

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

**APPELLANT:** KYLE HARPER

**APPLICATION NO:** A30/08/692

**PANEL:** MR P HOGAN (PRESIDING MEMBER)

**DATE OF HEARING:** 28 August 2008

**DATE OF DETERMINATION:** 3 September 2008

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**IN THE MATTER OF an appeal by Kyle Harper against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 13 August 2008 imposing a suspension of 2 months for breach of Rule 149(2) of the Rules of Harness Racing.**

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Mr K J Harper appeared in person.

Mr WJ Delaney appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

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**INTRODUCTION**

This is an appeal against conviction and penalty.

The Appellant was the driver of ROYDEN HOLMES, which ran in race 7, the Ross's Mitre 10 Solutions Marathon Handicap, at Gloucester Park on 8 August 2008. At the conclusion of the race, the stewards opened an inquiry into the Appellant's driving tactics. After hearing some initial evidence, the Stewards charged the Appellant with an offence against Rule 149(2). The Appellant pleaded not guilty. The hearing was adjourned and recommenced on 13 August 2008. On that date, the Stewards found the charge proved, and the Appellant was suspended for 2 months.

## THE DRIVING

The race was a 3309m standing start. The Stewards observations of the drive are contained within the particulars of the charge, which was put to the Appellant at page 6 of the transcript of the inquiry (T6). The Stewards said:

*".....and the specifics of the charge are that after losing approximately 70 metres at the start you commenced a three wide move racing in the back straight on the second occasion in an attempt to gain the lead of the one wide line held by BADBOY NITRO a horse that is not noted for relinquishing that position and as a result you have raced three wide from thereon before compounding badly from the 1200 metres and that, in our submission is unacceptable driving. Now are you aware of the nature of the charge and the specifics of it?"*

## THE APPELLANT'S EXPLANATION

The Appellant seemed to agree that his drive was not acceptable, because he said so on a number of occasions before the Stewards. At T2, he said: *"As it turned out it wasn't very good but I thought if I got to the breeze and backed off I thought it was entitled to run on a little bit."* At T11, he said: *"Sir, it was probably the wrong move and I've certainly learnt from it and wouldn't do it again....."*

Despite the apparent admissions, the Appellant's real answer to the Stewards criticisms was that he was driving according to instructions from the trainer, Mr Svilicich. As he said at T1: *"I was under instructions. Mr Svilicich said if he galloped he said send him around. I thought, I knew what BADBOY NITRO races like but I thought that I could catch him napping which I almost did - not quite."* At T10 he said: *"....basically all I can say is that I'm young, I'm learning, I was just trying to do the right thing by my trainer, I followed his instructions there were circumstances involved I sort of...by Mr Svilicich's testimony in the transcripts I think it probably come out as just you know Mr Svilicich's not always clear with what he's trying to say, but I think it's probably apparent that Mr Svilicich may not have meant that he wasn't entirely happy with the drive as it may come across. I'm not sure if you're aware, but I'm on the horse Friday night so Mr Svilicich couldn't have been too unhappy with the drive. Mr Svilicich said to me that he was happy 'cos I followed the instructions but, basically Sir I was just trying to make my trainer happy and keep the drive which I sort of did in this case,..."*

At the inquiry, the Appellant produced some written evidence from other drivers to the effect that the trainer instructs his reinsmen to drive his horses forward to lead or race outside the leader and with aggression. Similar written evidence was presented at the hearing of this appeal.

## THE STEWARDS' DECISION

The Stewards accepted that Mr Svilicich had issued instructions, as the Appellant had said. They had heard from Mr Svilicich earlier in the inquiry. They did not accept as a defence the fact that the Appellant drove according to those instructions. The Stewards said at T14: *"The limited driving instructions issued by Mr Svilicich were interpreted too literally and you failed to recognise that you were obligated to drive according to the circumstances of the race and adopt differing tactics. Despite your age and relative inexperience you are the holder of an 'A' grade driver's licence and are expected to drive to a reasonable standard."* The particular circumstances that the Stewards were referring to were firstly that ROYDON HOLMES had

lost approximately 70 metres at the start, and secondly that the desired position was occupied by BADBOY NITRO, a pacer not noted for relinquishing that spot.

### **CONCLUSION ON APPEAL AGAINST CONVICTION**

The Appellant himself acknowledged that the drive was unacceptable when he said that it was probably the wrong move, and he wouldn't do it again (T11). That acknowledgement, together with all the other relevant information, was taken into account by the Stewards. Once the Stewards had formed their opinion that the drive was unacceptable, a finding that the charge was proved inevitably followed. The Tribunal here on the Appeal cannot substitute its own opinion for that of the Stewards.

For all of the above reasons, the appeal against conviction is dismissed.

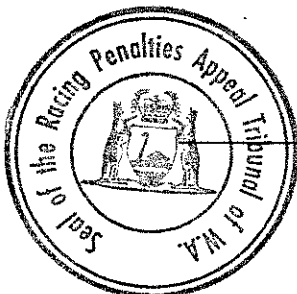
### **APPEAL AGAINST PENALTY**

The Stewards imposed a penalty of 2 month's suspension. They began by categorising the drive as "*...as bad a drive as we've seen, certainly in recent years,...*". They said that it was worthy of a 3 month suspension, and then they went on to discount that by 1 month for mitigatory factors. They took into account the Appellant's relative inexperience, and factors personal to him. He was only 18 years old, and driving was his only source of income. There was also the fact that the Appellant had 2 previous driving offences on his record.

I was told at the hearing of this appeal that penalties commonly imposed for a breach of this rule range between 1 and 2 months. The suspension imposed here was at the top of the range. The penalty therefore is consistent with the Stewards' finding that the drive was as bad as they had seen in recent years.

The Tribunal here on appeal will not impose a different penalty unless the Stewards failed to take into account a relevant circumstance in fixing that penalty. In my opinion, the Stewards did fail to take into account a relevant circumstance, namely that the Appellant was driving according to instructions. Although that fact did not amount to a defence as such, it should be recognised as a mitigatory factor. This is particularly so because the Appellant was only 18 years of age, and was relatively inexperienced. He did acknowledge the error in his driving tactics, and he did co-operate fully with the Stewards during the course of the inquiry. In my opinion, those mitigatory factors were worthy of a further discount of 1 month.

I allow the Appeal against penalty. I set aside the penalty of 2 month's suspension, and impose a penalty of 1 month's suspension.



**PATRICK HOGAN, PRESIDING MEMBER**