

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: NEIL BIGGS

APPLICATION NO: A30/08/804

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR A MONISSE (MEMBER)

DATE OF HEARING: 13 NOVEMBER 2017

DATE OF DETERMINATION: 31 JANUARY 2018

IN THE MATTER OF an appeal by NEIL BIGGS against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing (RWWA Stewards) on 18 August 2017, imposing a \$3,000 fine for breach of Australian Rule of Thoroughbred Racing 175(o)(iii).

Mr T F Percy QC with Ms J Byrne of Equitas Lawyers appeared for Mr Biggs.

Mr RJ Davies QC appeared for the RWWA Stewards.

1. By unanimous decision of this Tribunal, the appeal by Mr Neil Biggs against the penalty under Thoroughbred Racing Rule 175(o)(iii) is upheld.
2. By a majority decision of the Chairperson and Member Hogan, the penalty of a fine of \$3,000 imposed by the stewards is replaced by a fine of \$1,500.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL
REASONS OF DETERMINATION OF MR D MOSSENSON

APPELLANT: NEIL BIGGS

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Mr T F Percy QC with Ms J Byrne of Equitas Lawyers appeared for Mr Biggs.

Mr RJ Davies QC appeared for the RWWA Stewards.

BACKGROUND

1 Following a RWWA Steward's inquiry which commenced on 12 June 2017 and continued on 12 July 2017, Mr Neil Biggs was charged with a breach of Thoroughbred Racing Rule 175(o)(iii) in relation to the near side eye injury which had been sustained by LENNY'S PICK. The Stewards were of the opinion that Mr Biggs, being the person in charge of the gelding, had failed to provide the necessary veterinary treatment for the horse's injury. The inquiry had been initiated because of the report dated 6 June 2017 produced by Dr

Judith Medd and Compliance Officer Freya Norman following their visit to Mr Biggs' stables which are located at Leonora Race Course. The stable inspection had taken place following receipt of information from the public on two occasions regarding concerns which had been expressed in relation to excessive injuries and lack of provision of veterinary care of horses at Mr Biggs' stables.

2 The relevant parts of the offence Rule in question state:

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

.....

(o) Any person in charge of a horse who in their opinion fails at any time -

.....

(iii) to provide for veterinary treatment where such treatment is necessary for the horse".

3 The Stewards granted Mr Biggs permission to attend the hearing accompanied by his lawyer Mr Percy QC. The hearing proved to be a somewhat lengthy and detailed affair.

4 After the charge was laid Mr Biggs pleaded guilty to it, but "with some mitigating circumstances". In order to clarify the situation, senior counsel submitted that it was a conditional plea.

5 The Stewards adjourned the hearing once the nature of the plea was clarified to enable written submissions as to mitigation to be filed. Following receipt of those submissions there was no need for the Stewards to reconvene the hearing.

MITIGATION ARGUMENT

6 In the written submissions provided to the Stewards, the following facts were presented as mitigating factors:

"a) Factors Personal to the Offender:

5. *Mr Biggs has been a respected and reputable member of the racing community, as an owner, trainer and administrator for many years and has no history of dishonest or discreditable conduct.*

6. *He has singlehandedly kept the Leonora race club afloat for several decades.*
7. *Mr Biggs' investment in contribution to country racing in WA has been significant over many years. He is a popular and outstanding advocate for the sport in the public domain.*
8. *The references provided attest to his good character and his outstanding reputation in the industry.*

b) Factors relating to the Offence

9. *Mr Biggs fully cooperated with the Stewards throughout the entirety of the inquiry process.*
10. *Mr Biggs accepts that he committed the offence, and entered a plea of "guilty" upon being charged.*
11. *The horse had been retired in the paddock for 18 months prior to Dr Medd's visit on 18 April 2017 and Mr Biggs was not aware of the injury prior to this date. Had he been aware of the injury, he would have sought veterinary treatment by having a vet attend Leonora, or taken the horse to Kalgoorlie for treatment as he has done on several occasions previously.*
12. *As the horse was retired and was not an active race horse, there were accordingly no safety issues concerned with its maintenance.*
13. *The most significant mitigating factor in this case is that the closest vet from whom Mr Biggs could have sought treatment was some 250 kilometres away. Mr Biggs has a history of animal husbandry dating back nearly 50 years and believed that he could adequately deal with comparatively minor issues that arose from time to time without requiring veterinary assistance.*
14. *The horse, other than the injury in question, appears to have been in otherwise good condition and well cared for. He had saved the*

horse from euthanasia on an earlier occasion, and genuinely cared for its welfare.

