on behalf of the stewards.

Decision being appealed: Twelve months' disqualification backdated to commence 31 January 2015 – AR 193(1).

Appeal result: Upheld, penalty varied.

Extract of proceedings—in the matter of a decision concerning the stewards' inspection of Trainer Mr M. Neilson's stables on 31 January 2015, which revealed stomach tubing of the pacer My Aliyana.

THE CHAIRMAN: Mathew Nielson is a licensed trainer who undertakes that training business at premises situated at Pumicestone Road, Toorbul. On Saturday 31 January stewards M Ross and P Zimmermann undertook an inspection of the stables at approximately 11.45am. Later that same afternoon at approximately 2.40pm stewards re-entered the premises to undertake a further inspection and on the evidence presented by those stewards it was apparent that their vision into the tie up area of the stable was clear. Evidence was presented by the stewards that they observed Mr Nielson holding a black funnel and stomach tubing near a horse which was later identified by them as My Aliyana. At the time Mr Nielson was observed to be engaged in stomach tubing of that horse and on the approach of the stewards he attempted to hide the items that he was using. As a result of a report to Racing Qld by Mr Zimmermann an enquiry was convened after the Chairman of Stewards ordered that the horse in question My Aliyana be scratched from the meeting to be held on 31 January as a direct result of it having been treated on the day in question. The enquiry held on 19 February took evidence from Mr Nielson and a charge was levelled pursuant to Rule 193(1) which stipulates:

A person shall not attempt to stomach tube or stomach tube a horse nominated for a race or event within 48 hours of the commencement of that race or event.

Mr Nielson gave evidence that he was of the belief that it was for the purpose of the horse's benefit that he had to drench the horse with water as it had become dehydrated. The stewards confirmed that regardless of that protestation it was a breach of the Rule for

Mr Nielson to act as he had done so and convicted him of the charge and imposed a penalty that Mr Nielson's licence be disqualified for a period of 12 months. It was against the imposition of that penalty that this appeal was lodged.

The investigating stewards on the day in question entered the stable area of Matthew Neilson when he was absent and when he returned he identified he had been to vote. They inspected his stables and some of the horses and at no point in time did he make any comment to them about horses that he had racing that evening or that he had a suspicion that one was likely to be scratched. Sometime later the stewards again entered the stable area and surprised Neilson during the course of what appeared to them to be a drenching of a horse. Tubing, funnel and bucket were close by and Neilson had, on being taken by surprise, attempted to remove those items from the sight or proximity of the stewards. It is apparent that Neilson was aware he was in breach of the rules. Whether or not he was drenching solely with water or some other substance is irrelevant for the purposes of determining whether he was guilty of an offence. His legal representative at the outset of this Appeal identified that the appeal would proceed only on the question of penalty having discussed this issue with his client and confirming that what Nielson had done was obviously in breach of the rules.

Neilson was convicted of the offence under the relevant Harness Racing Rule 193. The stewards then embarked on a series of questions about his previous use of TCO2, his horses TCO2 reading being significantly high and in fact even during the course of the appeal the admission by the chairman of the stewards that there is absolutely no doubt that Neilson was acting outside the scope of the rules because of the high readings. Quite rightly Mr O'Sullivan objected to such a proposition as Neilson had never been charged with an offence of this nature and in fact in 16 years of engagement in the industry had only limited exposure to offences. He certainly had no drug offences of this nature. He is therefore to be treated as a clean skin when penalty is to be assessed and it is not sufficient, in this Board's consideration to have him penalised with a penalty that would ordinarily be visited upon someone who had not only breached the rules but in doing so had used substances that were also blatantly against the rules. The stewards may have suspected that Neilson was acting in an unusual manner but the fact is that he was taken by surprise, he was obviously cognisant that he had breached the rules and he was trying to delay the inevitable consequence namely a conviction and the imposition of a penalty for such breach.

Mr O'Sullivan raised important issues concerning the basis upon which the stewards had imposed the penalty of 12 months and was vocal in his protestations that the stewards did not identify the antecedents of Mr Nielson when they assessed penalty. He opined that when assessing the penalty the stewards had recourse to far more serious and provable offences committed by persons other than those merely under suspicion. Quite correctly the stewards are entitled to be suspicious of persons engaged in the training of horses and it is proper and appropriate for them to make enquiry and investigations when such suspicions are prevalent. It is the duty of stewards to identify whether people under the control of stewards breach the Rules under which they are obliged to perform. The issue for this Board is to identify whether the penalty imposed is, in all the circumstances reasonable.

This Board has looked at all of the issues concerning the evidence submitted both by the stewards and by Mr O'Sullivan who called Mr Neilson to give evidence under affirmation. The evidence given by Neilson was uncontroverted and in no way challenged by the stewards by way of cross examination. It is therefore not possible for this Board to identify

that what Neilson said before it was wrong. In fact the members of this Board determined and thought that Neilson was in fact truthful in his representation that he was flustered, was unsure of what was happening and was very concerned. On the other hand of course it was suggested that Neilson was of the mind to have scratched the horse and that his intention was that he would and wanted to scratch the horse. The fact is he did not do so and he made no effort to do so until later when he had composed his thoughts. Whether he thought better of it or not is irrelevant. We do not accept that at the relevant time he had formed the view that he was going to scratch the horse.

It is the opinion of this Board that the penalty imposed is excessive. There is no doubt Mr Nielson had expended significant monies in purchasing the property from which he trains and that he has a disabled child who is in need of considerable care and his wife/partner is pregnant with another child expected in July. The stewards accept that Mr Nielson has not been charged previously with any significant offence of a like nature. As a trainer and a driver he has had a number of penalties imposed but none of them relate to a significant breach of a Rule such as the one with which he is charged now. The stewards did not, in the opinion of this Board, properly make allowance for the issues surrounding both the administration of the tubing device and the material and also did not give proper credence to the almost blemish free history of the appellant. Had they done so, a penalty of something less than 12 months would have been appropriate. In the circumstances this Board, whilst accepting without doubt that the appellant was in breach of the relevant Rule, does not believe that the penalty imposed is reasonable and allows the appeal on penalty and imposes a disqualification of Mr Nielson's licence for a period of six months effective from 31 January 2015.

Further right of appeal information: The appellant and the stewards may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **14 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au