

Non Raceday Inquiry RIU v D G Burrows - Reserved Penalty Decision dated 15 May 2018 - Chair, Mr R G McKenzie

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

**BEFORE A JUDICIAL COMMITTEE
OF THE JUDICIAL CONTROL AUTHORITY
HELD AT CHRISTCHURCH**

IN THE MATTER of the New Zealand Rules of Harness Racing

IN THE MATTER of Informations Nos. A7222 & A7223

BETWEEN K R WILLIAMS, Racing Investigator for the Racing Integrity Unit

Informant

AND DONALD GORDON BURROWS of Balcairn, Public Trainer

Respondent

Judicial Committee: R G McKenzie (Chair)

D M Jackson (Committee Member)

Venue: Addington Raceway, Christchurch

Present: Mrs K R Williams, the Informant

Mr D G Burrows, the Respondent

Mrs P M A Burrows, Lay Advocate for the Respondent

Mr S P Renault, Stipendiary Steward (Registrar)

Date of Hearing: 4 May 2018

Date of Decision: 15 May 2018

RESERVED PENALTY DECISION OF JUDICIAL COMMITTEE

The Charges

[1] Information No. A7222 alleges that “on the 2nd day of February 2018, the Respondent being the registered trainer of the Standardbred LIGHTWORKOFIT, presented the horse to race in Race 8, the Macca Lodge- Tuapeka Lodge-Denario Breeding Mobile Trot, at the New Zealand Metropolitan Trotting Club’s meeting with a prohibited substance, namely Kavain (Kava) in its system in breach of the Prohibited Substance Rule, Rule 1004 (1A), (3) and (4)”.

[2] Information No. A7223 alleges that “on the 23rd day of February 2018, the Respondent being the registered trainer of the Standardbred LIGHTWORKOFIT, presented the horse to race in Race 10, the IRT Mobile Trot, at the New Zealand Metropolitan Trotting Club’s meeting with a prohibited substance, namely Kavain (Kava) in its system in breach of the Prohibited Substance Rule, Rule 1004 (1A), (3) and (4)”.

The Rules

[3] Rule 1004 of the Rules of Harness Racing provides as follows:

(1A) A horse shall be presented for a race free of prohibited substances

(3) When a horse is presented to race in contravention of sub-rule (1A) or (2) the trainer of the horse commits a breach of these Rules.

(4) A breach of sub-rule (1A), (2) or (3A) is committed regardless of the circumstances in which the . . . prohibited substance came to be present in or on the horse.

[4] The penalty Rule is Rule 1004 (7) which provides as follows:

(1) Every person who commits a breach of sub-rule (2) or (3) shall be liable to:

(a) a fine not exceeding \$20,000.00; and/or

(b) be disqualified or suspended from holding or obtaining a licence, for any specific period not exceeding five years.

[5] Mrs Williams presented a letter dated 13 April 2018 signed by Mr M R Godber, General Manager of the Racing Integrity Unit, pursuant to Rule 1108 (2) authorising the filing of the information.

The Plea

[6] Mr Burrows had signed the Statement by the Respondent on each of the information forms indicating that he admitted the breaches. He was present at the hearing of the information. The charges and relevant Rules were read to him, after which he confirmed that he admitted the breaches.

[7] The charges were found proved.

Summary of Facts

[8] Mrs Williams presented the following written submissions to the hearing:

1. LIGHTWORKOFIT is a 12-year-old bay gelding and is trained by Mr Donald Gordon BURROWS. LIGHTWORKOFIT is owned by Mrs P M Burrows, D G Burrows, S C Bavin and M N Bavin. LIGHTWORKOFIT has raced 45 times for 5 wins and lifetime stakes of \$34,721 as at 23 April 2018.

2. LIGHTWORKOFIT was correctly entered and presented to race by trainer Mr Donald Burrows at the NZMTC meeting on 2 February 2018. LIGHTWORKOFIT was driven in Race 8, the MACCA LODGE-TUAPEKA LODGE-DENARIO BREEDING MOBILE TROT, by Mr D J Dunn, winning the race and a stake of \$5,300. This stake has not been paid out.

