

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR FRANCIS LOWRY

APPLICATION NO: 21/2748

PANEL: MS K FARLEY SC (CHAIRPERSON)
MS B ROBBINS (MEMBER)
MS J OVERMARS (MEMBER)

DATE OF HEARING: 10 AUGUST 2021

DATE OF DETERMINATION: 10 AUGUST 2021

DATE OF PUBLICATION OF REASONS: 15 OCTOBER 2021

IN THE MATTER OF an appeal by FRANCIS LOWRY against a determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing imposing a 6 months disqualification for one breach of Greyhound Rule of Racing 84(4)(a).

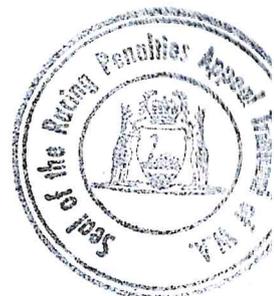
Ms Moffat of Petherick Cottrell Lawyers represented Mr Lowry.

Mr Ron Davies QC represented the Racing and Wagering Western Australia ("RWWA") Stewards of Greyhound Racing.

By a unanimous decision of the members of the Tribunal, appeal against penalty for the breach of Greyhound Rule of Racing 84(4)(a) of the RWWA Rules of Greyhound Racing is upheld and instead a penalty of 2 months suspension imposed backdated to commence on 22 June 2021.

Karen Farley

KAREN FARLEY SC, CHAIRPERSON



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REASONS FOR DETERMINATION

APPELLANT: MR FRANCIS LOWRY

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MS BRENDA ROBBINS (MEMBER)
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Mr Ron Davies QC represented the Racing and Wagering Western Australia ("RWWA") Stewards of Greyhound Racing.

Summary

In our opinion, for the reasons which follow, the Appellant's appeal against penalty for the breach of Greyhound Rule of Racing 84(4)(a) of the RWWA Rules of Greyhound Racing ("Rules") should be upheld and instead a penalty of 2 months suspension imposed backdated to commence on 22 June 2021.

REASONS

The decision of the Tribunal in this matter was handed down on 10 August 2021 and these are the reasons for the decision.

1. Francis Lowry ("Mr Lowry" or "the Appellant") is a RWWA Licensed Trainer in the WA Greyhound Racing Industry. He is 88 years of age and a pensioner.
2. Mr Lowry has held his licence for a period of 5 years and is a hobby trainer.
3. Mr Lowry appealed against the sentence imposed by the RWWA Stewards on 22 June 2021 where they imposed a disqualification of his trainers licence for 6 months, having found him guilty of breaching Greyhound Rule of Racing 84(4)(a) for having allowed a vet to administer an implant into his dog which contained a permanently banned substance pursuant to Rule 79A, namely Deslorelin.

Background

4. Mr Lowry had a problem. He had two dogs in training. A female, WHIZZING and a dog, ASTON COOPERS. The female was spotting and appeared to be having another cycle, despite having had a cycle only 3 months earlier.
5. Mr Lowry lives in suburbia, so the dogs are in close proximity to each other. He was not able to appropriately isolate WHIZZING. He was concerned about the stress that would be caused to ASTON COOPERS upon becoming interested in WHIZZING. Effects include Dogs going off their food and howling. There was also the risk of ASTON COOPERS getting to WHIZZING and there being an unwanted pregnancy.
6. For the welfare of the dogs, Mr Lowry took ASTON COOPERS to the vet to see if his interest could be diminished by the use of a testosterone lowering implant. Mr Lowry had previously used this type of implant with another dog and found it to be effective.
7. The implant known as suprelorin contains DESLORELIN, which is a gonadotrophin releasing hormone. Deslorelin is a permanently banned substance.
8. Mr Lowry's evidence was that he did not know the implant contained a permanently banned substance and this evidence was accepted by the Tribunal.
9. ASTON COOPERS received the suprelorin implant on 8 January 2021 at Halls Head Veterinary Clinic. Mr Lowry was not able to see his usual vet and attended upon a Dr Janie Boud.

