

DECISION

Racing Integrity Act 2016, sections 252AH, 252BM

Review application number	RAP-112	
Name	Leonard Cain	
Panel	Mr K J O'Brien AM (Chairperson) Ms J Maiden (Panel Member) Mr D Kays (Panel Member)	
Code	Harness	
Rule	Australian Harness Rule AHR 168(1)(e) <i>A person shall not before, during or after a race drive in a manner which is in the opinion of the Stewards:- improper</i>	
Penalty Notice number	PN-010522	
Appearances & Representation	Applicant	S Neaves (Instructed by Ryan Lawyers)
	Respondent	Queensland Racing Integrity Commission S Shinn
Hearing Date	17 September 2024	
Decision Date	17 September 2024	
Decision	Pursuant to 252AH(1)(b) the Racing decision is Varied <i>(delivered ex tempore)</i>	
Case References		

Reasons for Decision

- [1] This is an Application brought pursuant to section 252 AB of the *Racing Integrity Act 2016* for the review of a penalty decision made by Harness Racing Stewards on 10 September 2024.
- [2] The Applicant is licenced harness racing driver Mr Leonard Cain. On the 4th of September 2024, Mr Kane was the driver of the horse Three Machs in race seven on the Redcliff Harness Racing programme. Following that race, Stewards indicated an intention to conduct an inquiry into his drive of Three Machs.
- [3] The inquiry was in fact conducted on 10 September 2024 and as a consequence, Mr Cain was charged with an offence against Australian Harness Racing Rule 168(1)(e). He pleaded guilty to that charge and received, by way of penalty, a licence suspension of 21 days. He now contends that that penalty was excessive.
- [4] Australian Harness Racing Rule AHR 168(1)(e) provides that a person shall not before, during or after a race drive in a manner which is in the opinion of the stewards, improper.
- [5] The particulars of the charge against the Applicant are set out in the penalty notice as follows:
- Your actions near the 300 metres in raising your elbow and making or attempting to make contact with the head of Bertils Firefox and further, shortly thereafter, thrusting your head back and making or attempting to make contact with the head of Bertils Firefox was improper both from an animal welfare aspect as well a danger to runners in the field considering any potential negative reaction of Bertils Firefox.*
- [6] In his Application for Review the Applicant sets out his reasons for seeking the review as follows:
- The penalty is excessive in all the circumstances, but particularly in regard to:*
- a. Failing to have any or any proper regard to the dangerous circumstances in which the applicant acted in the alleged manner;*
 - b. Failing to have any or any proper regard to the competing obligations of the applicant at the time of the alleged incident;*
 - c. Failing to have any or any proper regard to the evidence of the appellant;*
 - d. Failing to have any or any proper regard for the circumstances personal to appellant*
- [7] At the Steward's inquiry the only witness who gave evidence was the Applicant himself. It is necessary to refer in some detail to the evidence which he gave. He is directed by the Stewards to an incident in the front straight with a lap to travel where the driver of the horse Bertils Firefox, Mr John Kerr, has allowed his horse to contact the Applicant's sulky wheel and flatten his tyre. When asked if that was correct the Applicant responded as follows:¹

¹ Transcript of steward's hearing lines 14-41

He (the driver of Bertils Firefox) contacted me multiple times. He contacted me as you stated at probably the 1,000m. He sort of hit that wheel, hit me, went back to the other wheel, hit it. Come back, hit me. I was yelling at him, grabbed off, that was fine. All over and done with. Going down the back again, probably the 600, same thing, run out, hit my wheel, run in, hit my other wheel, run over me, yelled at him again, got off me, no worries.

Then going down that last sort of straight before that home turn, my horse started to yield ground, I don't know if he was driving his horse forward or whether his horse was following a little bit or what it was doing, but he run over me and then he run over my wheel, again, both wheels, come at my inside wheel and started to actually get awfully close, like his knees – he was kneeling me in the back to start with and then his horse actually made contact with the crossbar of my sulky –the undercarriage of my sulky and that's when I went, this is too much for me, this is getting way too dangerous. I'd been yelling at him continuously throughout the race again at that stage. I think he just got to the point where he went...if you're going to yell and carry on, I'm just going to run over you and it just become too dangerous. Then that's when I sort of went, like I sort of tried to puff myself up to get the horse away because I was like, we're moments from – if he stands in the gig with me, he's going to go down, he's going to pull me down, there's going to be an awful scrimmage that doesn't need to happen. So yeah, just got – by that point of the race, it just got way too dangerous for me.

