



RACING APPEALS TRIBUNAL
of New South Wales

Case Title: Mitchell Butterfield v Harness Racing NSW

Hearing Date(s): 17 October 2011

Decision Date: 14 November 2011

Jurisdiction: Racing Appeals Tribunal

Before: Kavanagh J

Decision: Disqualified from Harness Racing New South Wales for a period of eight months.

Legislation Cited: Racing Appeals Tribunal Act 1983

Cases Cited: Kilroy, Stewards' Report, Stephen Kilroy, 13 May 2010
Elder, Stewards' Report, Darren Elder, 30 August 2010
Roots, Stewards' Report, Roy Roots, 27 September 2010

Category: Principal Decision

Parties: Mitchell Butterfield (Appellant)
Harness Racing NSW (Respondent)

Representation

M Butterfield (Appellant)
R Sanders (Respondent)

DECISION

The Appeal

- 1 This is an appeal by Mr Mitchell Butterfield, a trainer in the harness racing industry, from a decision of Stewards of Harness Racing NSW ("HRNSW")

against a conviction for a breach of rr 190(1), 190(2) and 190(4) of the Australian Harness Racing Rules ("the Rules") for a positive swab.

- 2 The appellant, a licensed trainer with HRNSW, presented and raced "Crazyaswaz" in Race 3 at the Newcastle Harness Meeting on Friday 2 September 2011. Crazyaswaz was subject to the pre-race random drug testing regime and, accordingly, a blood sample was taken from the gelding.
- 3 The Australian Racing Forensic Laboratory ("ARFL") tested the blood sample taken from Crazyaswaz on 6 September 2011 and detected a total plasma carbon dioxide ("TCO2") level of 38.5mmo/L. This is above the 36.0mmo/L threshold as defined in r 188A(2)(a) of the Rules, which reads:

PART 12
PROHIBITED SUBSTANCES
Determination of prohibited substance

188. ...

188A. (1) ...

(a) ...

(b) ...

(c) ...

(2) The following substances when present at or below the levels set out are excepted from the provisions of sub rule 1:

(a) Alkalinising Agents, when evidenced by total carbon dioxide (TCO2) present at a concentration of 36.0 millimoles per litre in plasma.

(b) ...

...

- 4 As a result of the positive reading, the second portion of the sample package containing further blood vials was sent to the Queensland Government Racing Science Centre in Queensland for confirmatory analysis on 6 September 2011. This sample arrived on 7 September 2011 and was analysed on that day. It was found to have a TCO2 level of 38.6mmol/L.

- 5 The appellant was issued a penalty of 10 months disqualification by HRNSW.
- 6 Mr Butterfield pleads guilty to the charge but appeals on the ground the penalty of 10 months disqualification was excessive and too severe. A stay of penalty was sought by the appellant but was refused by the Tribunal on 23 September 2011.
- 7 Mr Reid Sanders, the Regulatory Manager of HRNSW, appeared for HRNSW and relied upon the transcript of the Stewards' inquiry with attached exhibits from that inquiry numbered '1' to '14' and an offence record. All the documentation went before the Tribunal with the agreement of Mr Butterfield.
- 8 Mr Butterfield was self-represented (he was given support by Mr John Camilleri, an owner of a horse trained by Mr Butterfield and also a bloodstock agent, who clearly places much trust in Mr Butterfield). He has represented himself with Mr Camilleri's assistance because, he opines, he cannot afford a solicitor.
- 9 Mr Butterfield relied upon submissions and a number of cases where the Stewards have imposed suspensions when a similar offence was considered. These authorities, he suggested, give credence to his submission the penalty imposed was too severe.
- 10 Mr Butterfield, in addressing the severity of the sentence, opined he was unfairly treated at the Inquiry and asserts his story was "just thrown aside" and was not taken seriously. He felt his fate was decided before he even said a word before the Inquiry.
- 11 Mr Butterfield revealed he trains horses for a living and has accounts with his feed store, his vet, his bank and with others worth thousands of dollars of credit. He pleads if he cannot earn a living training horses he cannot

make the payments on these goods and services which in turn will put him in severe financial and legal difficulties.

- 12 Further, he reveals, he works at the Newcastle Harness Racing Club as a track attendant on race days and that part of his income is crucial. He has been offered work in a racing stable driving horse trucks to and from the races and to and from track work each day but a disqualification means he cannot do this type of work.
- 13 HRNSW defends the penalty imposed and submits it is in no way manifestly excessive when reference is made to the HRNSW penalty guidelines. These guidelines were published effective 1 January 2010 and state that a first offence for excessive levels of TCO2 should attract a penalty of 12 months disqualification.
- 14 HRNSW contended it must take severe action to ensure that the integrity of the industry is protected and also to increase the perception and confidence of the public of the integrity of harness racing.

Consideration

- 15 The relevant rules provide:

190. (1) A horse shall be presented for a race free of prohibited substances.

(2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.

...

(4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.

- 16 This is a rule which obliges a trainer to ensure his horse is presented drug free. It is an absolute obligation placed upon the person who presented the horse. In this matter, Mr Butterfield so presented Crazyaswaz.
- 17 Mr Butterfield, in submissions before the Stewards, argued his brother was in charge of the feed and voluntarily mixed the pre-race feed up with an after-feed booster given to his horses. He suggests the Stewards gave no

consideration to this proposition as endorsed, he contends, by evidence from his brother, a young 16 year old.