10. Following the appointment Mr Lowry telephoned Dr Judith Medd, RWWA Regulatory Veterinarian who was unavailable. He was referred to another vet, who he also telephoned but was unable to reach.
11. It was Mr Lowry's evidence that he thought he was obliged to inform RWWA that a minor procedure had been undertaken on his greyhound; albeit, a mistaken and incorrect belief.
12. Mr Lowry then received a call from Steward Simon Jones. He advised Mr Lowry that the call was being recorded. Mr Lowry was placed effectively on notice that the implant he had the vet put into the dog contained a banned substance and that it should be removed and the dog should not race. He was informed that the dog was now to become the subject of an inquiry.
13. Mr Lowry had the implant removed on 9 January 2021. ASTON COOPERS did not race as he was voluntarily scratched by Mr Lowry.
14. The implant was in ASTON COOPERS for a period of less than 24 hours.

The inquiry

15. The Stewards commenced an inquiry on 11 March 2021. It was reconvened on 19 May 2021 and finally concluded on 16 June 2021. The Stewards advised of their penalty by letter of 22 June 2021.
16. The duration of the situation for Mr Lowry was extremely long. From the date the implant was removed until he received his penalty, 5 months had passed, with Mr Lowry having to attend 3 hearing dates.
17. The process of the inquiry had a considerable impact on Mr Lowry and upon his family. Mr Lowry was shaking during the hearings and he gave evidence he had to be medicated in order to attend. At page 6 of the transcript dated 16 June 2021 He said "*...you know we've had 159 days of extreme distress and worry. My wife is on the verge of a nervous breakdown and I'm – I had to have a tablet before I come in here from my doctor. As you would be aware, I get the shakes. Sometimes maybe I'm a bit incoherent when I'm questioning...*"
18. It was clear from reading the transcripts that at times Mr Lowry was confused by the process and evidence from RWWA veterinarian Dr Medd. He appeared generally exhausted with the process and baffled as to why such an inquiry was ongoing given it was he who advised the Stewards about the implant in the first place. He immediately had it removed and the dog did not race.

19. The Stewards were concerned to conclude the inquiry in an appropriate manner, however, they acknowledged that it was lengthy and impacted on Mr Lowry and his family. Notwithstanding that acknowledgement, the Tribunal is of the view that the process of this inquiry and the time that it took was unnecessarily long and caused undue stress and concern to Mr Lowry.
20. The actual discussion that Mr Lowry had with Dr Boud was the subject of dispute. The inquiry had a copy of the vet notes but this evidence was not tested as the vet "for personal reasons" did not give evidence. This was despite there being a very lengthy period over which she could have appeared.
21. The vet notes read:

Date: 8 January 2021, 11.40am. Clinical details: Suprelorin inj. Owner's other female dog has just come into season early and O wants to avoid mating and unwanted pregnancy so has requested a six-month Suprelorin injection to reduce testosterone and stop pregnancy. He has otherwise been well. EDUD fine and well. BAR, MM pink, CRT one sec, heart and lungs NAD, BCS 4.5/9, typical greyhound stature, otherwise in good health. Advised O that I believe any hormone type medications may not be allowed to be used in racing greyhounds. O said so long as he could give stewards a list of the ingredients in the medication then he will be fine to use. I advised him I don't have knowledge of the requirements for the greyhound racing industry but am happy to provide the name of the ingredient (gave the owner the drug information from the Suprelorin packet) if he wanted the implant given. I advised I still would not recommend its use however O insisted – was insistent he would like to implant – implanted Suprelorin injection. Implant contains 4.7 milligrams deslorelin (six-month implant). Advised O that he can take up to eight to 14 days to become completely effective so best to keep the dogs separated during this time to prevent unwanted pregnancy."

22. Mr Lowry advised the inquiry that he could not recall the vet advising him against the use of the implant and denied that he "insisted" on its use as was documented in the vet notes.
23. In their Judgment the Stewards found Mr Lowry had initially denied having a relationship with the vet upon who he attended and preferred the evidence in the vet notes over that given by Mr Lowry. They found that "*it would be logical after reading Dr Boud's concerns the only reason the implant occurred was on your direction*" (paragraph 7 of the Reasons for Decision).

