



APPEAL of KACIE CONNOR: AR 135 (b)

Appeal Committee: Mr John Stewart (Chairman) and Mr Charles Burkitt

Date of Hearing: 6 and 18 November 2014

Date of Decision: 2 December 2014

REASONS FOR DECISION

Stewards' Decision

Kacie Connor is an apprentice jockey. On 11 October 2014 she rode "Leave a Message" in the 1300 metre FLY NTAS Handicap at Pioneer Park, Alice Springs.

AR 135 provides:

- "(a) Every horse shall be run on its merits.
- (b) The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field.
- (c) Any person who in the opinion of the Stewards has breached, or was a party to breaching, any portion of this Rule may be penalised, and the horse concerned may be disqualified.
- (d)...".

After conducting an inquiry, Stewards found Apprentice Connor guilty as charged of a breach of AR 135 (b).

Particulars of the charge were:

"...after racing in a rearward position in running from the 400 to the end of the race you did fail to ride your mount with sufficient vigour and displayed a distinct lack of urgency or purpose in attempting to so improve the horse's position at the finish when in the opinion of stewards it was reasonable and permissible in all the relevant circumstances to do so."

Apprentice Connor was suspended from riding in races for 3 months.

The Appeal

Apprentice Connor challenged the finding of guilt and the severity of the penalty. She sought a stay of the penalty pending the hearing of her appeal.

The appeal was heard on 6 and 18 November 2014. Apprentice Connor was represented by a legal practitioner, Mr Bill Piper. Mr David Hensler, Chairman of Stewards, conducted the case for the Stewards.

Grounds of appeal were:

“Leave a Message” the horse in question had recently been sent to Adelaide to be scoped and x-rayed which came back clear. He never travelled in the run, after drawing barrier 1. I came round the corner 4-5 horses off the fence due to laying/hanging on one rein. He never felt right in the run, didn't respond to being hit at the 400 m and ridden hands and heels prior to that. My intention was to ease him out of the race as a safety concern, given I know his history of knee issues and fear of a substantial enough injury to cause the horse to fall.

The time run in the race was 0.68 seconds faster than the run the start before when he was beaten 3.3 lengths.

Subsequent vet examination by the club's vet reported intermittent lameness of the knee in question and pain on applying pressure to the suspensory tendon. In a discussion with the vet he said that while the knee is less significant, the pain in the suspensory would stop the horse from stretching out, which reinforces my opinion that he didn't feel right in the run.

Given all these concerns I believe I am/was using a safety first opinion. I have no desire to have this or any horse fall/dramatically injure itself, me or other riders.

My obligation to the public at large to give the horse every opportunity does not require me to run the risk of serious injury or death.

After all this I do not believe I should be found guilty when mitigating circumstances were in play.”

Stay

The application for a stay pending the hearing of the appeal was opposed by Stewards. We granted the application essentially because we felt that the appeal raised serious issues for consideration. The available material did not enable us to form a view about the merit of the appeal with any degree of confidence but we felt that the potential prejudice to the rider of not granting a stay was a significant consideration. We expedited the hearing of the appeal.

Evidence

The transcript of the Stewards' inquiry was admitted into evidence at the hearing of the appeal. When referring to the content of the transcript we will use the prefix “T” followed by the page number.

Oral evidence was given by:

- Apprentice Connor
- Trainer Greg Connor

- Chief Steward David Westover
- Veterinary Surgeon Dr Harry Waters
- Veterinary Surgeon Dr Jamin Farebrother.

We observed the video recording of the race from various angles.

The transcript revealed that at the inquiry Apprentice Connor told Stewards (at T 2) that the horse “wanted to get on one rein” and “kept wanting to lay out”. She said (at T 21) that she tried the whip but the horse didn’t respond, adding that “He didn’t feel right from the first corner.” She said (at T 4) that “halfway down the straight I was thinking about pulling him up because he’d hung the whole way from about the 600.” She said (at T 12) that with about 100 metres to go “As soon as I went to pull him up he decided he wanted to go”. She added (at T 14) that “if the horse doesn’t feel right I’m not going to pull the stick and try and flog him out at any point”.

