

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR D MOSSENSON (CHAIRPERSON)

APPELLANT: GIOVANNI FILARDO
APPLICATION NO: A30/08/562
PANEL: MR D MOSSENSON (CHAIRPERSON)
MR J PRIOR (MEMBER)
MR W CHESNUTT (MEMBER)
DATE OF HEARING: 23 MAY 2002
DATE OF DETERMINATION: 19 JULY 2002

IN THE MATTER OF an appeal by Mr G Filardo against the determination made by the Stewards of the Western Australian Trotting Association on the 19 March 2002 imposing a 6 month disqualification for breach of Rule 190(1) of the Rules of Harness Racing.

Mr G Winston was granted leave to represent the appellant.

Mr WJ Sullivan appeared on behalf of the Stewards.

Background

MANHATTAN STAR won Race 6 at Pinjarra on 4 February 2002. The post-race urine sample taken from MANHATTAN STAR revealed the presence of diclofenac, an anti-inflammatory drug usually used on humans. MANHATTAN STAR was trained by Mr Filardo.

On the 1 March 2002 Mr Filardo attended a taped interview before Mr Skipper, Chairman of Stewards, and 2 other Stewards. Mr Filardo was advised of the analyst report and was asked for an explanation. He stated he could give none. MANHATTAN STAR was withdrawn by the Stewards from its engagement that day and its nomination refused until the inquiry was concluded. A stable inspection was arranged and horses were impounded. Mr Filardo was then asked whether he had rubbed any cream on to the horse or given it an injection. Mr Filardo responded that about 6 weeks before he had applied some cream on

some swelling when MANHATTAN STAR kicked the rail. The cream, called Voltaren, was used by Mr Filardo on himself because of back problems. Mr Filardo admitted that in recent times he had been applying the cream on his hands every day.

By letter dated 11 March 2002, the Chairman of Stewards wrote to Mr Filardo advising in accordance with Rule 191(2) the Stewards had conclusive evidence of the use of a prohibited substance when MANHATTAN STAR was presented to race on 4 February 2002. In accordance with Rule 190(2) the Stewards issued the charge that:

'As the trainer of MANHATTAN STAR you presented the gelding to race at Pinjarra on the 4th of February 2002 where a urine sample taken from the gelding after its winning performance in race 6, the Greenfields Liquor Store Stakes, contained the prohibited substance diclofenac.'

The Rule states:

'190. Presentation free of prohibited substances

- (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.*

...'

Mr Filardo was advised to attend an inquiry on the 19 March 2002 to present evidence in defence of the charge. Mr Filardo did attend. The inquiry was chaired by Steward W Sullivan. No plea to the charge was called for during the course of the inquiry. After a number of preliminaries the Chairman of the inquiry put to Mr Filardo the following:

'Having heard all the correspondence, and the reports from the – both laboratories, Mr. Filardo, what's your explanation for the presence of –'

to which Mr Filardo responded:

'My explanation sir I've got arthritis, I've been operated on the arm. I've been operated twice on my back. What I do, is I keep a tube in the stable because the first thing I do in the morning, I go there, I put a bit on my hands and stuff, and I rub it. I rub it on my back, and I put it on my hands, ... that's all I did. It just relieves the pain for a couple of – well, a couple of hours. That's it.'

Dr Rieusset, the Association Veterinary Consultant, gave evidence to the inquiry that Voltaren is a non-steroidal anti-inflammatory drug used for arthritic and rheumatoid conditions, joint problems and muscle problems. After minor trauma it is rubbed onto the affected area. If taken by mouth or in the form of a suppository it is absorbed very quickly. If rubbed on it needs to remain for some time to be absorbed. If it is used constantly on a person's hands by someone handling a horse and some goes onto the equipment such as the bit, the ropes and the feed bins *'there is some chance that it is going to get small amounts being absorbed orally, as well as some possibly coming through the skin'*. Although the levels found were not particularly high, it is difficult to say whether the chances are that its absorption was consistent with its transmission via the equipment. Dr Rieusset explained *'but it's more likely that it's rubbed onto the horse's leg...fairly*

regularly as well as its gone onto Mr Filardo's hands and that way it could probably have got that level'.

