

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

**APPELLANT:                      AARON PAUL ROGERS**

**APPLICATION NO:              A30/08/739**

**PANEL:                              MR D MOSSENSON (CHAIRPERSON)**

**DATE OF HEARING:              30 JANUARY 2012**

**DATE OF DETERMINATION: 30 JANUARY 2012**

**DATE OF REASONS:              13 APRIL 2012**

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**IN THE MATTER OF an appeal by Apprentice Jockey Aaron Paul ROGERS against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 15 January 2012 imposing a 14 day suspension for breach of Rule 137(a) of the Rules of Thoroughbred Racing.**

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Mr WR Maumill was granted leave to represent Apprentice Rogers.

Mr RJ Mance represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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On 30 January 2012 I heard and determined this matter. I upheld the appeal and quashed the conviction. I now set out my reasons for having done so.

## BACKGROUND

Aaron Paul Rogers is a first year apprentice jockey who rode TENPIN in Race 6 at Mount Barker Turf Club on 15 January 2012. Following the running of the Race, Apprentice Rogers, another apprentice and two jockeys who were involved in an incident during the Race were called by the Stewards to an inquiry. Mr D Pateman, a trainer representing Apprentice Rogers, also attended the inquiry. The heading to the transcript of the inquiry describes the process as an inquiry into the reason why ROMILLUS ridden by Jockey M Chui, was tightened and bumped heavily. The transcript reveals that at the outset all riders were told by the Chairman of the inquiry there was '*...an incident probably around about the 200m, maybe getting past the 200m...*'. After the riders and mounts were identified for the record, the participants were then told by the inquiry Chairman that '*...just getting near the 200m, there was a bit of interference....*'. The riders were asked to explain what they each understood had happened.

Jockey Chui initially stated his horse was bumped '*...from both sides...*'. Apprentice Yuill's horse '*...got turned sideways*' but she could not tell the Stewards where the pressure came from. Jockey Pascoe referred to being held tight from the top of the straight and receiving '*...pressure from my inside and a little bit from my outside.*' Apprentice Rogers stated he believed he had already pushed out '*...before it all happened*'.

After the Stewards played the film to the riders they were asked for their further comments. By that stage the other riders in part revised their descriptions but the appellant stuck to his original explanation. The Chairman of the Stewards then summarised the position by stating '*we've got to consider..., apprentice Rogers, was it your move to the inside which has caused the incident?*' The appellant responded that he was already on the outside before the incident had occurred.

Concerns were expressed by the Chairman that Apprentice Rogers shifted out causing Miss Pascoe to shift onto Jockey Chui, even though Apprentice Rogers moved back.

Mr Pateman responded by stating he believed Apprentice Rogers had straightened up and then questioned the assertion that his movement had caused the chain reaction. The Chairman reacted by stating that even though Apprentice Rogers had moved back in, he had caused Miss Pascoe to be tightened or forced out and she could not get back in. Although it was acknowledged Apprentice Rogers did straighten, the question was, did he straighten quickly enough.

The following passage reveals one of the adjudicator's thoughts regarding the situation and the change in direction of the evidence of one of the riders in the face of a leading question which was put to him by that adjudicator:

*Pascoe: When the, the last incident has happened because I've been held that tight my horse, he's going sideways, he hasn't been able to get his legs back underneath him, like there's only been those couple of strides and he hasn't been able to balance himself because there has been so much pressure from both my sides that, yeh he's sort of sideways and hasn't been able to get his legs back under him quick enough.*

*Chairman: And that's through the pressure from you (sic) inside?*

*Pascoe: Yeh, through the pressure from my inside. (T9)*

At the conclusion of the inquiry process Apprentice Rogers was charged under Rule 137(a) of the Rules of Thoroughbred Racing with careless riding. The careless riding was particularised in the charge to be '*...just prior to getting to the 100m you allowed your mount to shift outwards*'. The Chairman then went on to further explain the charge by describing the snowball effect caused to the other riders in the following terms:

*Which has, your mount to shift outwards, TENPIN, which has put pressure on Kerry Pascoe's mount, HUSSONACE, which has caused that horse to shift out onto ROMILLUS, which has bumped with Kyra Yuill had been on his outside with JENEVIV, which has been turned inwards and as a result Mr Chui was, Mr Chui's mount was bumped heavily and restrained and unbalanced. (T10 & 11)*

