

**REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL**

APPELLANT: ALDO GEORGE CORTOPASSI
APPLICATION NO: A30/08/609
PANEL: MR D MOSSENSON (CHAIRPERSON)
DATE OF HEARING: 17 MARCH 2004
DATE OF DETERMINATION: 17 MARCH 2004

IN THE MATTER OF an appeal by Aldo G Cortopassi against the determination made by Racing and Wagering Western Australia Stewards of Harness Racing on 7 March 2004 imposing 21 days suspension for breach of Rule 163(1)(a) of the Rules of Harness Racing.

The appellant represented himself.

Mr R Oliver appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

BACKGROUND

Following the running of Race 7 at Williams on 7 March 2004, the Racing and Wagering Western Australia (RWVA) Stewards of Harness Racing opened an inquiry into an incident that occurred racing into the back straight on the first occasion. Called to the inquiry were Mr Aldo Cortopassi, the driver of DONTTELLCHRISTINE and Mr Kirk Bourne, the driver of MYSTYS GIRL.

At the outset of the inquiry the Chairman of the inquiry made the following statement:

'I observed an incident from the stand adjacent to the winning post. As the field has raced into the back straight on the first occasion Mr. Cortopassi found himself

racing in a three wide position and Mr. Bourne was racing back off Mr. Cortopassi in the one wide line. Mr. Cortopassi has then started to restrain in an effort to gain a position into the one wide line and then shifting down has contacted the near side fore leg of MYSTYS GIRL causing that horse or (sic) race roughly.'

After the two drivers gave evidence and the film of the incident had been viewed on several occasions the Chairman laid a charge in these terms:

'Mr. Cortopassi after viewing the film again in your absence, Stewards do believe you have a charge to answer to and it is under the provisions of Rule 163 (1)(a) and that is of causing interference.'

Rule 163 of the Rules of Harness Racing states:

'163. Offence relating to matters during the race

(1) A driver shall not -

(a) cause or contribute to any crossing, jostling or interference;

...

(4) A driver who, in the opinion of the stewards, fails to comply with any provision of this rule is guilty of an offence.'

After acknowledging that he was aware of the Rule as well as of the incident and where it happened, Mr Cortopassi declined to enter a plea to the charge. He also declined to put forward any further evidence in answer to the charge. The Stewards then considered the matter and announced their finding in these terms:

Mr Cortopassi acting on the evidence as presented by the observing Steward and the evidence put forward by Mr Bourne and viewing the official video, Stewards find you guilty of the charge.'

In response to an invitation from the Chairman to address on penalty, Mr Cortopassi stated:

'Ah, yes my very good driving record, I'd go round at a meeting five or six times a week. I am led to believe the Stewards still have an option if they feel appropriate for a fine. Um after a meeting I had with the RWWA representatives on Thursday, that's what they told me. Um I do have an Inter Dominion series to drive in and I don't...around a lot. I am a safe driver and I try not to be in here at the best of times and I think November 2002 was the last time I was suspended, or found guilty of a charge, so if the Stewards could see a way of a very lesser penalty or a fine it would be much appreciated because I was very much looking forward to driving in an Inter Dominion series.'

In response the Chairman acknowledged that Mr Cortopassi's last suspension was on 11 December 2002 and that his record was mainly minor whip infringements. The Chairman subsequently announced the penalty in these terms:

'Mr. Cortopassi in assessing penalty this panel has thought long and hard as you would over any penalty, but specifically with this one when we know the importance of driving and being engaged in the Inter Dominion series, however having said that I will read this memo that was sent to all Stewards with regards to drivers receiving a fine and...

"It was resolved effective 1st March, 2004 any driver found guilty of a race driving offence shall no longer have the option of a fine in lieu of suspension."

This is deemed a race driving offence Mr. Cortopassi. That was sent by the Integrity and Assurance Committee of the RWWA on 11th February, 2004.

Where fines can be used is for things like contacting wheels or minor infringements. Having said that a normal penalty of this type of thing would be a 28 day suspension of your reinspersons licence, but taking into account that you have an excellent driving record and it has been quite some time since you were last suspended, Stewards will give you the 7 day dispensation on that which means you will be allowed to drive on Sunday 28 March, 2004 as of midnight of that date. With that you have the right to appeal to the Racing and Penalties Appeals Tribunal.'