3. Following the race, the Stipendiary Stewards ordered that LIGHTWORKOFIT be post-race swabbed. LIGHTWORKOFIT entered the swab box at 9.20pm and Swabbing Steward, Mr M P McCann, obtained a urine sample from the gelding at 9.25pm. The race was programmed to start at 8.56pm. The urine sample was taken in the presence of the Mr Burrows. The urine samples were recorded with the Sample number 139961. Mr Burrows does not contest the taking of the sample.

4. LIGHTWORKOFIT was correctly entered and presented to race by trainer Mr Donald Burrows at the NZMTC meeting on 23 February 2018. LIGHTWORKOFIT was driven in Race 10, the IRT MOBILE TROT, by Mr G D Smith, winning the race and a stake of \$5,300. This stake has not been paid out.

5. Following the race, the Stipendiary Stewards ordered that LIGHTWORKOFIT be post-race swabbed. LIGHTWORKOFIT entered the swab box at 9.46pm and Swabbing Steward Mr G Johnston obtained a urine sample from the gelding at 9.50pm. The race was programmed to start at 9.30pm. The urine sample was taken in the presence of Mr Burrows. The urine samples were recorded with the Sample number 81616. Mr Burrows does not contest the taking of the sample.

6. On the 21st March 2018 the New Zealand Racing Laboratory reported Karvain (Kava) was detected in Sample Numbers 139961 and 81636. The Control Samples were clear.

7. On the 22nd March 2018, RIU members Mrs Kylie Williams and Mr Nick Ydgren went to the training establishment of Mr Burrows, 91 Smiths Road, Amberley, and advised him of the positive swabs returned by LIGHTWORKOFIT.

8. Mr Burrows was given copies of the Certificates of Analysis, the Swab Cards, RIU Swabbing Record Book and Race Results.

9. Mr Burrows could not offer an explanation for the presence of Kavain (Kava) in the urine samples taken from LIGHTWORKOFIT at the two race meetings.

10. Mr Burrows confirmed that he was not aware that Kava is a prohibited substance under the rules and does not check with a Veterinarian when using new supplements/products.

11. There are at least two products that are readily available in New Zealand that contain Kava. Mr Burrows had heard of one of the products as his daughter had used it on one of her horses in the past. Both products on their website advise that they contain Kava and that Kava is swabbable under FEI (Federation Equestrian International) rules. Mr Burrows advised that he has not used either product on his horse and none were found on his property.

12. Mr Burrows confirmed that LIGHTWORKOFIT was stood down from racing after breaking at the start in each of the four raceday starts from 17 December 2017 to 7 January 2018. After this Mr Burrows went to a local Rural Supply Company seeking a product to calm his horse. Mr Burrows purchased a product and this was one of the samples tested by the Laboratory and did not contain Kava.

13. The horse then finished 4th, 1st, 10th and 1st in its next four starts. The two wins are the subject of these positive swabs.

14. Mr Burrows does not keep a diary of treatments and keeps the horse feeds and additives in a locked shed.

15. Samples of several products were taken and forwarded to the NZ Racing Laboratory for testing with the Laboratory advising on 10 April 2018 that none of the products contained Kava.

16. Mr Burrows has been training since 1978/79. Mr Burrows has trained 38 winners.

17. Mr Burrows has not previously been charged with a breach of the prohibited substance rule.

[9] Mrs Burrows confirmed to the Committee that the Summary of Facts was accepted by Mr Burrows.

Informant's Penalty Submissions

[10] Mrs Williams presented the following written penalty submissions:

1. Mr Burrows has pleaded guilty to two breaches of Rule 1004(1A), (3) & (4) after presenting LIGHTWORKOFIT at the races with a prohibited substance in its system, namely Kavain (Kava), at the New Zealand Metropolitan Trotting Club meetings on the 2nd February and 23rd February 2018.

2. The penalty provisions that apply in this case are outlined in Rule 1104(7).

1004(7) Every person who commits a breach of sub-rule (2) or (3) shall be liable to:

(a) a fine not exceeding \$20,000; and/or

(b) be disqualified or suspended from holding or obtaining a licence for any specific period not exceeding five years.

3. The rules also require the mandatory disqualification of the horse: Rule 1004(8) states:

1004(8) Any horse connected with a breach of sub-rule (1), (2), or (3) shall be disqualified from any race entered and/or liable to a period of disqualification not exceeding five years.