Trainer Greg Connor told Stewards (at T 8) that immediately after the race Apprentice Connor mentioned to him about the horse: “Just didn’t feel like he wanted to go, I was going to pull him up with 150 to go’, or whatever, ‘and then he grabbed the bit’”.

Chief Steward Westover informed Apprentice Connor (at T 17) of the response Stewards were expecting: “If you are going to pull it up, you pull it up. If you are going to ride it out we should be seeing you ride it out hands and heels. We are not seeing either.” She responded (at T 18): “I rode him hands and heels. I didn’t hammer him because he still didn’t feel right.”

Sometimes a rider is involved in a difficult balancing exercise between the respective interests of the horse and the punters who backed the horse. This point was aptly made in the following exchange (at T 20):

“MS CONNOR: ...I don’t think racing is about punishing horses. If they’re not right, you still look after them. It’s still a safety thing.

MR WESTOVER: We’re not disagreeing with that at all. That’s our job, but our job is also to make sure that the punters are getting a fair run for their money.”

The conflict between these obligations will feature in our consideration of this appeal.

“Leave a Message” was examined by Dr Waters at the request of Stewards on 13 October 2014. Dr Waters’ report was produced during the course of the Stewards’ inquiry. Dr Waters reported that the horse had moderate effusion of the right inter-carpal joint. There was a moderate pain response elicited with

deep palpation of both proximal suspensory ligaments. The horse demonstrated a grade 2/5 right foreleg lameness. Dr Waters added:

“The lameness observed is most likely referable to the right intercarpal joint based on the effusion response to flexion and history reported by Mr Connor. Pain on palpation of the proximal suspensory ligament can be a common incidental finding in a racehorse. The degree of lameness observed is unlikely to affect race performance though this is best assessed in the light of the rider’s account.” (Emphasis added)

Apprentice Connor told us that she was initially indentured to Gerald Ryan and has had about 720 rides in the Northern Territory and various States. She is a relatively experienced apprentice. She has ridden “Leave a Message” in all of his races and most, if not all, of his trackwork.

She insisted that the horse is normally free in his action and maintains his position in a race but in this race he “didn’t feel right”. She conceded (at T 15) that she had made a mistake in omitting to report the problem to the Stewards immediately after the race but told us that she didn’t want to report a problem in front of the owners until a vet had made a diagnosis.

The video recording was of limited assistance. Apprentice Connor urged us to observe that the horse was pulling and had a stilted galloping action. Mr Hensler submitted that the horse did not appear to be laying out to such an extent as to compromise Apprentice Connor’s ability to ride competitively. Dr Farebrother told us that he observed the horse hanging in the race and that this behaviour was consistent with lameness in an outside leg.

The horse had a history of persistent or recurring knee problems. Dr Farebrother observed swelling of the right inter-carpal region on 27 May 2013. A bone spur was removed from the right knee in Adelaide on 31 December 2013. The horse was sent to Adelaide for x-rays and “scoping” between 3 and 9 September 2014.

Trainer Greg Connor again corroborated Apprentice Connor’s evidence that she told him something was amiss with the horse. He did not ask the duty veterinary surgeon to examine the horse, preferring instead to consult his own vet, Dr Ken Oliver. A few days after the race, Dr Oliver administered anti-inflammatory injections to both knees on 15 October 2014. He advised Mr Connor that if the horse did not respond to the treatment its “future as a race horse should be re-assessed”. Mr Connor gave evidence that the horse kept on laying out in subsequent trackwork. Connections had probably spent between \$20,000 and \$30,000 altogether on veterinary fees and agistment for the horse. So a decision was made to retire the horse from racing.

