

**REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)**

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: KIM DAVID YOUNG

APPLICATION NO: A30/08/703

PANEL: MR D MOSSENSON (CHAIRPERSON)

DATE OF HEARING: 7 JANUARY 2009

DATE OF DETERMINATION: 7 JANUARY 2009

IN THE MATTER OF an appeal by Mr Kim David YOUNG against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 15 December 2008 imposing a six week suspension for breach of Rule 149(2) of the Rules of Harness Racing.

Mr R Tomlinson was granted leave to appear for Mr K D Young.

Mr S J Shinn represented Racing and Wagering Western Australia Stewards of Harness Racing.

Mr K D Young, an experienced driver, drove the favourite VAN HELSING in Race 6 at Northam on 25 November 2008. Following the running of the race the Racing and Wagering Western Australia Stewards of Harness Racing conducted an inquiry into Mr Young's driving. The Stewards sought an explanation for the tactics employed in the early part of the race. The Stewards described the situation in terms that Mr Young had:

'...shown a little gate speed, possibly attempted to get a position mid field, going down the back straight on the first occasion there appeared to be a bit of a gap up ahead of you that you just couldn't reach, at which point you ended up driving back and going up the fence, bearing

in mind that your horse's form was vastly superior on paper to the rest of the field...'

Despite Mr Young's best endeavours to explain and justify his approach and the fact that his horse pulled up sore after the race, the Stewards proceeded to lay a charge as follows:

'... The tactics you adopted were taken separate to the veterinary situation on the horse. We believe that you chose to adopt those tactics at the time separate to his veterinary state. We've taken into account his previous start, you've explained to us and we've seen the film many times and we've taken that into account. We've taken into account what you have put to us as far as the horse's hanging is concerned. That being said we've also taken into our deliberations, the horse's previous starts and the way he's been driven in those, the previous nine starts to this one. Probably not least of all his previous Northam start over the same distance and weighing all that up the Stewards feel you have a charge to answer and that charge is under Rule 149(2) and it states that a driver shall not drive in a manner which in the opinion of the Steward (sic) is unacceptable and what the Stewards are saying is that after restraining the horse, after restraining the horse early in the race to the rear of the field that by dropping onto the marker peg line at approximately the 1900 metre point that you have essentially cost the horse's winning chances to blind luck, a horse that was a \$1.50 favourite and in doing so we feel that it was an unacceptable move and blameworthy.'

Mr Young pleaded not guilty to the charge and presented further argument to support his position. However, the Stewards concluded that the charge was sustained. The Stewards announced Mr Young was guilty, even although they failed to enunciate any reasons for so doing. Mr Young appealed against the decision, the grounds of appeal being:

'My evidence was that my horse was not travelling like he should after release point. From then on I had to drive accordingly. He has since been found to be sore supporting my case.'

At the appeal hearing Mr Toblinson produced a veterinary report dated 7 January 2009 from equine surgeon Dr Ross Wallace. In his report Dr Wallace expressed the opinion that the examination revealed VAN HELSING to be '*...1-2/5 lame in its left fore at trot...*' Ultrasound '*...revealed a moderate tear in the body of the suspensory branch...*' Dr Wallace concludes that the lameness was sufficient to result in the horse not performing during the course of the race in question and was likely to change the horse's action and make it drift on the track. The damage in the suspensory branch was likely to cause the lameness and be the reason for the horse drifting during the race and performing poorly.

In response to that report Mr Shinn explained that the vet on the track in the evening had examined the horse and, whilst acknowledging soreness to touch, gave evidence that the horse trotted up sound. Further, I was told the usual situation is for a horse to run away from soreness. Therefore, if soreness had contributed to the wayward running, the horse should have run outwards not inwards. This proposition was not challenged by the other side.

It was further argued for the Stewards the degree of hanging played the part in the steering, or in other words, it was the tactics adopted by the driver that counted. The horse had run soundly in the race. One could not say that the soreness had any relationship to the tactics that had been adopted. The Stewards investigated the drive and had laid the

charge because Mr Young had gone back in the field. This action, or indeed the lack of sufficient action, compromised the prospects later in the race. The poor drive was not as a consequence of the horse's condition but by virtue of the choice made by the driver.

Earlier Mr Shinn had argued that at the first turn VAN HELSING was taken out wide and held that way at the three wide. The Stewards did not take exception to the driver going back to the rear. However, once down to the peg line it required luck to have genuine prospects of winning such a long race and that the acceptable practice would have been to make use of the opportunity of the pace having slowed up in the middle of the race to move to the outside. There had been no dispute by the driver that he was on the best horse in the field.

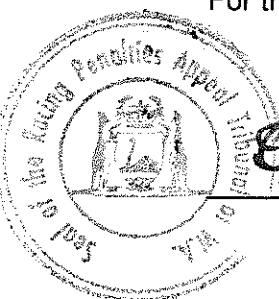
Mr Tomlinson submitted by way of reply that the driver's tactics were warranted. VAN HELSING had been taken to the rail with the view of giving the horse the best prospects of winning. It was put to me, and I do not doubt it, Mr Young is very experienced and enjoys a good record.

In view of the evidence before the Stewards and the arguments which had been submitted before me, I came to the conclusion I had no alternative but to dismiss the appeal. There was a clear conflict of opinions and assessment as to the quality of the drive. The arguments on behalf of the appellant contradicted both the evidence from the Stewards at the inquiry and arguments raised on behalf of the Stewards at the appeal. In view of the wording of Rule 149(2), I am required to determine whether the Stewards had fallen into error in arriving at their opinion. This means, as has been stated on so many occasions previously, that on an appeal against a driving infringement the Tribunal cannot simply substitute an opinion expressed by a party or its representative but may only interfere with the Stewards' opinion, when it has been demonstrated that no reasonable Stewards could have arrived at the conclusion which these Stewards did based on the evidence before these Stewards. Even although the veterinary report which was produced at the appeal hearing provided further or other evidence of a relevant nature which was not before the Stewards, that information of itself was sufficiently answered or explained by Mr Shinn for me to be unmoved by it.

As I recently stated in Staeck (Appeal 699), albeit in a thoroughbred racing context but in respect of a Rule which also is qualified by the words '*...In the opinion of the Stewards...*':

'As has been repeatedly stated before in appeals of this nature, the test in all of these types of cases is not what impression members of the Tribunal may form for themselves of the quality of a ride based on any argument which may be pressed for an appellant as supported by the opinion submitted by the rider's counsel or representative. Rather, the ultimate test in these types of matters is whether the Tribunal has been persuaded that the Stewards have fallen into error in reaching the conclusion which they did on the basis that their decision was so unreasonable that it is untenable and it should be interfered with.'

For these reasons I dismissed the appeal.



Dan Mossenson

DAN MOSSENSON, CHAIRPERSON