The Stewards produced into evidence some sheets from Horse Chiropractics dealing with different dates early in 2002. The 1 February entry contained a remark 'No problems'. The Chairman of Stewards asked whether the horse did not have soreness and problems meaning '*...that you wouldn't have had to rub any of the Voltaren on any of his joints?*'. Mr Filardo denied that he had. When asked if he was quite sure about it he said he was. Mr Filardo was specifically asked by the Chairman of Stewards whether the horse kicked a rail or had ever kicked a rail requiring Voltaren to be rubbed on him. Mr Filardo answered '*No, sir. Nothing sir*'. After Mr Filardo was played the tape of his interview with the Chairman of Stewards and other Stewards, which proved that he stated he had rubbed cream on the horse after it kicked a rail and had a bit of swelling, Mr Filardo responded '*I think I was out of my brain*'.

The inquiry then went into some little detail regarding Mr Filardo's training and lifestyle practices. Later in the inquiry Mr Filardo admitted that due to kicking either the rail or the stables MANHATTAN STAR had a little swelling in one of his back legs. Although Mr Filardo admitted manipulating it with his hands he denied what he had told Mr Skipper during the taped interview. He stated '*Probably I was a little bit out of my head, I don't know. I just – I don't know sir*'

The Stewards then called one of the part owners of MANHATTAN STAR and interrogated him at some length. Eventually the Stewards asked Mr Filardo to leave the room so that they could consider the matter. When they called him back in they made the following statement:

'...Mr Filardo, after considering all the evidence tendered, the stewards accept the laboratory's reports that diclofenac was present in the urine sample taken from MANHATTAN STAR after winning race 6 at Pinjarra on the 4th of February 2002. Stewards have also considered the evidence from Mr. Vassallo, Dr Rieusset and Mr Russo. The stewards find the charge sustained, that as the trainer of MANHATTAN STAR you presented that horse to race not free of a prohibited substance, and that substance being the anti-inflammatory drug diclofenac. Having found you guilty as charged, Mr Filardo, the stewards now have to consider the matter of penalty. Have you got anything you wish to put towards the stewards in regards to penalty?'

In response to the requests to address penalty Mr Filardo stated:

'...if anything happened, it was unintentionally'.

He gave evidence of his disability pension, his odd jobs and the fact that he had no offences of this kind previously in his 22 years involvement with horses. The Chairman of Stewards pointed out that '*Normally for these offences, a disqualification is in order, and the last anti-inflammatory substance the stewards dealt with was for Mr James Jones, from Northam, with a horse called – from York I think, with a horse called MARLES CHOICE. He was disqualified for the anti-inflammatory drug ... dexamethasone*'. Mr Filardo was then asked what hardships he would have if he were disqualified. Mr Filardo explained he only received a small charge for training, he was not profiting but did it for the love of it. In other words the training was just paying to feed horses and he was not living off the horses. He only trained 2 horses.

After adjourning to consider the matter the Stewards announced their findings on penalty in these terms:

'Mr Filardo, the offence is a very serious breach of the rules, and if allowed to go unchecked, will undermine the confidence of the racing public and have serious consequences for the industry. You were sufficiently experienced to be aware of your obligations as a trainer to present your horse drug-free. The WATA has gone to great lengths to advise trainers of the care required of them in relation to the use of drugs in their horses and have made available facilities to assist trainers in ensuring that they produce their horses drug-free for racing. If due care is exercised, there's no excuse for a trainer to fall into jeopardy of the drug rules.

Mr Filardo, the stewards, in considering penalty, have taken into account what you have told us, that your explanation was that the drug was accidentally applied to MANHATTAN STAR. However, from the evidence, the stewards cannot be satisfied that the drug was administered accidentally. By your own admission on the 1st of March 2002 to Mr Skipper and Mr Austin, that you used Voltaren on MANHATTAN STAR in the past. However, on this occasion, it was more probable than not that administration was made. The stewards further considered your involvement in the industry and your earnings derived from the industry as a trainer driver. The stewards have also considered the penalties that have been handed down recently in the case of Mr James Jones where he was disqualified for a period of 6-months.

The stewards, taking all those reasons into account, are of the opinion that the penalty to be handed down is a penalty of disqualification of period of 6-months...'