24. The Stewards were of the view that this was a serious matter and that as soon as the concerns were raised by the vet, that this should have been a red flag for Mr Lowry and he should not have proceeded with having the implant put in his greyhound.
25. At the inquiry Dr Medd gave evidence that the implant works by reducing the levels of testosterone in the dog. It can start to take effect anywhere from 60-120 minutes onwards and the initial effect is to actually raise the level of testosterone and then it starts to drop.
26. This evidence shocked Mr Lowry who from reading the package was under the impression that it took 7-14 days to become effective and believed that the implant only lowered testosterone levels. It is not surprising that Mr Lowry did not know the intricacies of how the implant worked, given the process is complex and was explained during the inquiry by way of expert evidence of a RWWA vet.
27. At Page 52 of the transcript dated 11 March 2021 Dr Medd stated the implant had a
- “...fairly complex mode of action. Deslorelin actually has an initial direct action on the body which causes an initial increase in plasma testosterone levels, so initially you get a spike in testosterone levels when you administer deslorelin to an animal. This is then followed by an eventual decrease in testosterone levels and this is a process known as down-regulation or negative feedback.”*

THE APPEAL

28. At the hearing of the appeal Counsel for the Appellant confirmed the sole ground of appeal was that the penalty imposed by the stewards was in all the circumstances manifestly excessive. An alternative penalty was sought by way of a warning; or the disqualification be backdated to the first day of the 7-week ban imposed on 8 January 2021; or a nominal fine issued in lieu of disqualification.
29. Senior Counsel for the Stewards sought that the appeal be dismissed on the basis that the penalty imposed was wholly appropriate in the circumstances.
30. Mr Lowry was guilty of the administration charge, despite not knowing that the suprelorin implant contained a permanently banned substance because the relevant Rule is an absolute one. Mistake is not a defence.
31. Principles against penalty are constrained by the principles of appellate review of discretionary decisions. These principles were re-stated by this Tribunal in *Robert Alan Westworth* RPAT Appeal No 832 on 15 March 2020 by Member Robbins citing *House v R* [1936] HCA 40; (1936) 55 CLR 499 at [2] per Dixon, Evatt and McTiernan JJ:

“The manner in which an appeal against an exercise of discretion should be determined is governed by established principle. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed, and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust the appellate court may infer that in some way there has been a failure to exercise the discretion which the law reposes in the court of first instances. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has occurred.”

32. It is with these principles in mind that the Tribunal considered whether or not the Stewards’ decision on penalty was “manifestly excessive”.

Circumstances of this case

33. This case is unique.

34. Firstly, the motive of Mr Lowry was the welfare of his Greyhounds.

35. Secondly, the Stewards became aware that ASTON COOPERS had been implanted with the permanently banned substance, because Mr Lowry called to inform them that this had occurred.

36. Thirdly, upon being informed by Greyhounds Steward, Mr Simon Jones on 8 January that suprelorin contained a permanently banned substance, Mr Lowry acted as soon as practicable and complied with all the Stewards instructions.

37. He took ASTON COOPERS to the Halls Head Vets Clinic for the implant’s removal on 9 January 2021 and informed the Stewards that this had been done on 10 January 2021. He acknowledged that the greyhound had to be scratched from the race it was engaged in on Tuesday 12 January 2021 and arranged for the Halls Head Vets to provide written documentation to RWWA and subsequently presented the greyhound for a clearance sample at the time requested by the Stewards.