15. *It is submitted that the offending in the present case is best categorised as an error of judgment rather than as an abject or callous disregard for the welfare of the animal."*

7 In addition the written submissions contained an acknowledgment that there are few offences of a similar nature recorded in thoroughbred racing. The following greyhound racing comparative cases were briefly referred to:

- 7.1 Trainer Jean Martin who was fined \$1,000 on 18 January 2014, for failing to provide veterinary attention following a greyhound sustaining a leg injury.
- 7.2 Trainer J Walters who was fined \$750 on 10 February 2014, for failing to provide veterinary treatment.
- 7.3 Trainer D Coldstream who was fined \$1,500 on 23 December 2014, for failing to provide veterinary assistance when required.
- 7.4 Trainer M Newton who was disqualified for six months on 23 December 2015, for failing to provide veterinary attention when required to do so after the greyhound suffered an injured shoulder.

The first three were breaches of Greyhound Racing Rule 106(1)(d) and the last one a breach of Greyhound Racing Rule 143(i)(d) (which is now the same Rule number as 106(1)(d).

The relevant part of Rule 106 states

"A registered person must ensure that greyhounds, which are in the person's care or custody, are provided at all times with:

- (d) veterinary attention when necessary."*

STEWARDS' REASONS

8 Following receipt of the written submissions, the Stewards completed their deliberations and issued their reasons by letter dated 18 August 2017. For convenience, those reasons are summarised as follows:

- 8.1 Offences under AR175(o)(iii) are treated very seriously.
- 8.2 All horses are expected to be given utmost care and attention and their welfare must be rigorously protected at all times.
- 8.3 The retired thoroughbred LENNY'S PICK sustained an eye injury which Mr Biggs did not notice for a number of weeks resulting in it not receiving the veterinary treatment which it urgently needed. The inspection was in response to an unrelated complaint from an anonymous person regarding the general training and injury treatment practices at Mr Biggs' stables. The injury only came to light due to the intervention of a RWWA official.
- 8.4 The blindness which LENNY'S PICK suffered in the near side eye may well have been avoided or lessened had it been properly identified with immediate treatment having been arranged.
- 8.5 Because there was no veterinarian in the local area, it necessitated a high level of vigilance to ensure all horses under direct care of Mr Biggs as the trainer were monitored closely on a daily basis. This was required to ensure they remained in good condition and were injury free. A veterinarian should be contacted immediately, should the need arise.
- 8.6 Mr Biggs had failed to achieve the level of supervision required, with significant adverse consequences to LENNY'S PICK. The horse largely had been fending for itself without being under daily supervision.
- 8.7 The injury to the eye was easily discernible to an experienced horse person. The offence arose through negligence due to inattentiveness and unawareness. It was an error of judgment rather than a deliberate act or omission or from having no regard to LENNY'S PICK's general welfare.

- 8.8 It was important the penalty reflected the necessary level of specific and general deterrence. A clear message must be sent to all industry participants, not to ever compromise welfare of horses.
- 8.9 The guilty plea and acceptance of the offence, the cooperation with the Stewards including the remorse shown, coupled with an unblemished record in excess of 50 years as a trainer, were all significant factors in Mr Biggs' favour. Further, the references which were produced all attested to Mr Biggs' good character and reputation.
- 8.10 This was an isolated offence and out of character. It was unlikely that Mr Biggs would reoffend in the future
- 8.11 There was only one prior offence under the same rule in thoroughbred racing. Trainer Mr V Sigley was fined \$1,500 for failing to provide veterinary treatment to a horse under his care which became lame due to inadequate hoof cover.

9 The Stewards' letter concluded by stating:

"...a broad range of penalties are open. In evaluating your particular offence on a comparative basis to those mentioned and taking into account all of the relevant circumstances as stated herein, the Stewards do not believe a disqualification or suspension of your licence should be applied, nor do we believe a caution or reprimand is justified and in our opinion the matter can be dealt with by a fine of \$3,000."

APPEAL GROUNDS

10 Only the penalty is the subject of the appeal. The grounds of appeal are:

"1. The Stewards erred by imposing a penalty that was excessive in all the circumstances of the case, having regard to:

I The appellant's plea of guilty;

II The appellant's unblemished record over fifty years as a licensed trainer;

III Previous cases decided under the provisions of the rule in question and similar rules in other codes;

2. The Stewards erred by failing to make any allowance for the fact that there was no veterinary surgeon located within 200 kilometres of the appellant's training establishment."

