

RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR THE DETERMINATION OF MR A E MONISSE
(PRESIDING MEMBER)

APPELLANT: MR STUART ALEXANDER MCDONALD

APPLICATION NO: 22/10940

PANEL: MR ANDREW E MONISSE (PRESIDING MEMBER)

DATE OF HEARING: 13 DECEMBER 2022

DATE OF DETERMINATION: 14 DECEMBER 2022

DATE OF PUBLICATION: 20 MARCH 2023

IN THE MATTER OF an appeal by STUART ALEXANDER MCDONALD against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing to impose a 14 day suspension for breach of 163(1)(a)(iii) of the Rules of Harness Racing

Mr Gary Hall Snr represented Mr Stuart Alexander McDonald.

Mr Brad Lewis represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Introduction

1. This is an Appeal by a licensed reinsperson, Mr Stuart Alexander McDonald (“the Appellant”) against conviction recorded by the Racing and Wagering Western Australia Stewards of Harness Racing (“the Stewards”) for breach of Rule AR 163(1)(a)(iii) of the RWWA Rules of Harness Racing (“the Rules”).
2. On 13 December 2022, I heard the Appeal. On 14 December 2022, I announced my decision to dismiss the Appeal, with my reasons for that determination to be published at a later date. I now publish those reasons.

The Inquiry

3. On 5 December 2022, the Appellant drove the horse HEART OF HEARTS as it competed in Race 2 at Pinjarra Paceway. At about the 200 m mark of that race there was an incident that occurred at the bend just before entering the home straight to the finish line and in front of a Steward observation tower.
4. On 5 December 2022, a panel of harness Stewards chaired by Stipendiary Steward Mr Peter Webster conducted an inquiry into that incident ("the inquiry"). The other members of this panel were Senior Steward Christopher Brown, Deputy Steward Louis Austin and Cadet Steward Ellie Asphar.

The breach of the Rules under inquiry

5. The Stewards in the inquiry charged the Appellant with contravening Rule AR 163(1)(a)(iii) of the Rules. That rule relevantly provides: "*A driver shall not cause or contribute to any... interference.*"
6. Rule AR 163(5) of the Rules relevantly provides: "*A driver who, in the opinion of the Stewards, fails to comply with any provision of this rule is guilty of an offence.*"

The Particulars for the charge

7. The particulars for the Appellant's charge were:

"... at Pinjarra Race Meeting on the 5th of December 2022 in Race 2, when you were the driver of HEART OF HEARTS, when racing into the home straight on the final occasion you've allowed your horse and your drive to come down the track contacting the offside front legs of BETTER BE BUCKS which dislodged the driver and fell to the track, also severely checking ABBEE BEE which was following HEART OF HEARTS." ("the charge")
8. The Appellant pleaded *Not guilty* to the charge.

The Evidence

The Race 2 footage evidence

9. The Stewards played the evidence of the race footage of Race 2 in the inquiry and to the witnesses in it.

Steward Austin's evidence

10. Steward Louis Austin was the first witness to give evidence in the inquiry. He was in the observation tower overlooking the incident under inquiry. His evidence included (as transcribed *nb.* same for all other witnesses that are quoted):

"I viewed this incident from the 200, approximately the 200m station, which gave me an elevated view of the incident. The field Mr Wych had been racing in the one out one back position getting to about the 500m Mr McDonald started to come forward, he had a runner to his outside, which was Ms Madeline Young and I felt Mr Wych was then able to move fairly to the inside of Mr McDonald, placing Mr McDonald in a four wide position. As they've come forward under my stand, I felt that even though Mr Johnson's horse who faced the breeze and started to drop out, he may have just wandered up a fraction, but I

certainly felt that Mr McDonald has allowed his runner to get down and tighten the ground someway of Mr Wych's horse. There was no appeal, certainly I didn't feel that there was any pressure to Mr McDonald's outside, Ms Young was there but back and I didn't feel was putting pressure on Mr McDonald however as they raced away, Mr McDonald's drive has got down further and subsequently contacted the front offside leg of Mr Wych's horse on two occasions which caused Mr Wych's horse to not only blunder but fall immediately. Mr Lewis was behind coming off the fence and working to a three wide position and however he couldn't miss the incident and as a result he's fallen on top of Mr Wych."