Dr Waters testified that as the duty vet at Pioneer Park he made no notation of any lameness in "Leave a Message" on 11 October 2014. He couldn't say whether the 2/5 lameness existed at the time of the race. If it did exist, it would be noticeable in the majority of horses but, depending on the severity, could go undetected. He confirmed his opinion that the rider is in the best position to assess lameness during a race.

Dr Farebrother testified that 2/5 lameness is difficult to observe at a walk or in trotting a straight line. And, while, in his opinion, instability in the leg caused the horse to exhibit the hanging around the bend that he observed, it is not inconsistent with the horse finding improvement in the straight. Dr Farebrother agreed that a horse exhibiting lameness two days later might not have exhibited the same signs on race day. He was unsure but suspected that this horse was affected by lameness during the race. He agreed with Dr Waters that a rider who is familiar with a horse would usually be the best judge of whether it is lame. He would expect the rider of a lame horse to pull it up. He testified that 2/5 lameness would certainly affect the ability of a horse to race as well as being a safety concern.

Statements of evidence by jockeys Robert Agnew and Terry Gillett were tendered on behalf of Apprentice Connor without any objection from Stewards. Where a rider feels concern about the soundness of a horse, the statements supported the rider's ability to react by restraining the horse or pulling it up. Mr Piper cited as an example the well-publicized action taken by jockey Zac Purton on "Admire Rakti" in this year's Melbourne Cup.

Submissions

The following is a brief summary of the parties' submissions.

Mr Hensler submitted that:

1. Apprentice Connor had seized upon the emphasized passage in Dr Waters' report to excuse a poor ride.
2. There was no evidence that the horse was hanging out.
3. Stewards had no experience of a lame horse being ridden continuously as in this case.
4. If Apprentice Connor felt that the horse was affected by lameness, she should have eased it down or retired it from the race.
5. The competitive nature of racing does not allow half measures.
6. The horse was a \$3 favourite. The integrity of the sport must be upheld.
7. Stewards were entitled to rely upon their experience and form their own conclusion.

Mr Piper replied:

1. Apprentice Connor accepts that the horse was not ridden with vigour and that there was an onus on her to explain her actions.
2. She has consistently maintained that the horse didn't "feel right". Stewards should have accepted her explanation.
3. Her response to her concerns about the horse was in accordance with industry practice with safety a primary consideration.
4. At most Apprentice Connor was guilty of a non-culpable error of judgment if the Committee finds that the horse was actually travelling better than she thought it was.

Consideration

The importance of AR 135 (b) was emphasised by Justice Haylen of the Racing Appeals Tribunal of NSW in the Appeal by Allan Robinson (1 October 2009):

"Rule AR 135 (b) is one of the rules central to the integrity of racing. Unless there is compliance with this rule allowing the betting public to invest on the basis that every horse will be given a full and fair opportunity to win or obtain the best possible place, the industry as a whole will suffer."

Justice Haylen made reference to the remarks by the Hon Mr T E F Hughes AC, QC of the Racing NSW Appeal Panel in the Appeal by Chris Munce (5 June 2003). A differently constituted Appeal Committee of Thoroughbred Racing NT referred to those remarks in the Appeal of Michael McDuff (18 November 2011) and we will not repeat them in full but we again endorse the cautionary note that the charge will not be sustained unless the Tribunal "is comfortably satisfied that the person charged was guilty of conduct that in all the relevant circumstances fell below the level of judgment reasonably to be expected of a jockey in the position of the person charged in relation to the particular race."

We also adopt this statement of principle by the Tasmanian Racing Appeal Board in the Appeal by Rhonda Mangan (2 May 2014) that the rule "intends to penalise a rider when he or she fails to take some measure which was either the only reasonable and permissible measure open to him or her or so clearly the measure that he or she should have adopted as to make the failure to do so deserving of punishment."

The decision of Judge Lewis, chair of the Victorian Racing Appeals and Disciplinary Board, in the Appeal by Talia Rodder (1 December 2011) is particularly apposite:

"The rule imposes an objective standard of care. The standard of care takes into account, amongst other things, the views and the explanations of the rider and the views and opinions of the Stewards. A mere error of judgment is not a sufficient basis for a finding that the rule has been breached. The rider's conduct must be culpable, in the sense that, objectively judged, it is found to be blameworthy."