APPELLANT'S PROPOSITIONS

- 11 The written submissions presented in the appeal combined with the arguments that were raised in the course of the appeal hearing were virtually identical to the propositions contained in the written submissions that had earlier been presented before the Stewards and which are summarised earlier herein.
- 12 The thrust of the case presented for the appellant was that there were some unique circumstances of the offending, coupled with Mr Biggs' personal background and his exemplary record in the industry which combined to mean that a caution, or at worst, a nominal fine would have been appropriate. Further, the Stewards could have exercised their power to suspend any fine proposed.
- 13 There are few offences of a similar nature recorded in Thoroughbred Racing and the only cases that were referred to were the ones stated above. Where the present case was distinguishable, was that there was no recorded case for a trainer who was located so far away from veterinary care who had been dealt with for breach of this Rule or the equivalent Rules in the other codes.
- 14 The imposition of a \$3,000 fine was an error of judgment on the part of the Stewards.

RWWA STEWARDS' ARGUMENT

- 15 Mr Davies QC argued that in order for there to be a successful appeal, it was necessary to demonstrate that the Stewards were in error in imposing the fine which they did.
- 16 There was no suggestion the Stewards had erred by taking into account irrelevant circumstances. The Stewards were in the best position to evaluate the seriousness of the offence and the possible adverse consequences to the industry as well as the appropriateness of the penalty which was ultimately arrived at.

- 17 The cases which were cited by senior counsel for the appellant were referred to.
- 18 Each case turns on its own circumstances with the level of neglect and severity of the injury requiring veterinarian treatment, given great emphasis when determining an appropriate penalty. A broad range of penalties are open. In evaluating this particular offence on a comparative basis and taking into account all relevant circumstances, the Stewards rejected the imposition of a disqualification or suspension as well as a caution or reprimand and in their opinion, concluded it should be dealt with by a fine of \$3,000.
- 19 Mr Davies argued that the Stewards did have detailed knowledge of the isolated location of the Biggs' stables as well as the difficulties associated with the obtaining of professional assistance. Further, they were well aware of Mr Biggs' background and his highly significant contribution to the local racing scene extending over many years.
- 20 Senior counsel also argued the appeal is a review of the primary exercise of the discretion in relation to a Rule that contains in effect the significant phrase "in the opinion of the Stewards". These facts make it a more difficult task to challenge on appeal. It was submitted that the Stewards are in the best position to know what might be the adverse impact on the industry of too lenient treatment and its significance in reflecting the fact that those in control are on top of the problem. Further, the Stewards' authority would be diminished if a caution was the outcome and would make them out to be a laughing stock. Mr Davies invited the Tribunal to resist the temptation of thinking that the fine imposed was "a bit tough" and therefore it was an appropriate approach simply to deal with the matter by halving the fine.
- 21 Mr Davies further submitted this is not a case where it can be said the Stewards failed to take into account mitigating circumstances.
- 22 To suspend the operation of this penalty would emasculate it. A regulated industry with a system of licensing participants requires there to be an ongoing appearance of proper control.
- 23 Fortunately, from an animal welfare perspective and in terms of the public's attitude towards the racing industry, very few cases of neglect have occurred. This means there

are only limited reported cases to refer to in relation to determining an appropriate penalty for breach of the Rule in question.

DECISION

- 24 LENNY'S PICK suffered for some time without Mr Biggs having detected or paid any attention to the injury. Unfortunately, whilst the problem remained unnoticed, the animal's condition was not addressed and ultimately it became blind. However, it is not clear from the evidence whether the blindness could have been avoided with timely appropriate treatment.
- 25 The Stewards properly approached the matter on the basis that the offence of failing to provide necessary veterinary treatment had in fact occurred. They were spared having to decide whether the Rule had been breached in view of the qualified plea of guilt. The difficult task which confronted the Stewards, once the conditional guilty plea was clarified, was to decide on the appropriate penalty. This task was not greatly assisted by reference to past cases.
- 26 As mentioned earlier, the only relevant thoroughbred racing case quoted (Sigley) had resulted in a \$1,500 fine for lameness which was caused due to inadequate hoof care. As no other details have been provided, these bare facts are not altogether helpful and provide little guidance. The circumstances of the neglect are not explained in the Stewards' reasons and were not presented at the appeal hearing. The four other examples referred to all relate to a different racing code, namely greyhound racing. Three involved fines of \$750, \$1,000 and \$1,500. Again, the details of them are very sketchy. One can only assume the fourth must have been much more serious as it resulted in a six months disqualification.
- 27 The Stewards made it clear in their written reasons that offences under Rule 175(o)(iii) are treated very seriously. Under the Rules, a broad range of penalties are open, as the Stewards quite properly stated in their reasons. This means a wide discretion is vested in the decision makers. I am satisfied the Stewards did properly exercise their discretion in concluding disqualification, suspension and a caution or reprimand were all inappropriate in this particular case. The first two types of penalty would have been