This penalty had the effect of depriving Mr Cortopassi of fulfilling his drives in the Inter Dominion Championships being conducted in Perth. Mr Cortopassi was at the time engaged for two runners in those championships, THE DIE IS CAST and MEGGIE DEAR. The heats were scheduled to be run on 12, 16 and 19 March 2004 with the final and consolation to be run on 26 March 2004. The Stewards stayed Mr Cortopassi's penalty to allow him to fulfil his drives on both 8 and 9 March 2004.

Mr Cortopassi lodged a notice of appeal against the harshness of the penalty on 9 March 2004 and sought a suspension of the operation of his penalty. The appeal was listed for hearing on 17 March 2004, and at the same time Mr Cortopassi was granted a stay until midnight on the day of the hearing or as otherwise ordered.

Pursuant to Rule 256 the Stewards in this case had a wide range of potential penalties open to them. They could impose a fine, a period of suspension, a fine coupled with a period of suspension, issue a severe reprimand or just a reprimand.

THE APPEAL

Mr Cortopassi submitted to the Tribunal that he had engaged in some 1500 drives since his last suspension. This he said averaged out at approximately 5 drives per meeting at 5 meetings per week. He claimed to be *'a clean and honest driver who, through a slight error of judgment had defaulted'*. He argued that had the incident occurred some 6 days earlier he would have been afforded the election of a fine in lieu of a suspension. Some time ago the Committee of the Western Australian Trotting Association had resolved to allow drivers who had been convicted of driving offences to elect a fine in lieu of a suspension in certain circumstances. RWWA, as controlling authority, had reversed this policy as of 1 March 2004. Consequently the option of a fine by way of election by Mr Cortopassi was no longer available to him.

In pressing his case Mr Cortopassi argued strongly that Gary Hall Jnr had been convicted of not allowing THE FALCON STRIKE to run on its merits. Mr Hall Jnr was suspended for 28 days prior to the commencement of the Championships for failing to obtain the best possible position in a race. The operation of the penalty however was postponed by the Stewards until 27 March 2004, being the day after the final of the Championships. According to Mr Cortopassi Mr Hall Jnr's matter involved a more serious offence than his own. Rather Mr Cortopassi argued that his infringement should be categorised as 'a mere honest mistake' as distinct from what he claimed was a deliberate action. The transcript of the Steward's inquiry reveals the following exchange took place regarding the circumstances of the incident:

"CORTOPASSI At the time, like when the race was on I thought the horse had found a position, I thought we were there. See he goes in behind already there, we have gone in behind.

CHAIRMAN Mr. Cortopassi, Mr. Bourne's horse does appear to contact the inside of your wheels not in behind.

CORTOPASSI Yea, I am saying I have got in behind Mr. Wallrodt.

CHAIRMAN Were you aware of where Mr. Bourne was?

CORTOPASSI I had a good look and I seen he was a fair way off but making ground and I just had a good look before I went there – I thought there was sufficient room to go there.'

Mr Cortopassi then called in aid the case of Mr Suvaljko. I was told rather than the usual three months suspension for a high level (39 mmol) of TCO₂ concentration a fine of \$5,000 was imposed by the Stewards in that matter.

Mr Cortopassi also argued that the standard practice in relation to fines was for the Stewards to impose a \$200 impost for each week of suspension. In other words a 21 day suspension was equated in money terms to a \$600 fine. With his monthly income and driving fees Mr Cortopassi would be financially considerably worse off by having the suspension rather than the fine. This aspect was exacerbated by the fact that he was driving two horses in the Inter Dominion series and one of his horses had the potential to make the final. It was then submitted that the owners of the horses Mr Cortopassi was scheduled to drive in the Championships deserved the same 'rights as' the owners involved in Mr Hall Jnr's drives. Further, I was told that in effect, due to his past association with both horses, Mr Cortopassi was the only suitable driver for them. In the case of one of the horses in question the only other driver with any familiarity was already committed to drive in the same series.

So far as the incident was concerned Mr Cortopassi went on to argue that he considered that he had been in the right. He claimed he was not in a position to pull out at the relevant time as he was over committed. A 21 day suspension was a very harsh penalty for him in the light of his record.