We made mention earlier of the rider's duty to look after the welfare of the horse. That duty finds expression in AR 92A (4):

“The Stewards may suspend or limit in any way a rider's permission to ride in races if they find that any aspect of his race riding technique, method or practice may be a hazard to himself or other riders, or may be contrary to the requirements of horse welfare.”

In addition, AR 137A (3) prohibits “excessive, unnecessary or improper” use of the whip and sub-rule (4) applies the sanction to circumstances where injury is caused to the horse or the horse is showing no response.

Decisions of other tribunals concerning the application of AR 135 (b) must be treated with caution. There is scope for immense variation in the relevant circumstances of each case. To see how the rule has been applied in similar cases this small sample is enlightening:

- Racing Appeals Tribunal of Queensland in the appeal by Mandy Radecker (25 February 2008): The Tribunal found that the horse had respiratory issues which could have been a contributing factor to its performance and provided an explanation why the rider did not put pressure or vigour into her ride. In upholding the appeal the Tribunal commented: “This is a serious charge and any explanation provided by a rider under this charge needs to be fully canvassed and considered before it can be considered as not being relevant.”
- Racing Appeals Tribunal (SA) in the Appeal by Amy Herrman (8 July 2014): The rider explained that her mount was intractable and difficult to control. The Tribunal upheld the Stewards' finding of guilt on the grounds that the horse was not displaying behaviour to justify the rider's conclusions.
- Racing Penalties Appeal Tribunal (WA) in the Appeal by Daniel Ganderton (22 July 2013): The rider restrained the horse out of consideration for its welfare. He thought there was something wrong with it. Veterinary inspections revealed nothing wrong with the horse. The Stewards contended that the rider was mistaken but did not allege any malfeasance. The Tribunal held that the image of racing should come second to the welfare of horses and riders. It held that the Stewards failed to give sufficient weight to the rider's explanation. The appeal was allowed.

Safety and integrity are core areas of responsibility for Stewards. For the most part, the two objectives go hand in hand. Safer practices will generally result in more truly run races. Adherence to proper integrity standards will reduce the appetite for unacceptable risks in the conduct of races.

AR 135 (b) has the potential to serve the interests of both integrity and safety. The rule is designed to ensure that each horse has the opportunity to do its best and to that end the rider is expected to take “all reasonable and permissible measures”. Every conceivable measure is not necessarily “permissible”; the rider must avoid infringing other applicable rules. But AR 135 (b) recognizes that there are situations in which it might not be “reasonable” to take all “permissible” measures.

We bear in mind that AR 135 requires the Stewards to form an opinion. Where the Stewards have formed an opinion, it is to be respected. We accept, as Mr Hensler submitted, that the Stewards have utilised vast experience in the observation of races in coming to their opinion. To succeed, the appellant must demonstrate that, having regard to all the evidence, the Stewards fell into error.

It is well established that one of the factors to be taken into account by Stewards is any explanation advanced by the rider. The explanation given by Apprentice Connor at the Stewards’ inquiry was deemed worthy of consideration. The Stewards reacted by arranging for the horse to be examined by Dr Waters. His opinion provided a substantial degree of objective support for the difficulties that Apprentice Connor said she experienced. We consider that it is likely that the lameness was responsible for those difficulties. In light of Dr Farebrother’s evidence it is also likely that the horse was less troubled by lameness in the straight but, even so, it is understandable that the rider refrained from finishing the race with greater vigour as charged.

We regard Apprentice Connor’s explanation as genuine and reasonable. We are of the view that the Stewards erred in failing to give adequate weight to her explanation in making their determination that she was in breach of AR 135 (b). We agree with the Stewards that it is hard to tell by observing the video recording that the horse was difficult to control. However, we are satisfied that the evidence of Apprentice Connor should be accepted, reinforced, as it is, in material respects by the evidence of both Dr Waters and Dr Farebrother. Having accepted her explanation, we are not comfortably satisfied that she was guilty of conduct as charged.