1004D Any horse which has been taken to a racecourse for the purpose of engaging in a race which is found to have administered to it or ingested by it any prohibited substance shall be disqualified from that race.

4. Sentencing Principles -

The four principles of sentencing can be summarised briefly

- Penalties are designed to punish the offender for his / her wrongdoing. They are not retributive in the sense that the punishment is disproportionate to the offence but the offender must be met with a punishment.
- In a racing context it is extremely important that a penalty has the effect of deterring others from committing like offences.
- A penalty should also reflect the disapproval of the J.C.A for the type of behaviour in question.
- The need to rehabilitate the offender should be taken into account.

The first three principles are particularly important here.

Relevant Precedents –

In addition to the sentencing principles the Judicial Committee should have regard to relevant precedents.

There are no previous positive swabs for Kava however the following have points of relevance as to the need to impose a penalty.

R.I.U. v J M Whittaker – 17 August 2015

Subject: Caffeine positive with a horse – fined \$1,000, costs \$1,800. Extract from Whittaker decision: *“RIU v L J Justice (2011) where that Committee stated penalties will be imposed for breaches of the rule which will recognise, reinforce and give effect to the pivotal significance of the rule in maintaining the integrity of racing, whether or not culpable conduct is involved. Naturally where culpable conduct is involved, penalties imposed will normally be greater than in cases where such conduct is absent but we think it is wrong and contrary to the intent and purpose of the rule to assume the absence of culpable conduct should attract no, or only a token penalty.”*

R.I.U. v P M Williamson – 10 December 2012

Subject: Procaine positive with a horse – fined \$3,500, costs \$350 to JCA. The source of the positive swab was not identified. *“Against those factors is the ever-present need to maintain the integrity of and public confidence in harness racing by adequately punishing the breach and deterring Mr Williamson and others from offending in a similar manner in the future.”*

5. Aggravating Features –

Mr Burrows cannot advise how the Kava came to be in the horse's system on the two racedays but specifically sought out a product to give a calming effect on the horse without seeking Veterinary advice. The horse then went on to win twice and be placed fourth in its next four starts. The two wins are subject to these positive swabs. Kava is inherently used to produce a drink with sedative, anaesthetic, euphoriant and entheogenic properties. Kava is used for its sedating effects.

We are dealing with two positives swabs. The first positive swab was not declared when the second positive swab occurred.

6. Mitigating Factors –

Mr Burrows admits full liability as the trainer and admitted the breach at the first opportunity and has cooperated fully throughout the investigation.

Mr Burrows has a clear record not having breached this rule.

Mr Burrows has been training for over 40 years and has trained 38 winners.

Conclusion –

The Racing Integrity Unit seeks a monetary penalty of a fine of \$10,000. The reason for this figure is that the JCA guidelines, 1st May 2015, have a starting point of \$8,000 for a first offence of presenting a horse with a drug in its system.

In setting penalty for two breaches this committee can take reference from *RIU v A L J Lynch*, 16 October 2015. Extract: *"In RIU v B Towers (15 May 2015), which related to 2 charges where the Defendant Towers failed to present his horse free of the prohibited substance namely Clenbuterol, the Committee in its written decision considered options for determining penalty for multiple charges. The Committee in Towers referred to RIU v Mclnerney noting that it was submitted to support the submission that when setting a quantum, the Committee could look to set the financial penalty for the second breach at a level which was half that of the original breach. An approach in line with that adopted in Mclnerney supports the view that to impose a quantum for each breach, albeit resulting from the same on-going action. As with the Beck decision the circumstances of Towers are slightly different to the present case, albeit the discussion on rationale for decision making offers something for this Committee to consider in determining penalty quantum for all 3 charges."*

Mr Burrows has to be given credit for the manner in which he has conducted himself during this inquiry and admitting the breach at the first opportunity. However, the onus is on trainers at all times to ensure that a horse in their care and control is completely drug free when presented at the races.

We also seek the disqualification of LIGHTWORKOFIT under Rule 1004(8).

7. The R.I.U. are not seeking to recover any costs in this matter.

Respondent's Submissions

[11] Mrs Burrows presented a lengthy written Submission on behalf of the Respondent which is now summarised:

1. Mr Burrows was granted a professional horseman's licence in 1976. He holds a Public Trainer and a Graduation Driver licences. He has trained a small team of horses for the past 42 years. He is a fully-qualified Farrier, specialising in corrective shoeing.

