

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR CALLAN SUVALJKO

APPLICATION NO: 24/2772

PANEL: MR ROBERT NASH (CHAIRPERSON)
MS NATALIE SINTON (MEMBER)
MS KELLY ZHANG (MEMBER)

DATE OF HEARING: 9 July 2024

DATE OF DETERMINATION: 22 August 2024


IN THE MATTER OF an appeal by CALLAN SUVALJKO against a determination made by the Racing and Wagering Western Australia Stewards of Harness Racing to disqualify him for a period of six months each for two charges, to be served concurrently, for breaches of Rule 190(1), (2) and (4) of the Rules of Harness Racing

Mr Luka Margaretic represented Mr Suvaljko.

Ms Venetia Bennett and Mr Stephen Waddington represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Summary

By a unanimous decision of the members of the Tribunal, the appeal against penalty for two breaches of Rule 190(1), (2) and (4) of the Rules of Harness Racing is dismissed.



ROBERT NASH
CHAIRPERSON



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Results of the Appeal

1. For the reasons set out below, the appellant's appeal against the penalty imposed is dismissed.

Overview of the appeal

2. Mr Callan Suvaljko was charged with, and pleaded guilty at a Stewards inquiry on 16 May 2024, to the following contraventions of Rule 190(1) of the Rules of Harness Racing (**Rules**):
 - a) on 2 February 2024, ARDENS HORIZON trained by Mr Suvaljko presented for Race 8 at Gloucester Park not free of a prohibited substance, the corticosteroid drug Dexamethasone; and
 - b) on 12 February 2024, SKIPPYS DELIGHT trained by Mr Suvaljko presented for Race 8 at Pinjarra not free of a prohibited substance, the corticosteroid drug Dexamethasone.
3. By their reasons dated 22 May 2024, the Stewards imposed a penalty of six months disqualification for each contravention, to be served concurrently (**Reasons**).

4. By Notice of Appeal dated 4 June 2024, Mr Suvaljko has appealed against the penalty imposed on the grounds that the penalty was manifestly excessive in the circumstances:
 - a) in the form of the penalty, being disqualification rather than a fine or suspension; and
 - b) by reference to previous cases determined by the Stewards and this Tribunal.
5. Although during the hearing Mr Suvaljko submitted that the ground of appeal was that suspension (not a fine) was the more appropriate penalty, in his supplementary responsive submissions of 23 July 2024 he confirms his initial grounds as set out in his Notice of Appeal.

Background

6. Mr Suvaljko is a professional trainer and driver who has a long history of licensed involvement in harness racing.
7. Mr Suvaljko has what the Stewards in their Reasons described, a poor record in racing as a trainer with the following past relevant offences:
 - a) 1999 - Disqualified for two years for presenting a runner not free of the prohibited substance Tramadol.
 - b) 2001 - Fined \$5,000 for presenting a runner not free of the prohibited substance TCO2.
 - c) 2003 - Fined \$7,500 for presenting a runner not free of the prohibited substance TCO2.
 - d) 2018 - Disqualified for 12 months for presenting a runner not free of the prohibited substance TCO2.
 - e) 2018 - Fined \$2,000 for administering an alkalinising agent (Neutradex) within one clear day (associated with above).
8. On 2 February 2024, ARDENS HORIZON presented for Race 8 at Gloucester Park.
9. On 12 February 2024, SKIPPYS DELIGHT presented for Race 8 at Pinjarra.
10. Following the above two races, routine samples were taken from both ARDENS HORIZON and SKIPPYS DELIGHT.
11. On 4 April 2024, Dr Nicola Beckett, Team Leader Racing Chemistry Laboratory, ChemCentre, wrote to the Stewards advising that the samples from both ARDENS HORIZON and SKIPPYS DELIGHT was positive for Dexamethasone.
12. On 18 and 19 April 2024 respectively, the positive test results for SKIPPYS DELIGHT and ARDENS HORIZON were confirmed by Racing Analytical Services Ltd (Vic).
13. On 24 April 2024, the Stewards wrote to Mr Suvaljko to inform him of the results and directed him to attend a Stewards inquiry on 16 May 2024.

