

RACING APPEALS TRIBUNAL

QUEENSLAND

NOTICE OF DECISION

APPEAL NO: RT002-09

DATE: 12 March 2009

APPELLANT: Mr Shane Michael Thornbury

RESPONDENT: Queensland Racing Limited

APPEAL FROM: Appeal against the decision of the Stewards to impose a penalty of 6 months disqualification for a breach of Rule AR175(n). Appeal against finding and penalty.

BREACH OF RULE: Rule AR175(n)

DECISION: Appeal upheld.

APPEARANCES: J E Murdoch SC appeared on behalf of the Appellant.

Mr W R Birch, Acting Chief Steward, appeared on behalf of the Respondent.

REASONS FOR DECISION

Mr Brock Miller - Deputy Chairman

Mr Dennis Standfield - Member

The Appellant Mr Shane Michael Thornbury is a licensed trackwork rider. On the morning of Wednesday 4 February 2009 at Eagle Farm Racecourse, one of the horses which Mr Thornbury was working was the 4 year old mare Je Ne Sais Pas which is trained by Miss Cherie O'Neill.

An incident occurred with Je Ne Sais Pas which was referred to the Stewards by the Racecourse Manager Mr Bill Shuck. That incident is best described in the statement provided that morning by the Trackwork Supervisor, Mr Sean Ehlers to the Stewards which was Exhibit 2 at the Stewards Inquiry of 9 February 2009. The statement reads:-

“Statement in regard to incident at Track-work 4th February 2009

At approximately 6.00am this morning I observed the horse in question. This horse has proven to be a problem horse in the past. Yesterday morning Tuesday 3rd it proved difficult to work off from the 1800metre gap. It wiped around several times and caused problems to other horses working on the Dirt track.

This morning Wednesday 4th the same horse again proved difficult to get on the track. On its return the horse wiped around several times on the gap and adjacent the track-work hut. The next time I observed the horse the rider had dismounted near Rob Bradshaw’s tie-ups and was hitting the horse over the head with his whip. I yelled at the rider to stop hitting the horse to which he continued hitting it around the head. I observed the rider striking the horse around the head at least 5 times.

I informed both the trainer Cherie O’Neill and the rider Shane Thornberry that the horse would be restricted to the bull-ring only till its manners improved. I also spoke to Shane Thornberry regarding his actions and informed him that his actions were un-acceptable at Eagle Farm. Several licenses complained to me about the incident.

I reported the matter to the Racecourse Manager.

Sean Ehlers.”

The Stewards rightly carried out investigations concerning the incident and that same day the Veterinary Officer of Queensland Racing Dr Martin F. Lenz examined Je Ne Sais Pas at Miss O’Neill’s stables with Steward Mr Paul Gillard. Dr Lenz prepared a report of his examination of the horse which was Exhibit 10 at the Stewards Inquiry which stated:

“4 February 2009...

...The above mare was examined at her training yard on the morning of 4 February 2009. When first examined the mare was standing with her off side eye held slightly closed compared to the near side eye. Closer examination of the eye revealed mild blepharospasm (eye lids being held closed), mild conjunctivitis and mild localised corneal oedema (bluish discolouration in the normally transparent front part of the eye) in the off side eye. The near side eye was normal. These clinical findings are indicative of an eye that is mildly

inflamed. This clinical presentation would be consistent with the eye having received a blow (for example from a riding whip). In my opinion, it is unlikely for there to remain any permanent eye damage with correct treatment.

Please do not hesitate to contact me if I can provide any further information..."

Mr Paul Gillard obtained the Pro Cush whip used by the Appellant and took photographs of the horse's off side eye.

On the following morning, Senior Steward Mr Bevan Turner interviewed the following Licensees regarding the incident:-

Trainer Paul Dawson, Trainer Kelso Woods, Trainer Dwain Schmidt, Trainer John Flemming, Jockey Patricia Gesler, Apprentice Mitchell Wood

Transcripts of those interviews with the Licensees were obtained and on Monday 9 February 2009 the Stewards convened an Inquiry with respect to the incident. The Appellant and Trainer O'Neill were called to the Inquiry.

Prior to the commencement of the Inquiry the Appellant was provided with transcripts of the interviews taken by Steward Mr Turner. Those transcripts together with a letter from Mr Shuck, the letters from Mr Ehlers and Dr Lenz, the photographs of the horse and the whip were tendered as exhibits at the Inquiry.

The Chairman of the Stewards Inquiry was Mr Birch and when submitting the letters from Mr Shuck and Mr Ehlers he did ask the Appellant whether there were any questions of them and the following exchange occurred (Stewards Inquiry Transcript (SIT) Page 7 from Line 5)

“THE CHAIRMAN: No. Do you have any questions of them? In regards to their evidence?”

MR THORNBURY: Well, they are not here sir, so it is hard to question them.

THE CHAIRMAN: Well, they are available by telephone if you wish to question them in regards to anything contained in their letters?

MR THORNBURY: No, I do have questions of all the witness' statements though because none of them coincide with each other. They were all different.