In response Mr Oliver submitted on the Stewards' behalf that causing interference in the first 500 metres in a race was 'very serious'. This incident, which could have been avoided,

affected Mr Bourne's prospects in the race. According to Mr Oliver, in considering the merits one has to look at where the incident occurs, how it occurred, whether it could have been avoided, was it solely due to the driver's actions as well as the possibility of injury to both horses and drivers. The Tribunal was told the distinguishing feature in the Hall matter was that it was not a traffic incident. Even although it was still serious, there was no danger of injury to horse and driver. It was asserted that the Stewards had taken into account the Inter Dominion Championships by allowing a 7 day dispensation and a short stay to enable fulfilment of driving engagements. According to Mr Oliver, in view of the flyer from RWWA, this is now not the type of incident in which a fine should be imposed. Prior to 1 March 2004 the Stewards could have imposed a \$600 fine for this offence. The decision in the Hall matter was made by a different panel of Stewards. It was accepted that Mr Hall Jnr. was driving a favourite and there was plenty of betting on his horse.

In reply the appellant claimed his was '*only a minor interference*' although he did readily admit that there was some contact to the legs. However, no one was hurt in this incident whereas in the Hall incident '*the betting public was hurt*'. The public trust and confidence in racing was shaken. It was asserted that there are '*two sets of rules for people that can win and those that can lose*'. Accordingly Mr Cortopassi submitted the penalty imposed on him was very harsh. It was claimed that despite Mr Hall's prominence in the industry and prospects in the Inter Dominion Championships '*no individual was bigger than the industry itself*'.

Mr Cortopassi then explained how he was a very dedicated driver who attended every venue. No one else of his stature in the industry does that. This helps owners, trainers and the betting public by attending all race meetings. I understand that Mr Cortopassi is on the Committee of the Breeders, Owners, Trainers and Reinspersons' Association.

At the conclusion of the appeal proceedings I adjourned briefly to consider the matter and then announced my decision. I allowed the appeal, reduced the penalty to 14 days suspension, deferred the operation of the penalty until midnight on 26 March 2004 or unless otherwise ordered and indicated I would publish reasons in due course. I now set out my reasons.

REASONS

When one analyses the reasons enunciated by the Stewards for the penalty in the light of the submissions which were made on behalf of the Stewards in the appeal it appears that the Stewards may in fact have misinterpreted the memo which issued from RWWA. I was left with the clear impression that the Stewards did not believe in a case of causing interference that a fine remained an option open to them in the exercise of their discretion in fixing the penalty. However, as already specified Rule 256 does in fact give a wide discretion with a number of different potential penalties including the option of a fine.

Unfortunately, the reasons given by the Stewards contain no findings of fact both when they addressed the conviction and subsequently in dealing with the penalty. In respect of the penalty, after explaining the fine election is no longer available they in briefest terms assert '*a normal penalty is a 28 day suspension... for this type of thing*' and then make a concession of 7 days for the '*excellent driving record*'.

No attempt is made in the briefest of reasons which were supplied to support the 'normal penalty' proposition with any examples. No description or evaluation of the nature and quality of the drive is provided. The reasons contain no explanation for the 7 day dispensation. That time frame, distinct from any other, was simply applied for the good record.

Mr Cortopassi in presenting his argument strongly pressed the point that a fine remained open to the Stewards despite the communication identified by the Stewards which came from the Integrity Assurance Committee of RWWA. Despite this approach I am satisfied that in the circumstances of this offence a fine is not appropriate. Rather, a suspension remains the proper punishment to be imposed in relation to this driving transgression.

In the reasons regarding the tariff Mr Cortopassi was only told that a 28 day suspension was the norm without any examples or comparisons to support that proposition.

Westrot magazine used to publish information regarding offences. It ceased the practice early last year. As the Stewards do not in their reasons make reference to other offenders and their penalties for breaches of the same Rule, and as no examples were presented at the appeal I considered it appropriate to refer to Westrot to try and elicit what range of penalties have previously been imposed. A quick examination of penalties for Rule 163(1)(a) offences as at 6 January 2003 which have been imposed by the Stewards as recorded in the January/February 2003 edition of Westrot (p 77-81 inclusive) reveals the following:

Licensee	Date	Result	Penalty
J S (Jason) Vella	26-10-02	SUSPENSION	14 Days
J S (Jason) Vella	26-10-02	SUSPENSION	7 Days
M S (Scott) Eyre	27-10-02	REPRIMAND	
D S (Donald) Davies	02-11-02	REPRIMAND	
B D (Barry) Giudice	03-11-02	SUSPENSION	14 Days
C P (Clinton) Kimes	04-11-02	FINE	\$800
A R (Aiden) Warwick	08-11-02	FINE	\$400
P J (Phillip) Duggan	09-11-02	REPRIMAND	
T E (Tamara) Perry	10-11-02	SUSPENSION	28 Days
T E (Tamara) Perry	10-11-02	SUSPENSION	21 Days
S J (Stephen) Miller	11-11-02	SUSPENSION	14 Days
J S (Jason) Vella	11-11-02	REPRIMAND	
G B (Garry) Elliott	13-11-02	REPRIMAND	
C (Cono) Condipodero	15-11-02	REPRIMAND	
S L (Stephen) Boyd	15-11-02	SUSPENSION	14 Days