14. On 26 April 2024, RWWA investigators attended Mr Suvaljko's registered stable address and informed Mr Suvaljko of the preliminary positive swabs for Dexamethasone. There was a time delay from receiving the swabs to attending on Mr Suvaljko as Mr Suvaljko had been away from WA. During the electronic record of interview, Mr Suvaljko stated that:
 - a) all his racehorses received 2 mls of Dexamethasone via a nebuliser four days prior to racing;
 - b) ARDENS HORIZON received 2 mls of Dexamethasone via a nebuliser on the morning of 29 of January 2024 prior to racing at Gloucester Park on 2 February 2024; and
 - c) SKIPPYS DELIGHT received two mls of Dexamethasone via a nebuliser and 10 mls of Dexamethasone IV on the morning of 8 February 2024 prior racing at Pinjarra on 12 February 2024.
15. On 16 May 2024, a Stewards inquiry was held into the positive test results.
16. During the inquiry, Dr Ashley Nolan, a Chemist and Research Officer for the Racing Chemistry Team at the ChemCentre, gave evidence that the levels of Dexamethasone detected were as follows:
 - a) ARDENS HORIZON: 0.5 nanograms per mil.
 - b) SKIPPYS DELIGHT: 3 nanograms per mil.
17. Dr Nolan gave evidence that out of the thousands of urine samples for Dexamethasone using the current sampling method since 2018, there have only been 19 positive samples including the two the subject of the inquiry. Her evidence was that the level detected in ARDENS HORIZON was considered in the mid-range, and the level detected in SKIPPYS DELIGHT was within the higher range.
18. Dr Caroline McMullen, a Regulatory Veterinarian gave evidence during the inquiry that:
 - a) Dexamethasone is a therapeutic substance commonly used in the training of racehorses. It is a scheduled substance which requires veterinary prescription, and which needs to be withdrawn prior to racing in appropriate timeframes;
 - b) whilst the use of Dexamethasone via nebuliser was not uncommon in racing, it was an off-label method of treatment in which there was little by way of formal studies to inform those choosing this pathway as to suitable withdrawal times;
 - c) the medium recommended withdrawal period for Dexamethasone was four days following an intravenous injection. The withdrawal period may need to be extended where Dexamethasone is used by an off-label route of administration, such as oral use or for nebulisation; and
 - d) it was unwise to be combining an intravenous injection with nebulisation and still applying the same withdrawal period.
19. Having regard to the above factual background, the Stewards charged Mr Suvaljko, Mr Suvaljko pleaded guilty, and the Stewards imposed the penalties as stated in paragraphs 2 and 3 above.

Nature of the appeal

20. Appeals to this Tribunal are conducted pursuant to section 11(3) of the *Racing Penalties (Appeals) Act 1990* by way of rehearing: *Harper v The Racing Penalties Appeal Tribunal of Western Australia* [2001] WASCA 217.
21. The imposition of a penalty by the Stewards involves the exercise of discretion, exercised in a principled way. The test to be applied by this Tribunal for setting aside a discretionary decision, as in this case, is set out in *Australian Coal and Shale Employees Federation v Commonwealth* (1953) 94 CLR 621 at 627, which were confirmed to apply to this Tribunal: *Danagher v Racing Penalties Appeal Tribunal* (1995) 13 WAR 531 at 554.
22. The approach this Tribunal takes when reviewing penalties imposed by the Stewards has also been consistently stated in previous decisions of the Tribunal: see *Ferguson v RWWA (Harness)*, Appeal No. 853 (October 2021) [73]-[74]; *Oliveri v RWWA (Thoroughbred)*, Appeal No. 861 (February 2023) [40]; *Lewthwaite v RWWA (Thoroughbred)*, Appeal No. 863 (September 2023) [88]-[91].
23. The key feature of those statements is that it is not for this Tribunal to interfere with the penalty that has been imposed by the Stewards simply because it might have preferred to impose a different penalty had it been exercising the discretion. The discretion to impose a penalty is entrusted to the Stewards by reason of their considerable background experience and knowledge of the racing industry. The Tribunal intervenes only where a penalty has been imposed in error.
24. The assessment of the penalty must be done by reference to the well-established principle that the maintenance of public confidence in the integrity of the racing industry is facilitated by the imposition of stringent controls on trainers presenting horses to race without prohibited substances in their system – regardless of whether or not the trainer is at fault: see *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337 at 349.
25. The law regarding manifest excess establishes that:
 - a) intervention is not justified simply because the result arrived at below is markedly different to other sentences imposed for other cases; and
 - b) intervention is only warranted where the penalty is so far outside the range of penalties imposed in comparable cases such that it may be concluded that there must have been some misapplication of principle, even though where and how is not apparent from the reasons: *Hili v The Queen* (2010) 242 CLR 520 at [59].

The ground of appeal

26. Mr Suvaljko appeals on the ground of manifest excess being that the Stewards decision was so unreasonable or plainly unjust that this Tribunal may infer there has been a failure by the Stewards to properly exercise their discretion.
27. In addition to the Notice of Appeal and the parties' submissions during the hearing, the Tribunal has also had regard to the following materials filed after the hearing:
 - a) The Stewards supplementary written submissions of 23 July 2024 with annexures;
 - b) Mr Suvaljko's responsive submissions of 24 July 2024; and
 - c) Mr Suvaljko's supplementary responsive submissions of 26 July 2024.

