

RACING APPEALS AND DISCIPLINARY BOARD

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DECISION ON PENALTY

RACING VICTORIA STEWARDS and

MATTHEW LEEK

Date of Hearing 16 May 2018

Date of Decision 24 May 2018

<u>Date of Penalty</u>

Decision 4 June 2018

<u>Panel</u> Judge Bowman (Chair), Joshua Bornstein, Jeremy Rosenthal.

<u>Appearances</u> Jack Rush QC, instructed by Daniel Bolkunowicz, appeared on behalf of

the stewards.

Damian Sheales of counsel appeared on behalf of Mr Leek.

<u>Charge 1</u> AR 178AB(1)(a)

A person must not, without the permission of the Stewards, inject a horse, cause a horse to be injected or attempt to inject a horse, which is engaged to run in any race:

(a) at any time on the day of the scheduled race, prior to the start of such event; and

(b) at any time during the One Clear Day prior to 12.01am on the day of the scheduled race.

Summary The stewards alleged that on 8 August 2017 during a race day stable

inspection, Mr Leek was in possession of one 30 millilitre syringe containing a substance, an uncapped needle and one 100ml bottle each of L-Carnitine and Mitachondral which he intended to administer to the horses *High Valley* and/or *Cash Sale* prior to them racing at

Pakenham that day, in breach of AR 178AB(1)(a).

<u>Charge 2</u> AR 175(q)

The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(q) Any person who in their opinion is guilty of any misconduct,

improper conduct or unseemly behaviour.

<u>Summary</u> The stewards alleged that during a race day stable inspection on 8

August 2017, Mr Leek deliberately disposed of liquid in a syringe which

had the effect of destroying evidence relevant to a stewards' investigation, constituting misconduct and/or improper conduct.

Charge 3 AR 178F

- (1) A trainer must record treatment and medication administered to each horse in his or her care by midnight on the day on which the administration was given, and each record must include the following information:
- (a) the name of the horse:
- (b) the date and time of administration of the treatment or medication;
- (c) the name of the treatment or medication administered (brand name or active constituent):
- (d) the route of administration including by injection, stomach tube, paste, topical application or inhalation);
- (e) the amount of medication given (if applicable);
- (f) the duration of a treatment (if applicable);
- (g) the name and signature of person or persons administering and/or authorizing the administration of the treatment or medication.

Summary

The stewards alleged that Mr Leek failed to record the treatment and medication of L-Carnitine and Mitachondral to horses in his care.

<u>Plea</u>

Charge 1 - not guilty. Charge 2 - not guilty.

Charge 3 – not guilty

Decision

Charge 1 - the Board finds the charge proved.

Charge 2 - the Board finds the charge proved.

Charge 3 - the Board does not find this charged proved. The charge is therefore dismissed.

Penalty

Charge 1 - Mr Leek is convicted and disqualified for a period of six months.

Charge 2 - Mr Leek is convicted and disqualified for a period of six months.

The periods of disqualification are to be served cumulatively - a total period of disqualification of 12 months.

The Board orders that the commencement of the period of disqualification be deferred until 12.01am Tuesday 12 June 2018, it being the maximum period that the disqualification may be deferred, pursuant to the rules: see AR 196(6).

Pursuant to AR 196(6)(b), Mr Leek must not start a horse in any race from the date of the Board's decision, 4 June 2018, until the expiration of the period of disqualification.

Grace Gugliandolo Registrar Racing Appeals and Disciplinary Board Victoria 24 May 2018

RACING APPEALS AND DISCIPLINARY BOARD (Original Jurisdiction)

Racing Victoria Stewards v Matthew Leek

DECISION

Judge Bowman Chair

Mr J Bornstein Deputy Chair

Mr J Rosenthal Member

Appearances

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For the stewards Mr J Rush QC For Mr M Leek Mr D Sheales

Mr Matthew Leek, you have been charged with a breach of AR 17AB(1)(a), which could be summarised as follows. On 8 August 2017 two horses trained by you, *High Valley* and *Cash Sail*, were entered to run in races 1 and 2 respectively at Pakenham and on that day you attempted without permission to administer to them L-Carnitine and Mitachondral from a syringe found in your persons.