11. Later in his evidence Mr Austin corrected his earlier evidence, stating that it was ABBEE BEE being driven by Mr Christopher Lewis that had fallen, not Mr Wych's horse BETTOR BE BUCKS.

Reinsperson Wych's evidence

12. Mr Wych gave evidence that included the following:

"Mr Austin has basically wrapped it up."

"The pressure was coming from the outside."

"I appealed twice for room, which I never got, it got tight, my horses green, it's first start, state that, but I didn't drive into a wheel, no."

And:

"AUSTIN: Mr Wych, I'll ask you once again, did you steer up?"

WYCH: No. I didn't steer up at all.

AUSTIN: At the point of contact, was your horse's head turned to out Mr Wych?"

WYCH: No, I appealed quite a while before that for some room and Mr McDonald did say yes – I heard that – but I didn't get any – I didn't get any room at all, and it got tighter and tighter. And it's as simple as that."

Reinsperson Lewis's evidence

13. Mr Christopher Lewis, the driver of the horse ABEE BEE, also gave evidence. It included that he *"couldn't see exactly what was happening, fall there, but I was just heading to the outside of Mr Wych"*.

Reinsperson Young's evidence

14. Ms Madeleine Young, another reinsperson in Race 2, also gave evidence at the request of the Appellant. It included:

"AUSTIN: [D]id you at any stage, view Mr McDonald check his horse away on a number of occasions?"

YOUNG: I didn't, I just seen, I was following Mr McDonald and I felt like we were going in a straight line, he did check the horse, but after that I pulled out to make my run.

AUSTIN: So, just to clarify what I mean Mr McDonald has checked away..."

YOUNG: Yep

AUSTIN: on several occasions, he's checked away, Mr McDonald has said that in his evidence, you have observed Mr McDonald check his horse away?

YOUNG: Well I wouldn't say that I seen him checking because I'm behind him, but I felt that the whole...

AUSTIN: But you say he held his line?

YOUNG: Yeah, well I felt that we were, held the line, I didn't see the horse get, going down, but..."

15. Later in her evidence Ms Young, on the Appellant holding his line, stated:

"AUSTIN: At that point you hadn't come to the outside, and you say Mr McDonald was travelling in the true three wide line, holding his line

YOUNG: Yeah

AUSTIN: Prior to the contact you still say that?

YOUNG: From where I was yeah...

AUSTIN: Where were you at the time?

YOUNG: I probably just pulled off

AUSTIN: Coming to the outside of Mr McDonald, so did you put any pressure on Mr McDonald? Ok, did you see, I will ask you once again, once you've come off the back of Mr McDonald, did you see Mr McDonald make efforts to check his horse away from Mr Wych's run?

YOUNG: Well at that point I wasn't really watching what he was doing."

The Appellant's evidence

16. The Appellant gave evidence as to his driving of HEART OF HEARTS at the relevant time and in defence of the charge. After viewing the footage of the incident, he stated:

"[Y]ou can see that I'm moving my horse, trying to steer my horse and I think I'm doing a relatively, pretty good job it, and I think before Mr Wych's horse go down you can see his head gets turned rapidly to the right, goes up and that's when the contact happened, but it was turned up into me before it galloped. That's why the contact has happened."

17. The Appellant also stated that when the left wheel of his sulky made contact to the right foreleg of Mr Wych's horse BETTOR BE BUCKS that:

"AUSTIN: At the point of contact you were actually checking away

McDONALD: Yes, I would say, I was checked away the whole round the corner, I wouldn't have made it that far otherwise."

And in another part of his evidence:

"McDONALD: I was clear of that runner the whole way as passing and the only reason that I didn't make any contact was because he steered up into me"

18. The Appellant's evidence also included the following:

"CHAIRMAN: So, Mr McDonald, we notice shortly after Mr Wych's horse has contacted, the sort of natural arc of your horse, as you're entering the front straight, closes the gap between yourself and Mr Johnson quite considerably.

McDONALD: Yeah like I said this horse was definitely getting down but I was doing a lot to check it"

...

"McDONALD: ... I was way past, but I would have been way past if he hadn't steered up and made contact with me."

...

"BROWN: So you're severely checking the horse because why, because the horse wants to get down?"

