

RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION

APPELLANT: KYLE HARPER

APPLICATION NO: 20/5076

PANEL: MS K FARLEY SC (CHAIRPERSON)

DATE OF HEARING: 15 OCTOBER 2020

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IN THE MATTER OF an appeal by Kyle Harper against the decision made by the Racing and Wagering Western Australia Stewards of Harness Racing to suspend him for 6 weeks for breach of Rule 149(1) of the Australian Rules of Harness Racing.

The Appellant appeared in person.

Mr B Lewis appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

1. At the hearing of this matter on Thursday, 15 October 2020, I dismissed Mr Harper's appeal against the Steward's finding of 24 September 2020 that he had breached rule 149(1) of the Australian Harness Rules in race 6 at Northam on 29 August. I allowed his appeal against penalty and varied the penalty from 6 weeks suspension of his reinsperson's licence to 4 weeks suspension. These are my reasons for doing so.
2. Following the race, Stewards commenced an inquiry into Mr Harper's drive of MANOFTHEPEOPLE, who did not place in the race. It was clear (TS p.3, l.2) that Stewards were concerned that Mr Harper had failed to test the horse in the concluding stages of the race.
3. Mr Harper claimed that he did not have the opportunity to test the horse at that stage. In that initial inquiry, he claimed that the horse has been "*held up badly*" (TS p.1).
4. After viewing footage, Stewards adjourned the inquiry to view all aspects of the race including betting, the performances of MANOFTHEPEOPLE and the comments made by Mr Harper.
5. The inquiry resumed on 24 September 2020. At the hearing on that day, Mr Harper said that he made an assessment that it was not safely viable to take an opportunity that presented itself to make a run when a gap appeared. In any event, Mr Harper claimed that the best possible placing he would have potentially achieved was 5th. This did not affect the placings.

6. Stewards advised that they were of the view that a breach of Rule 149(1) had occurred. That rule states:

“A driver shall take all reasonable and permissible measures during the course of a race to ensure the horse driven by that driver is given full opportunity to win or obtain the best possible placing in the field.”

7. Stewards were of the view that Mr Harper failed to take the reasonable, permissible opportunity to shift his horse wider on the track in order to obtain clear running, when that opportunity was available, and as such the horse was not fully tested over the final 100 metres.
8. Mr Harper pleaded not guilty, saying that he did not believe he had done the wrong thing, and that if he had failed to take a reasonable or permissible measure it was a mistake and *“nothing sinister”*. He however maintained that the opportunity was not reasonable in his judgement at the time.
9. In finding Mr Harper guilty of the charge, Stewards, inter alia, acknowledged Mr Harper’s comments in respect to safety.
10. In addressing penalty Stewards acknowledged Mr Harper’s good record and placed no weight on historical offences dating back to 2007. They acknowledged (p.26 TS) that:

“...it may have been a mistake on your part however in balancing that perception is paramount in the racing industry...and the view of the Stewards is that the gelding was not fully tested at any stage over the concluding stages and in our view that’s an aggravating feature.”

11. Stewards went on to acknowledge that no other horses were affected by Mr Harper’s driving.
12. Having stated that the penalties for breach of Rule 149(1) *“range anywhere from a month to 4 months”* Stewards suspended Mr Harper’s licence for 6 weeks.
13. In doing so, Stewards nominated a “starting point” of 8 weeks suspension. Presumably that was reduced for what Stewards perceived were the mitigating factors.
14. Mr Harper appealed by notice dated 30 September 2020. He also applied for a stay of penalty. Having considered submissions in this regard I declined the stay but agreed to expeditiously list the matter for hearing.
15. At the hearing I had the benefit of the Stewards written submissions on the stay application, plus equally helpful written submissions in response from Mr Harper. I heard further oral submissions from the parties and viewed footage of the race.
16. The parties were agreed upon the portion of the race (approximately 100-150 metres from the finish) where the *“reasonable and permissible”* opportunity was said to present itself to Mr Harper. The disagreement arose in that the Stewards were of the view that the opportunity should have been taken, whilst Mr Harper remained of the view that he made a judgement (that he accepted may have been mistaken) that it was unsafe to do so.

17. The rule in question, unlike some other rules regarding the quality of drivers, is not expressed to be “in the opinion of the Stewards”, contrary to Mr Borovica’s written submissions. That fact means that the role of the Tribunal in arriving at its own assessment of the quality of driving employed means that overruling the Stewards decision is less difficult than it would otherwise be. Stewards are however generally in a better position than the Tribunal to objectively assess the quality of harness race driving. (see Appeal 502 Allan Christopher Lewis)
18. In the Lewis case, the Tribunal accepted Mr Lewis’ explanation for why he had driven the way he did and the Stewards “*failed to put forward a persuasive argument in reply*” (Lewis, p.5)
19. In this matter, whilst I found Mr Harper’s submissions to be cogent and reasonable as to why he had not taken the run, Stewards maintained that objectively the run should have been taken, and that the ensuing drive led to a perception that the horse was not given the opportunity to be tested. Mr Lewis submitted that whilst Mr Harper is a safe driver, on this occasion he had objectively taken the safety aspect too far, resulting in his horse not being appropriately tested.
20. For that reason, I dismissed the appeal against conviction.
21. In relation to the penalty imposed however, Mr Harper raised issues with the length of his suspension.
22. In the course of the hearing before me, it became clear that the “1 – 4 month” range of suspension penalty alluded to by the Stewards in the course of the inquiry was not in fact a true “range” but was simply indicative of some of the previous penalties that have been applied.
23. It is readily apparent that a variety of driving behaviour could lead to a breach of this rule, some much more egregious than others, although Mr Lewis advised at the hearing that the rule is not “commonly used”.
24. In arriving at penalty, Stewards stated that the fact that MANOFTHEPEOPLE was not fully tested at any stage over the concluding stages was an “aggravating feature”.
25. In so doing, I found that the Stewards were in error. It was the fact that the horse was not “fully tested”, insofar as Mr Harper failed to take advantage of a run that the Stewards believed was available to him, that led to the charge. It formed part of the particulars of the charge, and as such could not be said to be an aggravating factor.
26. In addition, there was much to be said by way of mitigation for Mr Harper. he had a very good record, there was no indication that any other horse had been affected by his manner of driving, and Stewards acknowledged that his failure to take the run may have been a mistake on his part. There was nothing untoward in the betting on the race and Mr Harper received no negative feedback from the trainers of the horse.
27. Whilst perception in the public is important in the industry and horses should be seen to be fully tested at all times during the course of a race, deterrence can be achieved by the fact of a suspension, rather than necessarily by its length in some circumstances.

28. For Mr Harper, whose income derives solely from his involvement in the industry, any suspension will result in significant loss of income.
29. For these reasons I varied the penalty imposed from 6 weeks suspension to 4 weeks suspension, in the particular circumstances of this case.

Karen Farley

KAREN FARLEY SC, CHAIRPERSON