2. He turned 65 in 2016 and is now semi-retired. He and his wife own a small farm of 15 acres in North Canterbury where he trains horses that they have bred. He is well-respected in harness racing circles and is described by those who know him well as a quiet, reliable professional person who always acts with integrity. He has never come to the attention of the Racing Integrity Unit nor has he ever had a positive swab before.

3. Mr Burrows accepts that he has committed a breach of the Prohibited Substance Rule and that it is a serious matter. He was shocked when informed that LIGHTWORKOFIT had tested positive to Kavain. He had not heard of it. It is not a substance he would feed to his horses.

4. None of the samples of feed and supplements collected from the property registered the presence of Kavain and Mr Burrows has no knowledge of how LIGHTWORKOFIT tested positive to that substance and he certainly did not administer any banned substance.

5. He does not cover his training costs with the small number of horses that he trains. He trains, not for financial gain but for the love of the sport. Neither does he bet on his or any other horses.

6. It was impossible for any notification of the first positive to occur prior to LIGHTWORKOFIT racing again on 23 February, on which date the horse won again, otherwise the horse would not have raced.

7. Mr Burrows pleaded guilty at the first opportunity, was cooperative and assisted willingly in the investigation. He is deeply regretful and he and his wife have suffered much stress. He has no money to pay a fine and a fine will effectively end his 42-year career.

8. Mrs Burrows presented a "Personal Statement" which we do not reproduce here but which we have taken into account in arriving at penalty.

9. Character references were available from a number of named "Harness Racing Stakeholders".

[12] Mrs Burrows then made further oral submissions to the hearing.

[13] It would be "catastrophic", she said for Mr Burrows to have to pay a fine of the amount submitted by Mrs Williams (\$10,000). She urged the Committee to take into account the mitigating circumstances that had been put forward. Herself and Mr Burrows had no income at present and the training operation had not made a profit in a decade because of the "depressed" state of the industry. It was accepted that Mr Burrows would have to pay a fine.

[14] LIGHTWORKOFIT was a relatively old horse when he began racing and has been a hard horse to manage. He has always been drug-free. Mr Burrows has not had a positive swab in over 40 years in the industry. The Committee needs to signal to the industry that there can be "clemency".

[15] A public apology has been made on social media because she and Mr Burrows were so upset at what had happened.

[16] Mrs Burrows stressed that there would not have been a "second penalty" because the horse would not have been racing had they been aware of the first positive. The horse has since won again at Addington on 26 April.

[17] Mrs Burrows submitted that a fine of between \$3,000 and \$5,000 would be an appropriate penalty in the circumstances.

Reasons for Penalty

[18] The relevant penalty Rule for a breach of the Prohibited Substance Rule is Rule 1004 (7) which provides:

Every person who commits a breach of sub-rule (2) or (3) shall be liable to:

(a) a fine not exceeding \$20,000.00; and/or

(b) be disqualified or suspended from holding or obtaining a licence for any specific period not exceeding five years.

[19] The starting point for penalty for a breach of the Prohibited Substance Rule is provided in the Penalty Guide for Judicial Committees (effective 1 May 2015). For a first presentation offence, the Penalty Guide starting point is a fine of \$8,000. The Penalty Guide provides that "the starting point is just that: movement both above and below may (and usually will) occur". The Committee believes that the starting point of \$8,000 for the first breach is the appropriate starting point in this case.

[20] The Committee must, of course, have regard to the fact that Mr Burrows has been charged with two breaches of the Prohibited Substance Rule. Of course, the starting point in the Penalty Guide relates to a single breach. The Judicial Committee in the case of *RIU v C D & A D Edmonds (2016)*, a case which involved one horse and two charges arising from positive swabs two weeks apart, adopted the view that a totality approach was appropriate and took a starting point of \$12,000 on the basis of \$8,000 for the first breach and \$4,000 for the second breach. A similar approach has been taken in other cases involving multiple breaches and, in adopting that totality approach, the Committee is satisfied that \$12,000 should be the starting point in this case.

[21] The Committee, having established that starting point, is required to take into account aggravating and mitigating factors in the particular case.