THE CHAIRMAN: Alright. So you have questions of the witnesses that gave evidence?

MR THORNBURY: Yes Sir.

THE CHAIRMAN: Alright, which witnesses would you like to question?

MR THORNBURY: I'd actually like to talk to all of them, because from viewing points people have said that they have seen the incident and exactly where I was hitting it and all that, it would be almost impossible for most of them to see what they have apparently seen, because John Flemming was over at his stalls and the way the track and stalls are set up and I was out the front of Mr Bradshaw's stalls down between the railing and Mr Bradshaw's stalls, there is a brick, ah, wooden walls between us. So from over there to here, to see exactly where I was hitting that horse would be near impossible. Trish and Mr Kelso Wood was also up inside stalls, which are around the back and around the other side and never really viewed perfectly what was happening.

Mr Mitchell Wood was actually – I could even – I don't know what, what he actually seen or what he actually – it's a fantasy story. For a start his horse went round when I was actually coming in on the horse and took off just as – after I turned into the stalls, that's when his horse went round and took off. Right? He was going away from me and he apparently seen all this stuff happen.

THE CHAIRMAN: Okay. Well you have heard what has been alleged -----“

When asked how he would like to respond to the allegations the Appellant stated not guilty and further went on to give his version of the incident (SIT Page 8 from Line 23) as:

“MR THORNBURY: Well, this particular incident, the mare had been whipping around as they all started out on the track and working round; she had actually worked round with me. Ran into the rail a couple of times, near the half mile, actually interfered with Jackson Morris who was working one of Lindsay Gough's horses, and he said “I'd stop and help you but I can't because this is a colt” and I said that the least thing I wanted was more horses around me. And then she played up all the way in, still playing up on the concrete. She played up as I went past Sean and he actually sort of

hunted her from behind, she spun around and carried on all the way up with Mr Schmidt and Chris following me.

As I got up to the end of the rail, where I normally walk through and then walk up the inside of the rail up to our stalls, she started whipping round half rearing. There's a rail there, it's the end of the rail where the post and that is.

She almost hung herself on that, like, on three occasions, which then I had to dismount because I was concerned that she was going to put herself up over the rail and hurt herself. When I dismounted and gone to walk her, she's pulled back, so then yes, I do admit to hitting her, but I did not hit her on the head. I was on the near side of her and holding the bridle in one hand. Right? And I hit her on the neck and the shoulder. I probably hit her – probably – I'd say probably five or six times – I would say. And then Mr Dawson had said something from the other side of the wall and I probably hit her once or twice after he's said something. And then she stopped running backwards so I grabbed – then I just pulled her forward and we walked up to the stalls and I tied her up.”

The Appellant then went on to state that he could not have hit the horse on the off side eye because of the way in which he was holding the horse, contending throughout that he only hit the horse on the near side.

It is clear from the Appellant's statements that he disputes the transcripts presented to him by the Licensees and while admitting to hitting the horse on the near side near the neck, denied hitting the horse on the off side or in her head.

The Stewards then proceeded to call by telephone the Licensees who provided statements. The Licensees that they telephoned were Trainer Mr Paul Dawson, Jockey Ms Patricia Gesler and Apprentice Mitchell Wood.

In the telephone calls with these Licensees the Appellant questioned them with regard to the evidence they presented in their statements. In his written submissions to the Tribunal, Mr Murdoch has summarised the evidence presented by these Licensees which the Tribunal finds are correct summaries and those summaries state with respect to the Licensees who were called by telephone:

“12. Paul Dawson, trainer, initially said that he had seen the mare struck on the head and that Thornbury was on the mare's offside. However, it appears that he was looking from the stables at Eagle Farm where he

ties up his horses and that he was looking through panels of timber. As to the area of the head that was struck, he said it was the side of the face. He believed it was the offside.

13. *When cross examined by Thornbury, Dawson conceded that he had difficulty seeing completely, but that he thought Thornbury was hitting the horse with the whip. He appeared to concede that he may have been wrong in recounting what he had seen. He explained this by qualifying that it was a "bit difficult" for him to see.*

14. *Ms Gesler, trackwork rider, was sitting on a horse in a stall three stalls away from the incident. She did not have a clear view. There was wood "you can kind of see through them". She was of the view that the horse was struck over the head.*

15. ...

16. *Apprentice jockey M Wood gave a statement to the effect that Thornbury was "kicking the horse in the guts and bashing it uncontrollably". When cross examined he said there were between two and four kicks. Apprentice Wood was on a horse going in the opposite direction, he had his back turned but said he turned around. When asked if the whip went anywhere near the horses eye, he said it was towards the head and towards the "sort of neck end of the head". He couldn't really tell whether it went near the eye or not.*

17. *Apprentice Wood's versions are unreliable because he was on a horse heading in the opposite direction and his version of the horse being kicked in the guts and bashed uncontrollably, is inconsistent with the other versions.*

18. *The version given by Apprentice Wood that describes Thornbury kicking the horse two or three times in the belly is difficult to accept in the circumstances. Thornbury would have needed ninja like agility to hold the rein with his left hand just behind the bit, use the whip with his right hand and simultaneously kick the horse which was pulling backwards, at the same time."*

The Stewards went on to charge the Appellant with a breach of AR175(n) which states:-

“A.R.175. The Committee of any Club or the Stewards may punish;

(n) Any person who in their opinion commits or commissions an act of cruelty upon a horse, or is in possession or control of any article or thing which, in their opinion, has been made or modified to make it capable of inflicting cruelty upon a horse.”