MCDONALD: Yeah, 100%, yeah, the horse getting down the whole way, if you go watch. I couldn't even get around the galloping horse, like the horse galloping, I'm just, I've got my hand back here and it won't go around it, so I understand like the horse was hanging. I was definitely checked 100%. I've got around that horse, I've got around that horse just one, without contact until the very last second when you can clearly see Mr Wych's horse getting steered up. Why that had to be steered up, I can't tell you why. The camera angle is not great because I can't see the inside horse."

...

"AUSTIN: And to you Mr McDonald, in your opinion, do you think Mr Wych's horse was already galloping before the contact?"

McDonald: No, it wasn't galloping before the contact, the contact

AUSTIN: I thought you said the horse was galloping

McDONALD: Oh no no, I said it was steered up and that's when the contact happened that's why."

The Stewards' decision

19. On 5 December 2022 the Stewards in their inquiry found the Appellant guilty of the charge after giving the following reasons:

"Mr McDonald, we have considered all the evidence you've put forward and the latter evidence of Ms Young. I'll read out the reasons. As the point of the contact is made to the off-fore of BETTOR BE BUCKS we do see some reaction from you, that you turned your horse's out marginally – sorry, your horse's head out marginally, however the incident has already occurred. It does not appear that, prior to the contact being made to BETTOR BE BUCKS that you were attempting to check your horse off – up the track, although you have acknowledged in your evidence that HEART OF HEARTS has a tendency to want to shift down the track prior to, and during, the incident. It was confirmed by the live observations of Steward Mr Louis Austin that you had allowed your drive to shift down the track, tightening the racing room of BETTOR BE BUCKS with your sulky wheel contacting the off-fore of BETTOR BE BUCKS on two occasions. Mr Wych stated, in his evidence, that he was tight for some distance prior to the racing to the incident. As a result, your drive shifted down the track and that he appealed to you for racing room to the incident, prior to the incident happening, in which you acknowledged

and said you provided that racing room, however, in the opinion of the Stewards, it is evident the pressure was not relieved. You advised in your evidence that Mr Wych had turned his horse's head out just prior to the contact being made to that runner, however the Stewards acknowledge, viewing the lateral patrol vision, that, at the time of the incident, Mr Wych turned his horse's head out slightly and in the opinion due to him checking his drive while being tightened by you. You requested Ms Madeline Young attend the inquiry, where Ms Young advised that, prior to the incident, she was trailing you and that, at that stage, you were holding your line, however prior to the incident occurring, Ms Young had shifted to your outside. It's evident in the lateral patrol film that I'M IN A PICKLE, driven by Mr Gary Johnson, is racing to the inside of BETTOR BE BUCKS, however it does not appear that he puts any pressure on BETTOR BE BUCKS and that was acknowledged by Mr Wych. Therefore, the Stewards are of the opinion I'M IN A PICKLE had no bearing on the incident."

20. After considering submissions from the Appellant on penalty and taking into account his "very good" driving record, the Stewards informed him of their following decision on penalty:

"Thank you, Mr McDonald. We listened to your consideration on penalty. We've looked at this many times. We've decided that there will be a reinsperson suspension of your licence. We have taken into consideration all means of penalty, though. We consider that the interference caused was high, there was a horse that fell and there were others that were interfered with. We think that the carelessness shown was low to mid. It was only a slight move of your horse. So, taking it into consideration, we believe a suspension of your reinsperson licence for 14 days is appropriate."

The Appellant's grounds of Appeal

21. The Appellant filed a *Notice of Appeal* dated 6 December 2022 against the Stewards' decision to find him guilty of the charge. His ground of Appeal for it was:

"The stewards failed to take into account the evidence that I provided, the evidence provided by Miss Madeleine Young and the evidence that was provided by the replay."

The submissions in the Appeal

22. Mr Gary Hall Snr made submissions on behalf of the Appellant at the hearing of the Appeal. These were effectively the same as those made by the Appellant in the inquiry, namely that Mr Wych drove into the Appellant's wheel who was maintaining his four wide line when that happened. In support he submitted that Ms Young was in the perfect position to see what had happened. He also relied on the race footage of the incident to submit that it shows HEART OF HEARTS' head is pointing up the track just before the contact is made, confirming that Mr Wych drove into Mr McDonald.
23. Mr Lewis for the Stewards of Harness Racing submitted, among other things, that Mr Wych maintained his evidence after watching the race footage that he was holding his line when the contact was made. As for Mr Wych's horse turning its head out, Mr Lewis submitted that it confirms the pressure coming from the Appellant's driving. Mr Lewis' concluding submissions was that it was the Appellant who gradually encroached on Mr Wych's ground and that Ms Young was driving her own race and did not see what actually happened when the contact was made.