[22] In the present case, as is the case in many or most other cases of presentation, the source of the prohibited substance, in this case Kavain (Kava), cannot be determined. Mr Burrows denied treating LIGHTWORKOFIT with any product containing that substance and no such product was found on his property. Neither the Informant nor Mr Burrows has been able to point to a likely source of the prohibited substance. The Committee has to deal with penalty on that basis.

[23] We cannot find any particular aggravating factors in this case. Mrs Williams in her penalty submissions highlighted an aggravating factor in that Mr Burrows had "specifically sought out a product to give a calming effect on the horse without seeking veterinary advice". This statement was not challenged by Mrs Burrows, which we take as an acknowledgement that Mr Burrows had treated the horse with a product intended to calm it. However, with no product containing Kavain having been found on the property and in the absence of any other proof, we are reluctant to draw the conclusion that such treatment was the source of the Kavain in the horse's system.

[24] Mitigating factors to which we have had regard are Mr Burrows' frank admission of the breach, his cooperation with the Racing Integrity Unit during the inquiry and his previous unblemished record over 40-plus years in the harness racing industry. These are significant.

[25] We have noted Mrs Burrows' submissions on behalf of her husband concerning their present financial position and the effect that a fine would have on them. The ability of a Respondent to pay a fine is one factor to which a Judicial Committee would normally have regard in fixing a fine in a particular case.

[26] The Committee notes that Mr Burrows accepts that a fine will be payable. However, he is concerned about the quantum of that fine and his ability to meet it. While impecuniosity may be a mitigating factor personal to a respondent, the Committee does not believe that to be the case here. Mr & Mrs Burrows admitted to ownership of a 15-acre farm in North Canterbury and, further, stated that they

would accept a fine of \$5,000. Those factors suggest that they are not impecunious to the extent that a fine would have a crushing effect on them. For those reasons, and because we have had no detailed financial statement presented in support of those submissions, we choose not to give any weight to financial position in this case

[27] From the starting point reached as above [paragraph 19], it is appropriate that Mr Burrows should receive a discount for the mitigating factors referred to in paragraph [23]. Mrs Burrows told us that character references were available. However, she saw fit not to actually produce any to the Committee so, unfortunately, in their absence, we can give no weight to these.

[28] After consideration, the Committee fixes the appropriate discount at 25 per cent.

[29] In arriving at a penalty of a fine of \$9,000, the Committee received considerable guidance from the *Edmonds* case referred to in paragraph [24] above. A fine of \$9,000 is consistent with the fine in that case, in which the facts were very similar.

[30] The Committee is satisfied that a fine of \$9,000 will suffice to satisfy the general purposes of sentencing which are well-established – to hold the offender accountable for his actions, to promote in the offender a sense of responsibility, to denounce the conduct of the offender and to deter the offender or other persons from committing the same or a similar offence. The Committee has also had regard, as always, to the important consideration of the need to maintain integrity and public confidence in Harness Racing.

Disqualification of Horse

[31] It is ordered that, effective from 7 May 2018, LIGHTWORKOFIT is disqualified from Race 8, Macca Lodge-Tuapeka Lodge-Denario Breeding Mobile Trot held at the meeting of New Zealand Metropolitan Trotting Club at Addington Raceway on 2 February 2018. Consequent upon the disqualification, the amended result for the race is as follows:

1st Speedy Command
2nd The Bloss
3rd Tijuana Taxi
4th Star Pride
5th Castleton Tui

[35] It is further ordered that, effective from 7 May 2018, LIGHTWORKOFIT is disqualified from Race 10, IRT Mobile Trot held at the meeting of New Zealand Metropolitan Trotting Club at Addington Raceway on 23 February 2018. Consequent upon the disqualification, the amended result for the race is as follows:

1st Mystical Star
2nd Westar Maggie
3rd Rachmaninov
4th Tijuana Taxi
5th Chivasion

[33] In the case of each of the above races, the Committee orders that stakes be paid in accordance with the amended result.

Costs

[34] Mrs Williams did not seek any costs in favour of the Racing Integrity Unit and, accordingly, no order is made.

[35] The hearing took place on a raceday and, in the circumstances, no order for costs is made in favour of the Judicial Control Authority.

R G McKenzie

CHAIR

Penalty: