

Racing Appeals and Disciplinary Board 400 Epsom Road Flemington VIC 3031 Telephone: 03 9258 4260 radboard@racingvictoria.net.au

Final Orders

APPEAL

DANIEL MCCARTHY - 'LATE CHARGE'

and

RACING VICTORIA STEWARDS

Date of Final Orders: 1 February 2018

Date of Hearing: 19 December 2017

Heard By: Judge Bowman (Chair), Brian Forrest (Deputy), Darren McGee.

Appearances: Edward Batrouney of counsel, instructed by Simonette Foletti,

appeared on behalf of the stewards.

Simon Martin of counsel appeared on behalf of Mr McCarthy.

On 8 June 2017, the Racing Victoria stewards advised licensed trainer Daniel McCarthy of their decision under AR 50 to decline or reject all future nominations or entries of *Late Charge* on the grounds that it is unacceptable for the gelding to race from a welfare or safety perspective due to an injury, or injuries, sustained to the gelding's superficial digital flexor tendon.

AR 50 provides that:

All nominations and entries are subject to approval, and the Committee of any Club, or the Stewards, may decline to receive, or at any time after having received, reject any nomination or entry without giving any reason for so doing.

A Notice of Appeal against the decision was lodged on 13 June 2017. A stay of proceedings was not requested.

Interim Orders

On 19 December 2017, the Board made interim orders as follows:

- 1. The matter is adjourned to a date to be fixed;
- 2. The Board varies the order of the stewards contained in the letter of 8 June 2017 and makes the following interim order:
 - a. The Board directs that *Late Charge* be permitted to participate in 2 official trials; and
 - b. The parties are to advise the Board as soon as the matter is ready to resume and of the outcome of the trials.

Final Orders

In accordance with the Board's interim orders made on 19 December 2017, *Late Charge* having participated in 2 official trials to the satisfaction of the stewards, the Board now makes the following final orders:

- 1. the appeal is allowed;
- 2. the decision of the stewards under AR 50 contained in the letter of 8 June 2017 is set aside; and
- 3. nominations or entries of *Late Charge* may be accepted henceforth.

Registrar

Racing Appeals & Disciplinary Board

Victoria 15 February 2018

RACING APPEALS AND DISCIPLINARY BOARD (Appellate Jurisdiction)

Daniel McCarthy v Racing Victoria Stewards

Reasons for Decision

Judge Bowman Chair

Mr B Forrest Deputy

Mr D McGee Member

Appearances:

For the Stewards: Mr Edward Batrouney of counsel, instructed by Simonette Foletti.

For the Appellant: Mr Simon Martin of counsel.

This is an appeal by trainer Daniel McCarthy, from a decision of the Racing Victoria stewards made under AR 50 to decline all future nominations or entries of the horse Late Charge.

AR 50 reads:

10

'All nominations and entries are subject to approval, and the Committee of any Club, or the Stewards, may decline to receive, or at any time after having received, reject any nomination or entry without giving any reason for so doing. If any nomination or entry be rejected under this Rule, the fees paid in respect thereof shall be refunded.'

Chairman of Stewards, Mr Bailey, informed Mr McCarthy by letter (8 June 2017) that, acting on the advice of Dr Grace Forbes, General Manager Veterinary Services, Racing Victoria, it is an unacceptable risk from a welfare and safety perspective for Late Charge to continue to race having regard to his injury history and the risk of re-injury.

Late Charge is now a 7 year old gelding. He was a colt during his racing career. From his first start (8 July 2013) to his last (15 August 2015), he had thirteen starts for four wins and one

1

third placing, winning \$253,400 in prizemoney. He contested multiple Group One and Listed races.

His racing career was curtailed by injury to the superficial digital flexor tendon (SDFT) in April 2014, October 2014, August 2015 and February 2016 as recorded by his treating veterinarian Dr Glenn Robertson-Smith during its racing career. He recommended the horse be retired following the injury to the right fore SDFT in February 2016, stating the horse will always be at risk of a serious tendon injury.

20

30

35

40

45

Dr Forbes in her reports referred to a variety of published studies relating to tendon injuries and in oral evidence to the Board reiterated her opinion that from a welfare and safety perspective Late Charge was an unacceptable risk to return to racing under any conditions.

A number of equine veterinary surgeons examined Late Charge at Mr McCarthy's request during 2017. On 6 June, Dr James Vasey reported slight thickening of the SDFT on the right fore leg. Ultrasound scans of both SDFTs revealed only minor fibre alignment disruption. The horse can resume racing, he said.

On 16 June, Dr Peter Angus performed an ultrasound examination of both forelegs. The overall ultrasound examination was typical of a horse that had suffered previous tendonitis and in line with many other horses he has treated with similar injuries. He believed the horse suitable to continue its racing preparation and to resume racing provided there is no recurrence of active tendonitis.

Also on 16 June, Drs John Walker and Matthew Morahan examined Late Charge. They wrote:

'SDFT injury is not a catastrophic injury in the racehorse and is more associated with poor performance rather than breakdown. In our opinion, with intensive and routine veterinary inspection, the welfare of the now gelding is on par with most racehorses in the industry and should be allowed to race.'