18 On examination of the transcript of the Stewards' Inquiry, the Panel did consider Mr Butterfield's explanation but held the explanation "could be deemed one of convenience".

19 More importantly, a breach of r 190 is one to which no defence or explanation can provide an excuse for the person who presents the horse for a race which horse is not drug free. That fact has been conceded by Mr Butterfield in his plea of guilty.

20 Further, the allowable threshold for TCO₂ is 36 and as the two laboratory readings of the sample were 38.5 and later 38.6, the threshold was passed to a significant degree. This was a serious breach.

21 While Mr Butterfield has only been training for 2½ years in the Newcastle area, his horses compete up north as far as Tamworth and down south as far as Tabcorp Park Menangle.

22 Mr Butterfield has also relied upon various prior decisions in support of his submission the 10 month disqualification is excessive. HRNSW pleads that the Stewards gave some consideration to Mr Butterfield and he was given a reduced penalty under its guidelines as penalty under those guidelines for such a breach would be a 12 month disqualification.

23 Mr Butterfield relied upon the Inquiries of Messrs *S. Kilroy*; *D. Elder* and *R. Roots*:

- Mr Kilcoy had presented a horse with TCO₂ levels in breach and was given credit for his forthright evidence, his excellent record in the harness racing industry over a period in excess of 30 years and his good character.

- Mr Elder, in July 2010, was penalised for a breach of the same rule for the excessive level of TCO2 and was suspended for a period of 10 months with the Stewards commenting on his forthright evidence, his experience in excess of 20 years and that a period of disqualification would have "a significant impact on his capacity to be employed outside the industry".
- In September 2011, Mr Roots was also suspended for 10 months and the same comments were made, especially related to his 30 years experience.

24 Mr Butterfield is 21 years old and has been racing horses for only two seasons. He trains horses on his father's farm. He has ten horses in training, two of which are owned by his father.

25 The difficulty for Mr Butterfield is that since August 2011, the drug testing regime of HRNSW has been under challenge. The integrity of that regime has been questioned. Since August 2011, Mr Reid Sanders has been brought into HRNSW as its Regulatory Manager. It is his obligation to assist in restoring the reputation and integrity of Harness Racing in New South Wales. HRNSW have had to increase the number of samples taken under its drug testing regime and the times (proximity to race) these samples are taken from the horses. The purpose is to ensure that horses are presented to race free of prohibited substances.

26 HRNSW have the responsibility to ensure that the integrity of the industry is uppermost and one of the ways to demonstrate to the public that they are taking all necessary steps is to ensure that all horses that race do so drug free.

27 The appellant has been associated with the presentation of horses for racing for a period of 2½ years. I accept he should have full awareness of the seriousness of presenting a horse that is not drug free. HRNSW has a protective obligation that requires it to ensure horses racing are free of

prohibited substances. Its penalty regime is basically protective, although it has a punitive effect.

- 28 The recent widespread publicity about the state of harness racing in NSW and the seriousness with which all activity within the industry is being reviewed must be supported. The offence was committed in September 2011, after the new regimes have been implemented.
- 29 HRNSW submits, given the number of recent cases involving a similar substance, there needs to be a strong element of both personal and general deterrence. The industry needs to send a strong message to those who, for whatever reason, present their horses to race not in accordance with the Rules, that the repercussions for such actions will be stringent.
- 30 While Mr Butterfield is young and inexperienced, he was on the same notice as all participants in the harness racing industry that there was to be strict adherence to the rules under which harness racing is conducted after the troubles were revealed in August 2011.
- 31 The guidelines relied upon by the Stewards came into effect in 2010. Mr Butterfield knew of them. The Stewards gave an acknowledgement of Mr Butterfield's circumstance when they said as to penalty:

We have taken into account your guilty plea. We have taken into account what you say are the circumstances of the case. We have taken into account that you are a young person who has had a licence for a short period of time; 2 ½ years as a trainer. We have taken into account that you are a full-time trainer and that you are trying to make a career in the harness industry. It is unfortunate that you have a positive in such a short period of time, and at such a young age, in your career. We have taken that into account.

We have taken all those factors into consideration. The stewards believe that the appropriate penalty in the circumstances - working, as I said, off the industry benchmark of twelve months - we believe that the appropriate penalty in the circumstances is that you, Mr Mitchell Butterfield, be disqualified for a period, effectively immediately, of ten months. We have taken into account, as I said, your guilty plea and numerous other factors.

32 As to penalty, under the *Racing Appeals Tribunal Act 1983*, the Tribunal has the following powers:

17A Determination of appeals relating to greyhound racing or harness racing

(1) The Tribunal may do any of the following in respect of an appeal under section 15A or 15B:

(a) dismiss the appeal,

(b) confirm the decision appealed against or vary the decision by substituting any decision that could have been made by the steward, club or GRNSW or HRNSW (as the case requires),

(c) make such other order in relation to the disposal of the appeal as the Tribunal thinks fit.

(2) The decision of the Tribunal is final and is taken to be a decision of the person or body whose decision is the subject of the appeal.

33 In the circumstances, I allow a small deduction of penalty given Mr Butterfield's inexperience and youth. He shall be disqualified from HRNSW for a period of eight months.