38. Mr Lowry's cooperation was acknowledged by the Stewards in their reasons at paragraph 21. It appears that once he became aware of his error he did everything that he believed he could do to comply with the Rules and offset the damage done from his act of administering the implant.
39. Fourthly, the evidence of the vet which the Stewards preferred over that of Mr Lowry was untested as the vet refused to appear at the inquiry for "personal reasons". This reason is vague and unconvincing.
40. The Tribunal is of the view that untested, disputed evidence is not safe to rely on. This is especially so as there was no evidence to support what such "insistence" was and the notes are clear that the vet gave Mr Lowry the option of proceeding with the implant, despite raising her concern. If someone is given two options and chooses one, it can hardly be said that they "insisted".
41. Furthermore, just because advice is given doesn't automatically mean it is heard and understood. There was no evidence in the vet notes confirming that any advice was understood by Mr Lowry.
42. The vet also had the option to decline to apply the implant, or to check with RWWA herself before proceeding. It is not clear why the vet made no inquiries. Dr Medd gave evidence at the inquiry that she often receives calls from vets checking about substances.
43. In their judgment the Stewards criticised Mr Lowry for initially denying having a relationship with Dr Boud. We do not agree with the Stewards that Mr Lowry can be criticised for denying having a relationship with Dr Boud. He had not attended upon her prior to the date of his appointment and the term "relationship" does imply more than a one off appointment. Mr Lowry was very clear about when he met her at his appointment and that he did not see her following the visit. We find there was no reason to doubt this evidence. He qualified his answer by giving an explanation of his dealings with her immediately after his comment with detailed answers.
44. Fifth, Mr Lowry has unique personal circumstances including his age. The Stewards state at paragraph 2 of their reasons that they considered Mr Lowry's personal circumstances including his age. One of the consequences of Mr Lowry's age is that he is less proficient in accessing current information on the internet than a younger trainer would be and unfortunately, he relied on his past experience rather than accessing up to date sources of information to check the facts on the rules and substance changes. This is no excuse for his offending, but it is understandable in his circumstances. Very few, if any, other trainers of his age are registered.

45. Due to the uniqueness of this case, it was difficult to align it with past cases for guidance on penalty.
46. In their reasons, the Stewards referred to the case of Peter Hepple Appeal No 792 ("Hepple"). Hepple was referred to as a "starting point" in relation to a penalty (paragraph 31 of reasons).
47. Mr Hepple received 12 months disqualification in circumstances where he was unaware that the substance he administered was permanently banned and where a veterinarian dispensed the substance. Mr Hepple was not a first offender as was Mr Lowry, and the substance had been administered on multiple occasions.
48. Mr Hepple did not report the administration of the substances to the Stewards, it was brought to their attention through a routine inspection. Mr Hepple's horses did race. By way of contrast Mr Lowry reported his action to the Stewards before the greyhound raced.
49. Another significant difference was in the motivation of the trainers in the two cases. In Mr Hepple's case it was to improve the animal's performance – that is it went against the presumption of a fair and level playing field and directly impacted on the integrity of the industry. We accept the evidence of Mr Lowry that his motivation was the welfare of his greyhounds.
50. The state of mind of Mr Lowry is a relevant consideration. We accept Mr Lowry's evidence that he believed the overall reduction in testosterone would act to reduce ASTIN COOPERS performance if anything. This was however an incorrect belief.
51. The case of Hepple can further be distinguished from Mr Lowry's because Mr Hepple was not regarded as cooperative or candid with the inquiry. While Mr Lowry became very frustrated during the inquiry process and said some unfortunate things, he did co-operate with the inquiry and directions of the Stewards.
52. While the cases referred to by the Stewards may be helpful guides, they cannot fetter the scope of the considerations that are to be applied in setting penalties for breaches of the Rules the need to have regard to all the circumstances of the individual case.
53. In considering penalty, the Tribunal also needs to consider what effect the offence had on the industry and the message that would be sent to other trainers. In our view Mr Lowry is not an appropriate vehicle for general deterrence. It is highly unlikely he will ever allow his greyhounds to be administered any kind of medication in the future without checking with RWWA vets first.

54. The Tribunal is conscious that the penalty imposed in this case should not discourage trainers to contact RWWA veterinarians to seek advice or be a dis-incentive for trainers to report a potential error.
55. As ASTON COOPERS did not race there was very little disruption caused within the industry and we are of the view Mr Lowry's actions are not likely to tarnish the reputation of the industry.
56. Given the above circumstances and taking into account the mitigating factors of the Appellant, we considered the penalty imposed in this case was manifestly excessive. The appeal for that reason was upheld and an alternative of 2 months suspension was imposed.

Karen Farley

_____ **KAREN FARLEY SC, CHAIRPERSON**

B E Robbins

_____ **BRENDA ROBBINS, MEMBER**

J. Overmars

_____ **JOHANNA OVERMARS, MEMBER**



