NEW SOUTH WALES

HARNESS RACING

APPEAL PANEL

APPEAL PANEL MEMBERS
P KITE SC
D KANE
J Moore

RESERVED DECISION

25 OCTOBER 2024

APPELLANT SCOTT WADE

RESPONDENT HRNSW

AUSTRALIAN HARNESS RACING RULES

190(1)

DECISION

1. The decision of the Appeals Panel is that the appeal is dismissed. The Appellant is disqualified for a period of 1 year and 10 months.
2. The appeal deposit forfeited.

Harness Racing NSW Appeals Panel

Appeal by Trainer Scott Wade

1. Mr Wade is the trainer of the horse Change of Mind which won Race 6, the SKY RACING ACTIVE PACE, at Penrith on 5 January 2023. On 1 March 2023 Harness Racing NSW (HRNSW) received from the Australian Racing Forensic Laboratory (ARFL) a Certificate of Analysis certifying that the urine sample taken from Change of Mind on 5 January was found to contain the prohibited substance levamisole. The result was subsequently confirmed by Racing Analytical Services Ltd on 20 March 2023.
2. The Stewards decided to open an Inquiry in relation to the result of the tests. The Inquiry commenced on 31 January 2024. Mr Morris, solicitor, was present representing Mr Wade. Evidence was taken from Mr Wade, Mr John Keledjian, the General Manager of ARFL, and Dr Martin Wainscott, Regulatory Veterinarian for HRNSW. An adjournment sought by Mr Morris was granted to allow him to obtain an expert report.
3. The Inquiry resumed on 15 April 2024. Further evidence was taken from Mr Keledjian and Dr Wainscott and a Report from Professor Michelle Colgave confirming the presence of levamisole was tendered on behalf of Mr Wade. The Professor was not required to give oral evidence.
4. The Stewards determined to charge Mr Wade with a breach of Harness Racing Rule 190 (1), (2) and (4). The particulars of the Charge being:

   "that you, Mr Scott Wade, licensed trainer of the horse Change Of Mind, did present that horse to race at Penrith on Thursday, 5 January 2023, not free of a prohibited substance, namely levamisole, as reported by two laboratories approved by Harness Racing New South Wales"
5. Mr Wade entered a plea of guilty. After receiving evidence from Mr Wade the Inquiry was adjourned to allow Mr Morris, solicitor for Mr Wade, to prepare submissions on penalty. The submissions dated 1 April were

filed. On 21 May the Stewards decision on penalty was published. Mr Wade was disqualified for a period of 1 year and 10 months.

6. The single ground of appeal in this case is that the penalty is excessive. The evidence on the appeal was the same as that before the Stewards.
7. Mr Morris made a number of submissions criticising the decision of the Stewards. He submitted the Stewards had erred by: increasing objective seriousness because the appellant was on a stay of proceedings; observing that Mr Wade's assurance had "not been realised"; double counting Mr Wade's offence record in both objective seriousness and subjective elements; and placing too much weight on the offence history.
8. As was the case in Wade No 2 an appeal to this Panel is a hearing de novo and the Panel is required to determine for itself the appropriate penalty. We observe, in that context, that our reading of the Steward's decision is different from that of Mr Morris. The Stewards definitely regarded the offence history as an aggravating factor to be considered in assessing penalty. Personal deterrence is a relevant consideration. On our reading of the decision the Stewards did not double count or place too much weight on the Appellant's offence history. Further the fact that the offence occurred during a stay is a relevant factor to be considered in weighing subjective considerations.
9. It is appropriate at this point to note that earlier charges against Mr Wade alleging breaches of Rule 190 had been found proven. The horse Better Bragger was found to have raced on 11 August 2020 not free of a prohibited substance. Likewise the horse Manchego on 31 August 2020. Mr Wade was disqualified for each offence for a period of 9 months to be served concurrently.
10. An interim suspension imposed by the Stewards on 25 March 2021 was stayed by the Racing Appeals Tribunal on 10 May 2021. The Stewards Inquiry was completed on 20 August 2021 on which date the disqualifications were imposed. An appeal to the Tribunal was lodged on

25 August 2021 and on 7 September the Tribunal granted a stay of those penalties. Following a number of interlocutory steps the appeal was heard on 14 December 2022.

11. The decision of the Tribunal on breach (Wade No 1) was published on 16 January 2023. In that decision the Tribunal found that levamisole was a prohibited substance within the meaning of Australian Harness Racing Rules 190 and 188A. The appeal against breach was dismissed.
12. On 2 March 2023 the Tribunal published its decision on penalty (Wade No 2). The penalty of disqualification was found to be appropriate in each case. The Tribunal performed its own analysis of objective seriousness and subjective features and took into account the periods of suspension and disqualification prior to the respective stays being granted amounting in total to a period of about 3 months. The Tribunal determined a penalty of 9 months disqualification in each case to be served concurrently and commencing from the date of the Tribunal's decision. We observe that the effective penalty, including time served, was 12 months disqualification.
13. The Tribunal also found that levamisole was a Class 2 prohibited substance within the meaning of the Harness Racing Penalty Guidelines. The Stewards had treated it as a Class 3 substance. The Guidelines provide a starting point for a first offence for Class 2 of 2 years while Class 3 is 1 year. The Tribunal also found that the appropriate starting point in that case lay between the two at 15 months.
14. The Penalty Guidelines provide a starting point for a second offence of Class 2 prohibited substance to be not less than 5 years and for a third offence not less than 10 years. Mr Morris contended that although this was a third offence the first two offences should be treated as one because Mr Wade was unaware of the first offence when the second occurred. That led the Stewards and the Tribunal to treat both the first and second offence as a "first" offence. While that was a proper

approach the same rationale does not apply to the third offence. Mr Wade was well and truly on notice of the first two offences when the third offence occurred. That is a consideration to be taken into account. At the commencement of the hearing before the Tribunal, the Tribunal did for completeness in the circumstances give the Appellant, through Mr Morris, a "Parker warning", given the concern of the Tribunal that the present offence to which the appeal relates may in fact be properly classified as a third offence. Mr Morris requested, and was granted an adjournment in order to take instructions. At the resumption, Mr Morris confirmed that the Appellant wished to proceed with his appeal.

15. Applying the McDonough principles this offence falls into the second category. HRNSW provide no evidence and have not contended that Mr Wade has deliberately done something to cause the presence of levamisole in the horse. Mr Wade has not presented evidence to show that he is blameless. Accordingly the objective seriousness of the offence falls in about the middle of the range. For a starting point of 5 years that would suggest a penalty of 2 years and 6 months coincidentally the figure chosen by the Stewards based on the reasoning in Wade No 2.
16. Mr Wade is entitled to a discount for his plea of guilty. We agree with the Stewards that the additional subjectives are of little weight. Mr Wade received credit for those subjectives in relation to the first two offences. Among those matters was an undertaking to take a number of steps identified by Mr Wade to prevent recurrence. While HRNSW does not challenged the introduction of those steps they observe that his intention had not been realised by reason of the occurrence of the offence. Something more needed to be done. Mr Wade provided no evidence of additional steps to ensure that he would not offend again. Other considerations raised are the product of disqualification and in any event are in this case offset by other considerations in particular adopting a

starting point for a second rather than a third offence and the fact that the offence occurred while on a stay.

17. The Panel therefore determines that a penalty of disqualification for a period of 1 year and 10 months is appropriate. We also consider it is proportionate have regard to the penalty imposed by the Tribunal in relation to the first two offences.
18. The appeal is dismissed and the appeal deposit forfeited.

P M Kite SC – Convenor

D Kane

J Moore

25 October 2024