You are also charged with a breach of AR 175(q). That charge could be summarised as follows. When producing to the stewards the bottles of L-Carnitine and Mitachondral, you emptied the contents of the syringe, which was in your vest pocket. It is alleged that this was deliberate conduct, you knowing that the stewards were conducting an investigation into possible race day administration. It is alleged that this action represents misconduct, improper conduct or unseemly behaviour.

The third charge alleged is a breach of AR 178F. In summary, it is alleged that you failed to record treatment and medication administered to another horse on an earlier occasion.

You have pleaded 'not guilty' to all charges. We make the following findings of fact.

Charges one and two arise from a visit to your stables by stewards on the morning of 8 August 2017. The stables had been kept under observation by Mr Dion Villella, using binoculars, prior to the visit. The persons in attendance at the stables were yourself and your fiancée, Ms Jenna Shanks, who is a licenced stable hand.

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A float carrying yourself, Ms Shanks, the two horses in question and a third horse, *Bonnard*, arrived at 9.15am. The horses were removed from the float. The order in which they were removed became a matter of some significance, as you and Ms Shanks changed your versions of events in this regard.

In any event, Mr Villella noted that you appeared to have a syringe in your hand. Stewards then entered the premises. During a conversation with the stewards, you denied that you had a syringe in your jacket pocket. You removed two small containers of medications, one container from each jacket pocket. You then put your hand back into your left jacket pocket, forced the needle of a syringe through the lining of your jacket, and squirted the contents of the syringe out and on to the ground. You used such force in pushing the needle through the material of your jacket that it was bent. The cap of the syringe was also in your pocket.

Your explanation about the syringe was that it had been used on *Bonnard*, the only horse of the three not scheduled to race that day. Whilst Ms Shanks gave some evidence before us, you, whilst in attendance, did not.

We do not accept the explanation advanced by counsel on your behalf. We find you guilty of the breach of AR 178AB(1)(a), noting that the charge is one of attempted administration. We are satisfied that you were seen with a syringe in your hand. You were in the vicinity of the two horses to race that day. When intercepted you had containers of medication in each jacket pocket. You had a syringe in your left pocket – the syringe with medication in it. Having got out the medications, you made a forceful attempt to empty the contents of the syringe through the fabric of your jacket. If ever there was a clear example of consciousness of guilt, this was it. We are comfortably satisfied that the charge has been made out.

We have reached that conclusion without having to take into account your failure to give any evidence. However, in our opinion that failure to answer the charge against you is something that can be taken into account. This is not a criminal court, where the presumption of innocence looms large and nothing can be read into the failure of an accused to give evidence. The Rule in *Jones v Dunkel* has long been found to apply at VCAT, and clearly in disciplinary matters. VCAT, like this Board, is obliged to apply the Rules of natural justice – see S 98(1)(A) of the VCAT Act and S. 5G(a)(xi) of the Racing Act.

In *Legal Services Commissioner v Brereton* [2008] VCAT 1723, the following was stated: "Although the tribunal is not strictly bound by the Rules of Evidence and practices of the Court, we agree that it is open to us to apply the Rule in *Jones v Dunkel* in this case, and that it is appropriate to in a proceeding of this nature."

The tribunal also referred to the unfavourable inferences that can be drawn.

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The Court of Appeal has also had something to say on this issue. In *Kyriackou v Law Institute of Victoria Limited* [2004] VSCA 322, the Court referred, with obvious approval, to the following extract from *NSW Bar Association v Meakes* [2006] NSW CA 340.

"Yet these were the very matters that were within the knowledge of the respondent and which he did not offer to answer in the witness box. On the contrary, he chose the safety of the well of the Tribunal In these circumstances, the only inference one can draw from the respondent's refusal to give sworn testimony in this matter was that his evidence would not have assisted his case."

Where, as above, the person not called is a party, the inference appears to be even more readily available.