excessive. The latter would have been inadequate. In view of the circumstances, in this case the Stewards decided that only a monetary penalty was appropriate. I am satisfied the imposition of a fine was the appropriate type of punishment to be imposed.

28 As is evident from the Stewards' reasons, having excluded the other possible outcomes, the Stewards simply concluded their reasons by abruptly stating "... in our opinion the matter can be dealt with by a fine of \$3,000." In so concluding, the Stewards have not explained or justified how or why they reached this conclusion as to this particular dollar figure. They have not specified what starting point was considered to be the appropriate amount of a fine to be imposed for this misconduct. They have not articulated whether or not they have in fact determined whether any adjustment or reductions were necessary due to the personal and other relevant circumstances. This sudden conclusion to the process of reasoning with the bare pronouncement that the matter attracts a \$3,000 fine means there is no way of knowing what credit, if any, has been given for the diverse range of compelling mitigating circumstances which are special to this case.

29 The fine imposed on Mr Biggs is double compared to the only directly comparable case in the thoroughbred code, namely Mr V Sigley. To the extent one can be guided or influenced by the equivalent offences in greyhound racing, which is questionable, it is also double Mr Coldstream's fine, three times that of Mr Martin and four times that of Mr Waters.

30 I reiterate, the written reasons of the Stewards offer no helpful insight as to how or why this figure of \$3,000 was arrived at. Whilst the reasons do in fact refer to various personal and mitigating circumstances in paragraph 8 (namely the guilty plea, cooperation, remorse, unblemished long record, good character and reputation, isolated out of character offence, unlikely to reoffend), there is no way of knowing to what extent, if at all, these factors influenced the ultimate outcome. I am satisfied the Stewards have erred in this respect as transparency is lacking. The reasons fail to adequately inform and do not enable the parties to comprehend the process of reasoning and evaluation.

31 There are many compelling ameliorating factors in this case. The special circumstances favourable to Mr Biggs include:

- 31.1 Mr Biggs' age, being 79 years old.
- 31.2 The isolated location of the training establishment, being Leonora, and the fact that the closest veterinarian from whom treatment could have been sought was some 250 kms away.
- 31.3 Mr Biggs' history of training horses for some 51 years during which time he had never been convicted of any charges under the Rules of Racing.
- 31.4 The fact that Mr Biggs has been part of the Leonora Racing Club during that time, had single handedly kept the Club afloat for several decades and had significantly contributed to country racing in Western Australia.
- 31.5 The fact that Mr Biggs has been a respected and reputable member of the racing community as owner, trainer and administrator for many years.
- 31.6 The good character references which confirm Mr Biggs' outstanding reputation in the industry.
- 31.7 The full cooperation with the Stewards throughout the inquiry, including entry of the plea of guilty upon being charged. The "conditional" plea of guilt reflected the fact that substantial mitigation was appropriate.
- 31.8 The fact that the horse had been retired in the paddock for 18 months prior to Dr Medd's visit and was not an active race horse.
- 31.9 The fact that Mr Biggs had not been aware of the injury prior to the visit and there were no safety issues concerned.
- 31.10 Mr Biggs having believed he could adequately deal with comparatively minor issues that arose from time to time without requiring veterinary assistance.
- 31.11 The fact the horse which was otherwise in good condition and well cared for, had been saved from euthanasia on a previous occasion.
- 31.12 That this was a case of an error of judgment rather than an abject or callous disregard for the welfare of the animal.