28. During the hearing Mr Suvaljko relied on Exhibit A (document titled “Past Precedent cases”) in support of his case. Exhibit A was a document which set out a list of penalties in past precedent cases by name, date and penalty. Mr Suvaljko in particular relied on the cases of Mr Zec and Ms Aldersea where a period of suspension, rather than disqualification, was imposed on trainers whose horses presented to race not free of the prohibited substance Dexamethasone.
29. In the Steward’s supplementary submissions, they provided a response to Exhibit A which was annotated with the relevant facts, matters and circumstances of each case including that of Mr Zec and Ms Aldersea, noting that neither had a record comparable to that of Mr Suvaljko and that:
- a) Mr Zec (September 2021) was to have received a fine, but instead requested suspension because he was impecunious.
 - b) Ms Aldersea (April 2022) was sentenced on four counts at the same time: a record-keeping offence (1) and three presentation offences arising from one sample, one involving the therapeutic substance Dexamethasone (2), and two involving the performance enhancing substances Pseudoephedrine and Ephedrine (3) and (4). Ms Aldersea was sentenced, having regard to her “*blemish free record of involvement with the overall racing industry for a number of years*” and to the principles of totality, to a fine of \$300 (1), a suspension of six months (2), and two disqualifications of 12 months, to be served concurrently (3) and (4).
30. In Mr Suvaljko’s responsive submissions, he points to the following cases which he says supported his position that a six month disqualification was manifestly excessive:
- a) Mr Reed received only a fine of \$8,500 despite having multiple prior offences, including a recent offence involving a permanently banned steroid substance (Stanozolol);
 - b) Mr Aiden De Campo’s case involved two Dexamethasone offences resulting in a fine of \$5,000, despite Mr. De Campo also using a nebuliser without specific veterinary advice; and
 - c) Mr Ferguson’s case which involved a second offence resulting in only a \$6,000 fine.

Determination of the appeal

31. The Stewards’ Reasons set out their consideration of the appropriate form of penalty. The following were expressly considered:
- a) all modes of penalty, including disqualification or fine (at paragraph 34);
 - b) the nature of the prohibited substance (at paragraphs 11 to 14);
 - c) the circumstances of the contravention (at paragraphs 15 to 23, 31 and 36);
 - d) potential hardship resulting from disqualification (at paragraph 34);
 - e) special factors (at paragraphs 21, 35 and 36); and
 - f) general factors (at paragraph 35).

32. In the Tribunal's view, the Stewards in their Reasons provided comprehensive reasons for the penalty which was imposed. They relevantly considered:
- a) Mr Suvaljko's history of prior offences which was described as "poor";
 - b) that Dexamethasone was therapeutic not performance enhancing, and the levels detected in each sample; and
 - c) how it came to be that Dexamethasone was detected in each sample finding that Mr Suvaljko's use of the product was not part of a strict and diligent approach.
33. The Stewards considered a broad range of previous cases involving both Dexamethasone and other substances where the person concerned was or was not a first-time offender (at paragraphs 27 to 32). They noted that higher penalties applied where a person had multiple prior offences (at paragraph 27) and stated that the case of Mr Andrew De Campo was comparable and provided assistance (at paragraph 32).
34. Mr Suvaljko's responsive submissions raises the case of Mr Reed, which the Stewards considered at paragraph 31 of their Reasons and found that there were several distinguishing aspects to that of Mr Suvaljko including his better prior record, and his better regime of the use of Dexamethasone which resulted in lower levels detected than in Mr Suvaljko's case. Further, the Stewards' response to Exhibit A recorded that Mr Reed's son Mark Reed admitted to administering Stanazolol without Mr Reed's knowledge and that was accepted by the Stewards.
35. As for Mr Aiden De Campo's case, the Stewards' response to Exhibit A sets out that this was his first offence and so this does not appear to be comparable.
36. As for Mr Ferguson's case, the Stewards' response to Exhibit A sets out that this was his second offence with the previous offence in 2008 (some 13 years ago) for TCO2. Again, Mr Ferguson's record is not comparable to Mr Suvaljko's.
37. In all of the circumstances, the Tribunal is not persuaded that there is any proper basis to interfere with the Stewards' determination that a period of six months disqualification is appropriate in this case. The penalty imposed is not so far outside the range of penalties previously imposed in comparable cases to warrant intervention by the Tribunal.



KELLY ZHANG
MEMBER



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1. I have read the draft reasons of Member, Ms Zhang.
2. I agreed with those reasons and conclusions and have nothing further to add.


ROBERT NASH
CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR THE DETERMINATION OF
MS NATALIE SINTON (MEMBER)

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MEMBER