The particulars given by the Stewards (SIT Page 38 from Line 35) were:-

“The specifics of the charge being that on the morning of the 4th of February 2009 at the Eagle Farm race course Mr Shane Thornbury you did commit an act of cruelty upon a registered race horse Jen ne sai pas by way of repeatedly striking the horse in the head area with your whip when dismounted.”

After being charged, the Appellant reaffirmed his plea of not guilty and stated that he did not strike the horse in the head. He did (SIT Page 39 Line 12) admit:

“I did hit it more than I should have and that – but there was no – I did not strike it in the head and I did not attack the horse or be totally cruel to the horse or anything like that. Okay. I probably – I was – frustrated at the time and I have probably vented a bit of anger towards the horse for her action and how she has been for the last three or four weeks. But in my opinion I have caused the horse no harm in any sort of way. I didn't hurt its eye – or any of that – or as I've been accused of hurting the eye – or hitting it on the right side of the horse or anything like that or striking it around the head. I hit it on the top of the neck. That's all.”

The Stewards deliberated on the matter and when finding the Appellant guilty did state (SIT Page 39 from Line 46):

“...The evidence of several witnesses interviewed independently and the evidence given before the stewards today satisfies us that you did strike Je Ne Sai Pas in the head with your whip and that, in our opinion, constitutes and act of cruelty.”

The Stewards then went on to consider penalty and imposed as a penalty a six month disqualification period.

With the matter now before the Tribunal it is incumbent on the Tribunal pursuant to Section 172(3) of the *Racing Act 2002* to make its decision on the material before the Tribunal.

There is no doubt that the issue before the Tribunal is whether the evidence it has before it reaches the required standard of proof that the Appellant repeatedly struck the horse in the head with his whip. While there were photographs taken of the off side eye of the horse with the inference being that this was caused by the Appellant, the Stewards did not specifically state that as specific of the charge. The Stewards have referred to the "head" while the Appellant states that he hit the horse on its "neck". While the difference to lay people may seem minor, there is a major difference to those in the industry where the striking of the neck can be considered as discipline with no lasting effects where if a horse is hit in the head, it could be cruelty and cause injury to a horse.

The question which the Tribunal has to consider is whether the evidence presented at the Inquiry by those who stated they observed the incident should be accepted as sustaining a breach of the Rule. In addition to the Licensees Paul Dawson, Patricia Gesler and Mitchell Wood, there were statements from Kelso Wood, Dwain Schmidt and John Flemming. Although the Appellant contested what they said in the transcripts of their statements, those Licensees were not called.

The charge before the Appellant is a serious charge. If found to have breached the Rule it will lessen his standing in the industry and his likely future employment. There is no doubt that the evidence required to satisfy a breach of Rule is at the higher end of the "reasonable satisfaction" standard as enounced by the High Court in *Brigginshaw v Brigginshaw (1938) 60 CLR*. The Tribunal cannot rely on those untested statements when they are disputed. The Tribunal fails to see why the Stewards did not have those witnesses available. While they may not have been able to be contacted by telephone, in such a serious matter as this the Inquiry could well have been adjourned. Indeed, even the act of calling the witnesses by telephone when there is such a serious charge is of concern to the Tribunal. While the practicalities of having evidence received this way is often acceptable, when there are serious charges witnesses should be available in person to be questioned rather than rely on written statements. The Tribunal simply cannot accept the statements of Trainers Wood, Schmidt and Flemming as reaching the required standard of proof as evidence of the matters stated therein. With respect to the evidence of Trainer Dawson, Jockey Gesler and Apprentice Mitchell Wood, the inconsistencies in those

statements as previously referred to are such that the Tribunal also cannot accept those statements as satisfying its standard of proof required.

The other evidence before the Tribunal is the evidence of Mr Sean Ehlers previously referred to. While Mr Ehlers stated that he observed the incident, his statement was not able to be challenged by the Appellant at the Inquiry because Mr Ehlers was not available. While in the statement there is reference to “hitting it around the head” there is no specific identification of where in the head it was hit and it may well have been in the neck area as contended by the Appellant. Again, the Tribunal is unable to rely on that statement.

The Tribunal is not satisfied on the evidence before it that a breach by the Appellant of Rule AR175(n) can be sustained and upholds the Appeal with respect to a finding of a breach of the Rule.

As the Appeal with respect to finding is upheld, it is not necessary for the Tribunal to consider the matter of penalty.

The Tribunal therefore orders:

1. Appeal upheld.
2. Appeal deposit fee be refunded to the Appellant.

Mr Brock Miller

Deputy Chairman

Mr Dennis Standfield

Member