Licensee	Date	Result	Penalty
N A (Natalie) Duffy-Smith	18-11-02	REPRIMAND	
C A E (Clayton) Elliott	20-11-02	SUSPENSION	14 Days
M S (Scott) Eyre	22-11-02	REPRIMAND	
A (Tony) Hynam	24-11-02	SUSPENSION	14 Days
P H (Peter) Winterswyk	24-11-02	REPRIMAND	
H E (Harry) Miller	25-11-02	REPRIMAND	
R F (Richard) Polak	25-11-02	SUSPENSION	14 Days
C P (Clinton) Kimes	27-11-02	SUSPENSION	28 Days
R G (Ross) Johnson	27-11-02	REPRIMAND	
K M (Kevin) Green	01-12-02	SUSPENSION	14 Days
K M (Kevin) Green	01-12-02	SUSPENSION	21 Days
J S (John) Mackellar	01-12-02	SUSPENSION	14 Days
C R (Craig) Chase-Dunlop	03-12-02	REPRIMAND	
G E (Gary) Hall (Jnr)	04-12-02	REPRIMAND	
P H (Peter) Winterswyk	04-12-02	SUSPENSION	21 Days
M G (Mike) Reed	06-12-02	REPRIMAND	
R G (Reg) Phillips	07-12-02	REPRIMAND	
A L (Andrew) De Campo	07-12-02	FINE	\$400
B L (Bradley) Groves	07-12-02	SUSPENSION	21 Days
L B (Lindsay) Harper	08-12-02	FINE	\$400
S J (Shannon) Suvaljko	11-12-02	FINE	\$600
A G (Aldo) Cortopassi	11-12-02	SUSPENSION	21 Days
A G (Aldo) Cortopassi	11-12-02	SUSPENSION	7 Days
R J (Rodney) Marsden	14-12-02	SUSPENSION	14 Days
R G (Reg) Phillips	18-12-02	SUSPENSION	28 Days
A C (Aaron) Beckett	18-12-02	FINE	\$400
W J (Bill) Hayes	18-12-02	REPRIMAND	
A R (Aiden) Warwick	20-12-02	SUSPENSION	28 Days
S J (Stephen) Miller	20-12-02	REPRIMAND	
R (Ron) Young	23-12-02	SUSPENSION	21 Days

Licensee	Date	Result	Penalty
S R (Susan) Roberts	27-12-02	FINE	\$800
G R (Gary) Jones	27-12-02	SUSPENSION	14 Days
R A (Rodney) Lindau	28-12-02	SUSPENSION	21 Days
L K (Lyndon) Van Groningen	28-12-02	SUSPENSION	21 Days
M C (Matthew) Joss	30-12-02	SUSPENSION	28 Days
L R (Lindsay) Baker	31-12-02	SUSPENSION	21 Days
G E (Gary) Hall (Jnr)	31-12-02	REPRIMAND	
T B (Trevor) Warwick	03-01-03	REPRIMAND	

I readily appreciate the list lacks relevant supporting detail and is for that and other reasons very limited in its application. It is hard to speculate precisely what the effect, if at all, the action of the Committee in allowing elections of fines in lieu of penalties had on the range of penalties set by the Stewards. Another problem with this list is its failure to state which offence under the Rule was relevant. Unfortunately Westrot does not specify whether these offences are recorded for causing or contributing to interference, as is the case of Mr Cortopassi, or causing or contributing to the lesser offences of crossing or jostling. In the Suvaljko matter (Appeal 604), I came to the conclusion that 28 days was the standard. This was based on the material presented to me in that particular matter. From what appears in Westrot one could normally conclude that the starting point in the range of penalties is something less than the number of days of suspension applied by the Stewards against Mr Cortopassi. One can imagine extreme cases requiring a much more severe penalty than the present case where a driver's poor driving caused interference which resulted in the field being dropped or in altering the outcome of the race. In the present case one will never know what effect on the ultimate outcome it had other than Mr Bourne lost two lengths. Despite that Mr Bourne still managed to finish ahead of the appellant.

It is relevant to examine the reasons advanced by the Stewards in the Hall matter, namely:

'I will make it easy for you, for the sake of the exercise, it is my view that in these circumstances – in these particular circumstances, the Stewards should impose a period of suspension. However, bearing in mind the affect that will have on you and this particular horse and the Inter Dominions, not necessarily revolving around THE FALCON STRIKE, but he has been described your father as the "flagship", it wouldn't be inconceivable for the stewards, in imposing the suspension, would say well in these circumstances we would consider suspending it – the affect of it until, Friday midnight 26th March. They are the sort of things you have to think about and put to us.'

...

he is the only person who has driven the horse, and given the pre-post betting on the horse, it would be of benefit to those who supported it – supported the partnership, I suppose – that he remain.'

In his answers to my questions during the appeal it became fairly clear from Mr Oliver's perspective that the Stewards had not in substance been influenced by the actual circumstances of the particular incident once they had concluded interference had been caused. In other words I was left with the clearest impression that simply by having reached the conclusion that this was a driving offence, in other words that interference having occurred as a consequence of Mr Cortopassi's wayward driving, the Stewards did not then proceed to exercise their minds as to the actual gravity of the circumstances surrounding the offence or the full impact of the offence. A range of possibilities was open to the Stewards. I conclude the Stewards automatically imposed a blanket 28 day penalty which was then adjusted according to the driver's record. Even although one can infer the Stewards actually found that Mr Cortopassi 'caused' the interference this fact is not articulated or explained in their reasons. As it happened, by virtue of the offence having occurred early in the race, the driver who was interfered with did have sufficient time in which to recover from the incident and in fact finished ahead of Mr Cortopassi. Consequently I question the appropriateness of Mr Oliver's assertion, referred to earlier, that causing interference in the first 500 metres, on its own, is necessarily 'very serious'.

Having carefully considered:

- the transcript of the Stewards' inquiry
- the brevity of the Stewards' reasons
- the submissions that were made by both sides at the appeal
- the lack of logic in one aspect of the Stewards' submissions outlined above
- the decision of the Stewards in the Gary Hall Jnr matter
- the excellent driving record of Mr Cortopassi
- the role Mr Cortopassi plays in the industry
- the way Mr Cortopassi cooperated with the Stewards
- the message of uncertainty that the disparity of the Cortopassi penalty versus the Hall penalty could send to the industry, namely that there may be different rules according to the particular circumstances of individual drivers
- the fact that the two incidents relating to these two drivers occurred before the same important Series
- the impact of the penalty on Mr Cortopassi
- the impact of the penalty on the owners of the two horses Mr Cortopassi was to drive in the Series
- the range of penalties for this offence
- that the *Racing Penalties (Appeal) Act* requires the Tribunal to act according to equity, good conscience and the substantial merits of the case (s11(1)(b))

I am satisfied that the Stewards did not arrive at a proper penalty in all the circumstances. I consider the appropriate penalty in all the circumstances of this case to be a 14 day suspension.

In the Hall matter the Stewards concluded:

'After much deliberation on penalty, it is also a unanimous decision that you should be suspended for 28-days. However, we are taking the view that there are fairly special circumstances in this particular matter. However, the decision to suspend the effect of that penalty until midnight – or the penalty will take effect on the 27th March and you will be eligible to drive again on the 24th April. Against this decision, you have 14-days in which to appeal to the Racing Penalties Appeals Tribunal.

However, it is important that we point out that in making that decision it's not a precedent and should in no circumstances be seen a precedent. The decision was based on the particular circumstances of your offence and the circumstances of the upcoming Inter Dominion Series.'

In keeping with this approach it is appropriate to defer the commencement of the 14 day suspension until midnight on 26 March 2004 unless otherwise ordered. In view of the rather exceptional circumstances of this matter, following hard on the heels of the Gary Hall Jnr matter, it would not be fair or equitable for Mr Cortopassi to have to sit out the rest of the Inter Dominion Series. The Stewards in the Hall matter have made it abundantly clear that their unusual decision to defer the penalty cannot be used as a precedent as it was based on the then special circumstances. I totally endorse that reasoning and approach of not allowing such a deferment to become the norm. Despite this fact I have been persuaded to follow their approach. However, I stress that I only did so based on the unique circumstances of the Cortopassi matter. As I do not anticipate these circumstances are likely to be repeated the decision should not be interpreted as a ratification of the Stewards' approach which will make it appropriate to follow or repeat it in the future.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