The Appeal

The grounds of appeal are:

1. *Conviction – I am not guilty on the grounds that I wasn't aware that my use of Voltaren on my hands could have caused contamination within 1 hour.*
2. *Penalty – Manifestly excessive.'*

At the outset of the hearing Mr Filardo abandoned his appeal against the conviction. Mr Winston argued that the concentration of the substance was low and it was unlikely to affect performance, or at least there was no evidence that it did. There was no betting support for the horse. Accidental administration was a possible explanation. It was asserted the transcript did not support the findings. Mr Filardo had admitted he had the drug Voltaren. It was a different case to that of Jones (which was not appealed) as this was a topical ointment rather than an injection. Mr Winston relied on Mr Filardo's 20 years of drug free racing and on the case of McLaren where cortisone on the trainer's hands resulted in a not guilty finding. In the case of Andrew De Campo where there was an accidental administration of butazoladen, a \$2,000 fine was imposed. The most recent case was that of Gary Hall involving a second offence for a prohibited substance. Administration was accidental. The 6 month suspension and fine of \$5,000 was reduced to \$2,000 and a suspension for 10 days.

The Stewards relied on the fact that topical application of the substance rather than just residue on hands was the likely explanation. Mr Filardo had contradicted himself as to whether he applied the substance in the house or the stable. Mr Sullivan pointed out there is a very small rate of absorption. Mr Filardo was not candid with the Stewards in that he gave contradictory evidence. The Stewards did not believe that a small amount of residue on the hands would be sufficient to result in a positive swab. Mr Sullivan explained in the case of De Campo there was a genuine feed mix up. In the case of Hall, evidence was accepted that the wrong bottle was used and it was not deliberate.

It was also pointed out on behalf of the Stewards that previously, the Rules prescribed the penalty whereas now the discretion lay with the Stewards. It was submitted in view of Mr Filardo's personal circumstances had a suspension been imposed it would not in practical terms have amounted to a penalty at all. It was argued that it was necessary to take into account the effect of this matter on the industry.

Conclusion

Two comments can be made in passing regarding the handling of the inquiry by the Stewards. Although the Stewards conducted their inquiry inappropriately by not calling for a plea, this point was not taken in the course of the appeal. Further, the reasons for the decision on both conviction and penalty were far from precisely articulated. There is little by way of definitive finding. The findings of fact are not clearly stated. These factors, however, are no basis to upset the decision.

I am satisfied that there was evidence available to the Stewards which left open to them the conclusions which they reached. I adopt the submissions put to the Tribunal by Mr Sullivan.

Even if Mr Filardo's explanation had been accepted in full, this in itself would not have exonerated him. Whilst clearly it would have shown that there was no deliberate act to cheat it still would have revealed the fact that the training practices were totally unsatisfactory. No precautions had been taken to avoid the substance being transmitted to the horse. Had transmission occurred as a result of the equipment having been tainted then arguably it may have been appropriate for a higher penalty to be imposed.

Nothing credible was advanced to demonstrate why any of the findings of the Stewards and conclusions on the evidence should not be accepted. The cases which were relied on by Mr Winston are distinguishable on the facts. The penalty has not been shown to be excessive in all of the relevant circumstances. A serious offence of this nature calls for a harsh penalty in order to send the appropriate message to the industry.

For these reasons I would dismiss the appeal.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



THE RACING PENALTIES APPEAL TRIBUNAL

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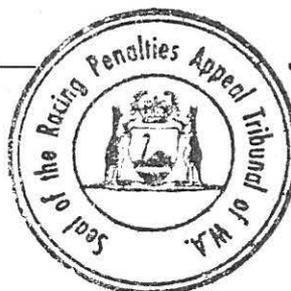
Mr G Winston was granted leave to represent the appellant.

Mr WJ Sullivan appeared on behalf of the Stewards.

I have read the draft determination of Mr D Mossenson, Chairperson.

I agree with those reasons and conclusions and have nothing to add.

John Prior



JOHN PRIOR, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR W CHESNUTT (MEMBER)

APPELLANT: GIOVANNI FILARDO
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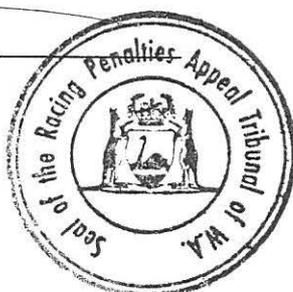
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WILLIAM CHESNUTT, MEMBER

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This is a unanimous decision of the Tribunal.

For the reasons published the appeal is dismissed.



DAN MOSSENSON, CHAIRPERSON