The matter was adjourned to allow Mr Maumill, who was Apprentice Rogers' Master, to attend. When the inquiry resumed on 18 January 2012 the Chairman carefully explained in some detail to Mr Maumill the essence of the charge in relation to '*...the incident which occurred near the 100m*'. Mr Maumill was also made aware of the explanation from the appellant to the effect that he had pushed out before it all happened. Later, the Chairman of the inquiry stated:

*Now after looking hearing (sic) that evidence and viewing the dvd ourselves, that's when we issued a charge, because we thought Aaron's shift caused Kerrie Pascoe to be taken outwards and when he straightened that it was a bit too late and that, she had to continue that outward movement through the tightening of Apprentice Rogers moving from her inside just prior to the incident. So that's where our concern is and that's why we issued the charge okay, so that's about where it's at. (T14 & T15)*

Mr Maumill argued in response as follows:

*...I'm surprised that watching Kyra, watching Kerrie Pascoe and Marco Chui and I've, looking at that, Aaron's nowhere near, Aaron's nowhere near, Aaron's nowhere near that interference Mr Mance when it occurred, that, that, the worst of that interference, if we go back Aaron's past that. Now Aaron Rogers is on a horse, I'll ask him in a minute, so Aaron goes for the whip, now he's past the interference and look at Kerrie, he's past the interference when, that's washing, all that interference takes place when he's a length clear of them. Now he brushed Kerrie Pascoe when he initially went for the whip and this horse has got a bit of a history of this if you go back through your records...*

*At Albany on the 26/12 under pressure he raced wide throughout. Because when you start working on him he starts heading out. On the 8/6/2001 he raced wide throughout. On the 26/6, 2011 I beg your pardon, on the 26/6/2011 under pressure again I've spoken to connections he raced wide throughout. On the 4/6 he threw his head in the air, raced wide from the 650m mark when they started working on him. On the 25, 21/5/2011 [sic] TENPIN raced wide*

*from the 600m. This is a horse that heads wide when you go for him. At Belmont as far back as 2010, on that occasion when they went for him, and I could only get a grainy film, the Stewards said he raced keenly, veered out to avoid heels and then raced wide, I think it was Chloe went for him, straight away started to move out. He's got form, this horse has got form. Now in defence of Apprentice Rogers and he will be pleading not guilty to the charge, obviously he's in a winning position at 100m out, he's got his whip in the left hand, he's a left hand rider which didn't help, he gave the horse a couple of whacks and if you see the horse, turns his head sideways and starts to move out, Apprentice Rogers stopped riding, tried to straighten him. Now your argument is that in doing that he came onto Pascoe, but the worst of the interference was caused by Pascoe after, after Aaron Rogers brushed her. She continued to bore out, checked Chui who galloped straight onto Kyra Yuill's, or not Kyra Yuill's backside, but the backside of Kyra Yuill's horse. In defence of Apprentice Rogers, this is a first year Apprentice on a horse that's got history, on a horse that's got, he hasn't had his licence 12 months yet, on a horse that's got history, an old campaigner and the book will tell you how many times he's been around... (T15 & T16)*

Mr Maumill then went on to reinforce his argument on the basis that Apprentice Rogers was 'a left handed whip rider on a horse with form, under pressure of moving out'. At first, as soon as he thought the horse moved out, he stopped riding, 'a length clear of Pascoe and that's when Pascoe started bumping heads'. [T19]

At the completion of all of this dialogue, Apprentice Rogers pleaded not guilty to the charge. When he was then called on to add anything further if he so wished, Mr Maumill spoke up for him and presented the following propositions on his behalf:

*And I just, with great respect draw the Stewards attention to the fact that the major interference occurred after Aaron was gone. The fact that he stopped riding the horse, clearly when the old horse moved out. The fact that he was length clear when the worst of it occurred and I'd also, I don't want to make any enemies, but I, with great respect, draw attention to Kerri Pascoe's appalling*

*poor horsemanship, horse, and personship. And the general tightening was that, occurred long after Aaron Rogers had passed it. (T21)*

In handing down their decision the Stewards stated:

*After considering all evidence presented, we're of the opinion that the shift of Apprentice Rogers outwards when riding along, has placed HUSSONACE in tight racing, which has put her on an outward shift, which has caused the bumping to runners to her outside, with ROMILLUS, Mr Chui's mount being unbalanced and restrained. We do accept that Apprentice Rogers did straighten, but the tightening to HUSSONACE had already occurred, causing that gelding outwards. We don't believe there is a shift from the outside and we're of the opinion that had Apprentice Rogers not shifted outwards and straightened earlier the incident and interference would not have happened. So in saying that, Stewards do find you guilty as charged Apprentice Rogers. (T22)*

As a consequence of these findings a 14 day suspension from riding was imposed.

## **THE APPEAL**

The following grounds of appeal against the conviction were argued:

- 1 *Stewards failed to correctly evaluate my efforts to avoid causing interference.*
- 2 *Stewards blamed me for interference caused by another rider.*
- 3 *Stewards failed to allow for the behaviour of my mount when the horse was hit with the whip.*
- 4 *Stewards applied an unreasonable standard for the time it took me to react when my mount moved outwards.*
- 5 *Stewards allege I 'allowed' my horse to move outwards when video evidence shows otherwise.*

6            *The decision to suspend Apprentice Rogers was based in part on unreliable evidence from other riders involved in the incident.*

At the appeal hearing Mr Maumill was given leave to represent the appellant. Mr Maumill earnestly presented his arguments which were in the essence, a repetition of what had been advanced before the Stewards. In the course of Mr Maumill's submissions, I was taken through the side on and front on views of the race. Mr Maumill's propositions were delivered with conviction. They were backed up by reference to the transcript as well as the video of the race which I was given the opportunity to carefully view.

Mr Maumill's argument was entirely consistent with the evidence of Apprentice Rogers' throughout the Stewards' inquiry. It also accorded with some aspects of what had been stated at the outset of the proceedings by the fellow riders prior to the various jockeys being shown the film of the Stewards' inquiry and having been led in some aspects of their evidence.

I was persuaded by Mr Maumill's explanation. I was satisfied that it was entirely plausible once I had viewed the film and digested some aspects of the riders' evidence. I was completely satisfied that the appellant's riding at the 200 metre mark may have been more than questionable, but by the 100 metres he was well clear and the troubles besetting the other riders were well behind him.

Mr Mance's response to Mr Maumill's argument did nothing to dissuade me from the conclusions which I had started to reach in relation to the matter. My factual conclusions were:

- 1            At about the 200 metre mark the appellant's horse clearly moved out.
- 2            The movement outwards of the appellant's horse was contributed to by two factors, the left handed application of the whip and TENPIN's propensity to so move under riding pressure.

- 3 A short distance beyond the 200 metre mark the appellant was presented with an opening.
- 4 By then the appellant was well clear of the horses which were involved in the incident which subsequently occurred at the 100 metre mark.
- 5 The problem which occurred around the 100 metre mark which was the basis of the charge as framed, was not caused by the appellant's horse.
- 6 The actions of the appellant which from the outset caused him to be under scrutiny had taken place about the 200 metre mark and were sufficiently disconnected from the 100 metre mark incident.
- 7 In the Stewards' reasons no allowance was made for these factors nor the appellant's proactive reaction in having stopped riding momentarily.
- 8 Some of the evidence of the other riders was coloured or a little questionable following the showing of the race film and the way they were asked to respond.

Having reached these conclusions I was then satisfied each of the grounds of the appeal had in fact been made out. That, however, did not mean the matter was concluded in favour of the appellant. The decision making process could not just end there as it remained necessary to address the difficult task of deciding on the consequent outcome, due to the wording of the relevant provision. The Rule states:

1 *Any rider may be penalised if, in the opinion of the Stewards,*

a) *He is guilty of careless, reckless, improper, incompetent or unfair riding.*

(underlining added)

The Tribunal has had to consider the interpretation and application of the underlined phrase on many prior occasions. It is worth referring back to what I have said about those key words in *D Luciani* (Appeal 626) where I stated:



*This Tribunal has on many occasions in times past had to consider the interpretation and the application of that provision to the facts and circumstances in relation to a wide variety of cases. As the Tribunal has clearly stated on previous occasions the only opinion that is relevant for the purposes of the Rule is that of the Stewards and not the opinion of any other person or party, not the jockey, not other riders in the race, nor the person representing the appellant in the course of an appeal. In order for this Tribunal to overturn a decision of the Stewards in relation to this particular Rule and upset a conviction for this type of offence, it must be demonstrated to the reasonable satisfaction of the Tribunal that, armed with all the relevant facts and information, no reasonable body of Stewards could have reached the decision and formed the opinion which the Stewards in question have of the particular racing incident.*

*I am not persuaded in all of the circumstances of this matter that it has been demonstrated that these Stewards were in error in forming the opinion which they did in relation to this careless riding incident. In other words, I was not persuaded that this was an appropriate case to interfere with that particular exercise of the Stewards' discretion. After all, it is the Stewards who are the experts in relation to the conduct of races and the tactics of riders in terms of the quality of those rides.*

I cannot recall any other case where it was demonstrated with such clarity that the Stewards had erred in their judgment of a racing incident. The present appeal clearly was a case where I needed to decide whether the Stewards' assessment of the ride was sufficiently inappropriate or unsatisfactory to be capable of being described as unreasonable, based on an objective assessment. Only in such an extreme circumstance could I actually step in and decide the matter differently from how the Stewards dealt with it in the first instance. Judging the quality of any ride can clearly be an onerous and technical responsibility. It is entirely appropriate for it to be left to the Stewards under the Rules. Stewards are the best persons equipped to deal with such matters. They do so on a regular basis. They must use their extensive knowledge, apply their training and call on their wide experience. It is an integral part of their overall responsibility to set and then enforce the standards and qualities applicable to competitive riding by the industry's professional racers. Whether or not a charge should be laid and thereafter a person be

convicted of a riding offence is appropriately left largely to their assessment. They are in a unique position to form an opinion and decide the fate of any rider under review. But despite having said all of that regarding their roles and responsibilities the Rule cannot mean that there will never be any basis for challenging their opinion. Even the Stewards are capable of making an error on occasion. There is still room, despite the application of the underlined passage in the Rule, limited as it may, be for the Tribunal to interfere and uphold a riding appeal. This power does arise from the provisions of the *Racing Penalties (Appeals) Act 1990*. Otherwise there would be no point in the legislation allowing appeals against riding incidents to be pursued. In this particular case, I was persuaded that the decision, which the Stewards made based on the wording of the charge (just prior to the 100m) rather than what was stated to the riders at the outset of the inquiry (around 200m), was so unreasonable that it should be interfered with.

## **REFUND OF THE FEE**

As a consequence of the appeal having succeeded I was asked at the end of the proceedings to refund the fee which was required to be paid in order to lodge the appeal. I reserved on that issue. The appeal lodgement fee was \$340. A stay had also been applied for and a further fee of \$70 was paid as a consequence. The stay had been refused.

Section 16(1)(b) of the Act specifies an appeal shall be instituted by lodging with the Registrar the notice of appeal *'together with the prescribed fee'*.

Section 17(9)(e) of the Act does authorise the Tribunal on the determination of an appeal to make *"...an order for the total or partial refund of any fee paid..."*. Despite this provision such an order is very rarely made. The lodgement fees in a small way collectively go towards defraying the Tribunal's costs which are otherwise paid for by the industry through RWWA. Importantly, the fee can have the affect of being somewhat of a disincentive, not just in respect of prospective frivolous or vexatious appeals, but also in respect of attempts by parties who may try to manipulate the system and gain some advantage. There have been some examples of this in the past where an appellant has applied for a stay as an exercise only to buy time to enable that person to continue to ride for an important race meeting or to train short term for

ulterior motives. Such use of the process is not in the public interest. This practice is contrary to the image and welfare of the industry.

In this present case I was simply asked to consider ordering a refund without there being any reasoned argument presented to back up the request. It was not said the refund was appropriate for any particular reason either in the public interest or because of the personal special circumstances of this appellant. In those circumstances, despite the fact the appellant did succeed in clearing his name, I am not persuaded there is any justifiable basis on which to order a refund of the fee. The fee application is refused.



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**DAN MOSSENSON, CHAIRPERSON**