- 32 Whilst there can be no argument that the offence is a serious one which requires a substantial punishment, clearly there are many influencing factors and aspects to be taken into account before arriving at the ultimate appropriate penalty to be imposed. When all these mitigations are combined, I consider they should have had a significant impact on the end ultimate outcome. The Stewards failed to identify this in their reasons.
- 33 I am conscious of the need, as the Stewards have properly enunciated, for there to be both specific and general deterrence in a case like this. I am satisfied it is appropriate to start with a figure in the order of \$3,000 as that amount reflects the appropriate level of fine which matches the seriousness of the offence. As the Stewards described it, the offending involved “negligence due to inattentiveness, unawareness and ... an error of judgment” for a prolonged period. The misdeed resulted in unnecessary suffering and possibly could have been the cause for the ultimate blindness. At the same time and in order to be entirely fair to the appellant, one must also then take into account all of the acknowledged relevant mitigation factors.
- 34 The Stewards are clearly in the best position to assess the starting points in the process of deciding on appropriate punishments in view of their specialist roles, responsibilities and experience of having to properly regulate and control the conduct of industry participants. The \$3,000 fine was not an inappropriate starting point despite being high compared to the examples of other penalties. It was a serious offence and such an amount is appropriate from a specific and general deterrence perspective.
- 35 Once an appropriate starting point was reached, it was necessary to give this appellant appropriate credit for the many personal and mitigating circumstances. From a personal perspective, one needed to acknowledge and give full and sufficient recognition for Mr Biggs’ undoubted personal standing and reputation in the industry. Mr Biggs’ lengthy, unblemished career prior to this matter, coupled with his role in supporting racing in the local remote area is highly commendable. Equally the various factors relating to the offence, which have been previously clearly identified and do not require repeating, needed to be given appropriate weight.

- 36 I would uphold the first ground of appeal. The penalty which was imposed was excessive. The Stewards erred in the exercise of their sentencing discretion. In determining punishment, Mr Biggs' conditional plea of guilt was not properly or adequately treated. I am satisfied the combined mitigations are both substantial and compelling to such a degree that they justify discounting the fine which was imposed by fifty per cent. I have reached this conclusion on the merits and not simply by adopting the course which Mr Davies warned against in his submissions.
- 37 I would allow the appeal and substitute a fine of \$1,500. I consider that a fine of \$1,500 is the appropriate punishment when all of the relevant factors are properly weighed into the sentencing equation. When all of these factors are properly considered, such an outcome would not serve to diminish the seriousness of the misconduct. At the same time, it should send the appropriate message to the industry regarding the importance of vigilance in dealing with animals and the fact that animal welfare in racing is paramount.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL
REASONS OF DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT: NEIL BIGGS

APPLICATION NO: A30/08/804

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR A MONISSE (MEMBER)

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Mr T F Percy QC with Ms J Byrne of Equitas Lawyers appeared for Mr Biggs.

Mr RJ Davies QC appeared for the RWWA Stewards.

I have read the draft reasons of Mr D Mossenson, Chairperson.

I agree with those reasons and conclusions and have nothing further to add.



PATRICK HOGAN, MEMBER



RACING PENALTIES APPEAL TRIBUNAL
REASONS OF DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT: NEIL BIGGS

APPLICATION NO: A30/08/804

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR A E MONISSE (MEMBER)

DATE OF HEARING: 13 NOVEMBER 2017

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Mr T F Percy QC with Ms J Byrne of Equitas Lawyers appeared for Mr Biggs.

Mr R J Davies QC appeared for the RWWA Stewards.

I have had the advantage of reading the draft reasons of Mr Dan Mossenson, Chairperson. I agree with his analysis of the circumstances of this appeal leading him to conclude that that the \$3,000 fine imposed by the RWWA Stewards was excessive. I also agree that that the penalty to now be imposed should be varied to a \$1,500 fine, however on the application of AR 196(4) I consider that it is appropriate to then wholly suspend the operation of that penalty for 6 months on the condition that the Appellant does not commit a further breach of the *RWWA Rules of Thoroughbred Racing* in that period.

In my view this revised determination that I would make pursuant to s 17(9)(c) of the *Racing Penalties (Appeals) Act 1990* (WA) is warranted given the exceptional mitigating factors personal to the Appellant. These factors are the extraordinary contribution that he has voluntarily made over the last couple of decades to country racing in Western Australia and his unblemished record as a trainer for more than 50 years.

For these reasons I would allow the appeal against penalty and impose a \$1,500 fine to be wholly suspended for 6 months on condition that the Appellant does not commit a further breach of the *RWWA Rules of Thoroughbred Racing* in that period.

A E Monisse

ANDREW MONISSE, MEMBER