On 20 June, Dr David McKellar performed clinical and ultrasonic examination of the SDFT of both fore legs. The left fore was clinically and ultrasonically sound. Clinically the right fore SDFT was slightly increased in diameter in the distal third of the tendon with no pain or heat on palpitation. Ultrasonically the right fore displayed good echogenicity and fibre alignment. The horse was not lame at a walk or trot, flexion tests and palpitation of the tendons revealed no abnormalities. In his opinion, the horse is suitable to continue its racing preparation and to resume racing.

On 1 August, Dr McKellar re-examined Late Charge. He noted the horse to be in good/fit body condition and in full training. Clinical findings were similar to his previous examination. He considered the horse fit to trial over 1000 metres.

Dr James Dawson in a certificate (undated) given following a physical examination of Late Charge stated the horse was in a suitable condition to be reinstated as a racehorse.

50

55

75

Dr Tom Russell examined Late Charge on 20 August when in full fast work. He found that both tendons felt surprisingly normal and he estimated the chance of re-injury to be less than the 80% given in a previous report which he wrote on 7 December 2016 (thought to have been made for the previous owners prior to Mr McCarthy purchasing the horse). Dr Russell added that there are horses currently racing successfully with worse looking tendons.

On 18 December, Dr David Shepherd examined Late Charge. He reported the horse to be in excellent condition. The SDFTs of both fore legs appeared straight in nature, not a bowed appearance as typically seen in horses with previous injury. Both SDFTs felt slightly enlarged but were not painful. He believed the horse fit to race.

Dr Geoffrey Hazard, a specialist in equine surgery with extensive practical and teaching experience and now a consultant, reviewed the veterinary opinions and treatment history at the request of Mr McCarthy. He examined Late Charge on 14 November 2017. In his report and oral evidence to the Board, Dr Hazard regarded the horse as suitable to participate in trials and then, providing all is well, to resume racing.

In commenting on the injury chronology from April 2014 to October 2014 and the recorded treatment, Dr Hazard said six months was an exceptionally short time for a sprained tendon to heal. It was noted that within that period Late Charge had three race starts, 30 August, 13 and 28 September. Dr Hazard said that in his experience, tendon injuries are not associated with catastrophic happenings and discomfort is usually easily managed. While acknowledging that Late Charge, given his injury history, is at greater risk of injury than a previously uninjured horse, contrary to Dr Forbes he considered the possibility of further injury an acceptable risk.

Since his last race start, Late Charge spent a season at stud. This was a failure as he was found to be infertile. Before purchasing the horse in December 2016, Mr McCarthy was aware that it had tendon problems but this did not dissuade him as he has enjoyed success with horses

that came into his stables with tendon issues. Once purchased, the horse was gelded and a lengthy intensive rehabilitation regime of predominantly slow work was undertaken.

Mr McCarthy is an experienced horseman, having grown up around horses on the family stud farm. He has held a trainer's licence for 25 years, currently training 10 horses from his Waldara property. He was an impressive witness. In the second half of 2017 Late Charge had six jump outs. At the hearing a video was shown of a jump out in August at Geelong. It appeared to be an encouraging performance. No suggestion was made to the Board that it was otherwise. A steward had been present at this and other jump outs. According to Mr McCarthy the horse performed well in all jump outs. His trackwork has increased but he has not had any tendon issues.

80

85

90

95

100

105

In considering this matter, the Board recognises the importance of animal welfare and safety and the role of the stewards in ensuring, as far as reasonably possible, the welfare of horses and riders.

In the exercise of the discretion to ban the horse, welfare and safety are the primary factors.

The interests of the trainer and his owners are secondary factors.

Dr Forbes has provided a comprehensive report, including published studies, in her assessment that the horse is an unacceptable risk under any conditions.

Mr Batrouney submitted that the Board should prefer the opinion of Dr Forbes to that of Dr Hazard and ignore the other veterinary reports as being of little, if any, probative value.

The Board does not agree with this submission. The reports of all the equine veterinarians addressed the same tendon injuries. Their reports are taken into account, not in the sense of adding some numerical advantage to the appellant's case, but in providing a current insight into the progress of the horse since being in Mr McCarthy's care. Recent reports revealed a horse in good racing condition. Dr Robertson-Smith, the treating veterinarian during the racing career of Late Charge, in his email acknowledged the relevance of up to date reports more so than old veterinary history. Dr Russell's report to Mr McCarthy is an example of a change in his prognosis since his previous assessment eight months earlier.

A recurring comment in the reports was that of many reported cases of horses with previous SDFT injury making successful returns to racing. Mr McCarthy gave examples of his personal experience with that phenomenon.

Having considered all of the evidence before the Board and the submissions of Counsel, the Board accepted that, while there is a risk of recurrence of injury, on balance it was not an unreasonable risk to permit Late Charge to return to racing conditional upon satisfactory completion of two official trials.

At the conclusion of the hearing on 19 December 2017, the Board adjourned the matter to a date to be fixed with a direction that Late Charge be permitted to participate in two official trials and the parties inform the Board as soon as the matter is ready to proceed and of the outcome of the trials.

Late Charge trialled over 1000 metres at Tatura on 16 January 2018 finishing first of six runners and over 1200 metres at Geelong on 29 January finishing second of five runners. Both trials were conducted to the satisfaction of the stewards. Late Charge has now had six jump outs and three trials (including one in NSW, which it won). It has performed satisfactorily on each occasion.

On 1 February 2018 the Board ordered that:

1. The appeal be allowed.

115

- 2. The decision of the stewards made on 8 June 2017 be set aside.
- 3. Nominations or entries of Late Charge may be accepted forthwith.