It is noteworthy that both Dr Farebrother (to a greater extent) and Dr Waters have considerable experience in attending to horses and performing raceday duties at the track. The transcript indicates that, in conducting the inquiry, the Stewards were influenced by the comment in Dr Waters’ report (emphasized above) that the “degree of lameness observed is unlikely to affect race performance” but less so by the qualification that “this is best assessed in the light of the rider’s account.” At the hearing of the appeal, the opinions of the veterinary surgeons supported the approach suggested by the latter phrase.

In the Appeal by Daniel Ganderton (above) the Tribunal accepted the rider's explanation even where a subsequent veterinary examination did not reveal any abnormality of a kind that might be consistent with the rider's concerns. No reflection on that decision is intended or to be implied but we simply observe that the rider's explanation would usually be more convincing where a firm basis is established by veterinary opinion.

It should be recognized that the Stewards made their decision without the benefit of Dr Farebrother's evidence. We allowed that additional evidence to be admitted at the appeal hearing in the interests of justice.

We do not need to decide whether Apprentice Connor's response to the behaviour of her mount was best practice or whether she should have pulled the horse up mid-race. She was not charged with failing to pull the horse up. Rather, the charge was that she failed to urge the horse to improve its position. Having decided that Apprentice Connor has given a satisfactory explanation in answer to the charge, we do not think that it is necessary to determine whether, in the circumstances, it would have been better to pull the horse up. The evidence on this point is inconclusive and we are mindful of the rider's status as an apprentice, albeit a relatively experienced apprentice, which suggests that any criticism of this kind is likely to point to, at worst, an error of judgment falling short of the degree of culpability that the charge required.

At the inquiry Mr Westover mentioned (at T 14) another specific obligation which may have arisen:

"MR WESTOVER: It's your obligation when you get on the scales to report anything that may have contributed to that horse's poor performance.

MS CONNOR: Yes, but I made no secret of the fact he'd hung out. I didn't think that was...

MR WESTOVER: That is only when we called you in for the inquiry. What I am saying is that when you got on the scales it should be reported that you feel that the horse was uncomfortable and whatever."

An obligation to make a report can be found in AR 140 (b):

"The owner and/or trainer and/or rider shall report to the Stewards as soon as practicable anything which might have affected the running of their horse in a race."

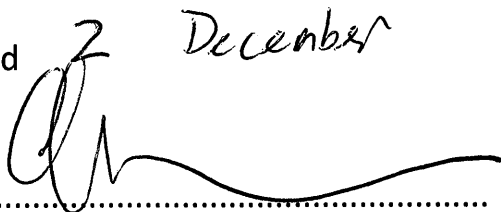
We refrain from making any finding in regard to that rule. Nevertheless, it is apparent that the rider informed the trainer of the difficulties which she had experienced in the race when she dismounted. It would have been very helpful if those difficulties had been reported to the Stewards as soon as practicable

without waiting for the Stewards' inquiry. Stewards may have been more readily inclined to accept the rider's explanation if delivered in this manner.

Stewards were rightly concerned about the interests of punters who would have been disappointed with the performance of a \$3 favourite. It is reasonable to expect that the punters would have been more understanding of the horse's performance if they were made aware that the horse was exhibiting signs of lameness and that the rider was worried about the risk of breakdown. The interests of all concerned would be served if the rider or trainer reported those concerns to the Stewards as soon as practicable and in turn if that information was mentioned in the Stewards' raceday report.

The appeal is upheld. The finding of guilt is set aside. The deposit will be refunded.

Dated *2 December* 2014

A handwritten signature in black ink, appearing to read 'John Stewart', written over a horizontal dotted line.

John Stewart
Chairman
Thoroughbred Racing NT