“In the opinion of the Stewards”

24. Where, as here, a breach of a rule of racing includes a finding of “*in the opinion of the Stewards*”, I have stated previously that a successful appeal requires that:
- a) the opinion was not in accordance with the evidence (*HARVEY*, Appeal 405, 3 March 1998, p 2 and *CLAITE*, Appeal 428, 8 September 1998, p 2);
 - b) the Stewards erred in a material particular in coming to their opinion (*HARVEY*, Appeal 452, 18 March 1999, p 1); or
 - c) the opinion was unreasonably held in that no reasonable body of Stewards, having considered all of the relevant materials, could reasonably have come to the opinion in question (refer for example to *HARVEY*, Appeal 452, 18 March 1999, p 1, and *LUCIANI*, Appeal 626, 19 November 2004, p 4) *nb.* an opinion of this description has been summarised as one which is clearly unreasonable (*CLAITE*, above).

(*HEARN*, Appeal 760, 6 January 2014, at p.3).

My decision

25. Given the points that follow, I am not persuaded that the Appellant’s Appeal against conviction has been made out in any of the three ways described in paragraph 24.
26. The Stewards considered the evidence given in it by the Appellant and Ms Madeleine Young and of the race replay footage of the incident. This is evident from their reasons for finding the Appellant guilty of the charge.
27. The race footage of the incident is not conclusive of what happened as they were all taken from fixed positions some distance away on other sides of the track to where the incident occurred. Further, they do not show the lines that the drivers maintained, or did not maintain, as they raced around the final bend. Accordingly, evidence given by others is necessary to determine whether there has been a breach of the Rules.
28. Ms Young’s evidence did not assist the Appellant at the critical time of the contact. Contrary to what Mr Hall Snr submitted, she was not in the “*perfect position*” to be able to state what was happening at that time. Ms Young, moments before the contact in question happened, had moved out wide of the Appellant to race. Accordingly, she was no longer behind the Appellant trailing him when that contact occurred. Her own evidence and the race footage confirms this.
29. Steward Austin was in a good position to view what had happened with an unobstructed and elevated view from the observation tower that he was in. From there he observed the drivers as they approached his position through to the 200 m mark where the contact occurred, although adjacent to it when that happened.
30. There is a factual dispute between the Appellant and Mr Wych’s evidence as to who caused the contact. However, Steward Austin’s evidence is consistent with Mr Wych’s evidence. While Steward Austin is also part of the panel of Stewards that charged the Appellant with breaching Rule 163(1)(a)(iii), he was the most independent witness to give evidence in the inquiry, especially given the limitations in the evidence given by Mr Lewis and Ms Young as to what they were able to observe.

31. Contrary to what the Appellant stated in his evidence, he was not clear of Mr Wych's horse "the whole way" when the contact was made. The footage clearly shows that the contact was made as the Appellant was passing Mr Wych's horse, not after he had passed that it. The Appellant also stated that Mr Wych's horse was not galloping at that time.
32. The Stewards in their reasons acknowledged that "Mr Wych turned his horse's head out". However, in their opinion this was only "slightly" and that it was due to Mr Wych checking his drive while being tightened by the Appellant.
33. The breach of Rule 163(1)(a)(iii) in this Appeal is where a driver simply *contributes* to any interference. This is to be compared to the other more complex breach in Rule 163(1)(a)(iii) where a driver *causes* any interference. The Appellant claimed that he did not cause the contact in question, but that was not what the Stewards charged him with doing.
34. The Stewards' opinion that the Appellant contributed to the interference of the contact in question was not one which was clearly unreasonable to make - that finding was consistent with evidence given in the inquiry.
35. In determining that the Appellant's Appeal against conviction is unsuccessful, I have considered all the materials including the transcript of the Stewards' inquiry and viewing the race footage, and the submissions made at that hearing of the Appeal by the parties' representatives.

Conclusion

36. For these reasons I would dismiss the Appeal.

A E Monisse

ANDREW E MONISSE, PRESIDING MEMBER