The inference that the evidence of the witness not called would not have assisted the relevant party is of considerable significance if the person not called is the party himself. As stated in Cross on Evidence, it is easy to apply the principle where it is the party who fails to give evidence he could have given – see *Steele v Mirror Newspapers Ltd* [1974] 1 NSWLR 191. Considerable significance also attaches if the

person not called is a party who is present during the hearing – again, see Cross and *Dilosa v Latec Finance Pty Ltd* (1966) 84 WN (NSW) 557.

You are a party in this case. You were present throughout the hearing. Your fiancée gave evidence. You did not, although you were at the centre of all that occurred. We are satisfied that we should draw the inference that your evidence would not have assisted your case.

In short, we find the charge proven in any event and we are fortified in that finding by your failure to give evidence.

We would add that, even without drawing an inference of the type referred to *Jones v Dunkel*, as indicated above we are comfortably satisfied that the first charge has been made out and we find you guilty of that charge, namely a breach of AR 178AB(1)(a).

We also find you guilty of the second charge.

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Mr Sheales, appearing on your behalf, effectively conceded that, unless we were of the view that you were in a state of panic, surprise or it was an accident when you emptied the syringe through the lining of your pocket, the only real alternative is that you did it quite deliberately. Inadvertence or accident appear to be out of the question. We are comfortably satisfied that what you did was quite deliberate and done with such force as to bend the needle on the syringe. We are similarly satisfied that this action constitutes misconduct, improper conduct or unseemly behaviour and a breach of AR 175(q).

The third charge is of less significance. We appreciate that the failure to record in a proper fashion the treatment of horses is an important matter and failure so to do obstructs the stewards in their work. However, we are not satisfied that a breach of AR 178F has been made out. The evidence does not satisfy us that the horse *Itsa Joke* was registered as a horse trained by you or was in your care. It was purchased by your fiancée, placed on a totally separate block and not registered. Charge three is dismissed.

We shall deal with the question of penalty at a convenient time in the immediate future.

Victoria 4 June 2018

RACING APPEALS AND DISCIPLINARY BOARD (Original Jurisdiction)

Racing Victoria Stewards v Matthew Leek

RULING AS TO PENALTY

Judge Bowman Chair

Mr J Bornstein Deputy Chair

Mr J Rosenthal Member

Appearances

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For the stewards Mr J Rush QC For Mr M Leek Mr D Sheales

Mr Matthew Leek, we have found you guilty of breaches AR 175AB(1)(a), relating to attempted race day administration to two horses. We have also found you guilty of a breach of AR 175(q) in relation to what could be described as the destruction of evidence, this constituting improper conduct and the like, we would refer to our earlier Ruling.

We have received written submissions as to penalty from the stewards and from Mr Damian Sheales of counsel on your behalf. Each set of submissions is extensive. It is apparent that considerable time and effort has been put into each. We are grateful for this assistance.

The bottom line is this. Effectively we accept the bulk of the submissions made on behalf of the stewards. For the breach of AR 175AB(1)(a) – attempted race day administration – there is no fixed penalty. Actual administration attracts a mandatory minimum penalty of six months' disqualification unless there are special circumstances – see AR 173 and AR 196(5). In the present case, there are no special circumstances. We agree that in your case the penalty which attaches to actual administration should apply to an attempted administration such as this. We would

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also point out that in your case the attempted administration was to two horses. However, we are treating it as the one charge that it is. You are disqualified for a period of six months. We consider that to be an appropriate penalty in all the circumstances of the case.

Turning to the breach of AR 175(q), this is a serious offence as defined in AR 1. Your particular offence involves a blatant and brazen attempt to tamper with, conceal or destroy evidence whilst what was at least a preliminary inquiry was taking place. It deserves the strongest condemnation.

We are of the view that a period of disqualification of six months is appropriate.

There is then the issue of whether these penalties should be cumulative, in full or in part, or concurrent. In our view, they should be fully cumulative. A clear message must be sent and the public would expect nothing less. To attempt to administer personally a substance to two horses on race day, to then attempt to conceal or destroy a central part of the evidence and to fail to co-operate or assist in the slightest with the stewards' investigation are factors which we believe warrant the full cumulation of the penalties.

You are disqualified for a total period of twelve months.

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