

Appeal decision

Date: 19 March 2014

Code of racing: Harness

Appeal panel: Judge W Carter (chair), Mr G Casey and Mr D Kays.

Appearances: Driver Peter McMullen appeared on his own behalf.
Mr C McLune, stipendiary steward, appeared on behalf of the stewards.

Decision being appealed: Suspension of licence to drive in races for a period of four weeks – AR149(2).

Appeal result: Appeal dismissed.

Extract of proceedings – in the matter of the Happy 96th Birthday Roy McGaw QO Pace (C2+) over 2138 metres at Albion Park on 15 February 2014. Driver: Peter McMullen

THE CHAIRMAN: This appeal by driver Mr Peter McMullen is a consequence of a stewards' inquiry which was held at Albion Park on 15 February 2014. The stewards inquired into Mr McMullen's drive on The Falcon Legend in Race 4. In that race Mr McMullen's horse was drawn three on the front line, and one of the other horses in the race driven by Mr Dux was drawn wider at five on the front line. The other relevant horse, the one driven by Mr Dawson, came off the second line.

I would like to refer to the relevant rule. Rule 149(2) provides "A person shall not drive in a manner which in the opinion of the stewards is unacceptable." It appears that this rule was included after the inclusion of Rule 149(1), the well-known rule which requires drivers to use all reasonable and permissible measures in a race to ensure full opportunity to win or obtain the best possible place in the field. Decisions of other appeal tribunals make it clear that in respect of the application of Rule 149(1), the test in determining whether or not the driver failed to take the reasonable and permissible measures is an objective test. A mere error of judgement is insufficient. However, the cases point out that if in the circumstances of the particular race, that error of judgement is objectively viewed as being culpable or blameworthy, then the error of judgement is not excused.

The terms of Rule 149(2) are obviously different. In this case stewards allege that Mr McMullen drove The Falcon Legend in a manner which, in the opinion of the stewards, was unacceptable. It seems to us that the issue for this board is to determine whether the

opinion of the stewards that the drive was unacceptable, having regard to the circumstances of the particular race, was a valid and supportable opinion.

Mr McMullen had previously driven this horse and had on an earlier occasion driven it in a manner which was apparently more aggressive than his drive in this case. On the other hand, as Mr McMullen pointed out, that was a mile race. This was a 2138 metre race, and having regard to the difference, the previous race was effectively irrelevant to his drive here.

We are inclined to agree with that view. However, the circumstances of the race are what we must objectively assess to determine the validity or otherwise of the stewards' opinion that his drive was unacceptable. Clearly the horse driven by Mr Dux, which was driven from barrier five on the front line, is a fast horse which commences quickly. It should be noted on the other hand that it is not a horse of superior quality and in this particular race finished at the tail of the field. On the other hand, Mr McMullen's horse started favourite.

Be that as it may, Mr McMullen, who I should add is a very experienced and well-regarded driver, and, in the view of the stewards, is notable for his capacity to commence horses effectively, was drawn in a favourable position at three on the front line. He obviously was intent on leading at the beginning of the race. The concern is that Mr Dux's horse came over from an outside position of five on the front to challenge Mr McMullen's position and at that point Mr McMullen says he committed an error of judgment. Rather than not allow himself to become engaged in a speed battle with Dux's horse, he chose to hold off and he would add that, at that time Mr Dawson's horse, which came off the second line, came more quickly to his outside than he expected. He was then forced into a position on the marker pegs running in a third position where he was effectively kept for the remainder of the race. From that point his chances on the favourite were very significantly diminished, having regard to the way in which the race was run.

It seems to us that in all of the circumstances the stewards' opinion was a valid and acceptable one. What persuades us to that view is that, given that Mr Dux's horse with superior speed had obviously gone to the front, it was still within the capacity of Mr McMullen to drive his horse at a point where, notwithstanding Dawson's horse, he could have maintained a position immediately outside of the leader from where he could have gone forward, and as he told the stewards in inquiry, that was his intention – that in fact if Dux went to the front that he could move outside of Dux and then progress to the lead at an appropriate time.

Therefore it seems to us that given Mr McMullen's considerable experience, skill and reputation, it was well within his capacity to have driven the horse to the point where it could have maintained a position outside of the leader, and that of course would have put Dawson three wide.

We do not think that the suggestion of Mr McMullen that he was required to do what he did because the horse was hanging is a valid submission.

Accordingly, we think that this is a case where the stewards formed a valid opinion, which we confirm was an acceptable opinion, and that accordingly Mr McMullen was in breach of the rule. We agree with the stewards' opinion.

We turn to the penalty. The penalty of four weeks suspension was, having regard to the standard penalties which are imposed for breaches of this rule, on the lighter side. The stewards, it seems, took the view that whilst it was a culpable error of judgement on the part of Mr McMullen, nonetheless, in all the circumstances, the penalty should be slightly less than normal and on that basis stewards imposed a penalty of four weeks.

We do not think that in the circumstances a penalty of four weeks was a manifestly excessive sentence. Accordingly, we dismiss the appeal.

Further right of appeal information: The appellant and the stewards may appeal to the Queensland Civil and Administrative Tribunal (QCAT) within **14 days of the date of this decision**. Information in relation to appeals to QCAT may be obtained by telephone on (07) 3247 3302 or via the Internet at www.qcat.qld.gov.au