A little later, it was suggested to the Applicant that it appeared from the race footage that he had thrown his elbow into the air in an apparent attempt to strike Bertils Firefox and also thrown his head back to make contact with that horse. When asked to comment the Applicant replied:²

It got to the point where I was like literally sitting there going, we're going to go down in a second, something needs to happen. I'm yelling at him, he hasn't taken evasive action, I can't do anymore. He's starting to – his knees are starting to come over my undercarriage, like I stated and then when he's pulled back across my body, obviously if his knees are getting in my undercarriage, my seat's here, he's pulled back across my body, so he's smashed me on the way back through, plus I've started copping knees in the back again.

Like I say, sir, that's all, all I'm sort of putting it down to is the fact that I was in a desperate position where I went, if I don't try and sort of get this horse back off me, it's going to end awful, you know, like potentially.

Later still the Applicant was asked if he had reacted out of frustration. He said:³

² Ibid lines 69-81

³ Ibid lines 236-245

Not really sir. It was more, in a way probably yes, but it was more a movement of like if I don't do something, he's about to step in the sulky with me, like I was actually at the point where I was seeing him any second, like any stride, this horse is going to put its leg over my undercarriage and if that happens, it's not going to be good for anybody. So it was more just the thing of, oh, like get out of the way kind of thing before you do it, because like I say, like at multiple times when he was doing it, I'd keep yelling, Johnny, Johnny, Johnny, like I say, at the 1,000, the 600 and there again, every time I yelled but every time didn't seem to make a lot of difference to him.

- [8] In imposing penalty, the Stewards seem almost to have taken the view that a suspension was an inevitable outcome given the nature of the offence and the potential danger it created for other horses and drivers.
- [9] They considered it an aggravating feature that the Applicant did not "shift out" to avoid the unwanted attention of Bertils Firefox and its driver, even though the stewards expressly acknowledged that that would have put the Applicant "out of the race". They accepted that the applicant considered himself to be in danger and they made reference to his plea of guilty and to his good record.
- [10] The Applicant, it should be said, has no prior convictions for this offence.
- [11] Mr Neaves, who appears for the Applicant, argues that the Stewards have failed to have proper regard to the situation in which the Applicant found himself. The repeated contact from Bertils Firefox and the other driver created a situation of danger to which the Applicant responded in desperation,
- [12] Mr Neaves submits that his client had an obligation to ensure that his horse had full opportunity to obtain the best possible placing in the race⁴ and his failure to move wider cannot in the circumstances be seen as an aggravating feature of the offence. It is important, Mr Neave submits, that his client be dealt with for what actually occurred, not for what, as a matter of speculation, might possibly have occurred.
- [13] For the respondent, it is argued that the offence should be regarded seriously as it involves making or attempting to make contact with the head of another horse. Such conduct may be viewed unfavourably by the public and to that extent there is an issue of animal welfare involved. Aside from the risk involved for drivers and other horses such conduct, it is submitted, creates a poor image for the industry.
- [14] The Penalty Guidelines create for this offence a starting penalty of three months suspension of licence. Clearly "improper conduct" can encompass a very wide range of offending

⁴ AHR 149(1)

circumstances and consequently it is an offence which can result in a wide range of penalty outcomes depending upon the particular conduct⁵.

- [15] The Guidelines⁶ are said to have been designed to act as a general deterrent by ensuring that the penalty imposed on an individual for a rule breach is sufficiently serious to discourage other licenced participants from breaching the rule. The Guidelines also are said to take into account the need for specific deterrence, that is, that the penalty imposed on an individual for a rule beach breach must be sufficiently serious to discourage the offender from reoffending.
- [16] The imposition of a penalty in any given instance involves a balancing between the severity of the offence, the need for deterrence, both for the individual concerned and the industry generally, and any mitigating factors. All situations are assessed according to their individual merits.
- [17] The guidelines are set out a number of factors which can be of relevance in assessing penalty. These include the circumstances of the offence including any mitigating or contributing factors and the degree of culpability involved, that is, the degree of personal or moral blameworthiness of the person accused of the breach. Other factors of relevance include an early plea of guilty, the frequency of participation in the racing industry of the offender, the disciplinary record of an offender, and, where appropriate, the race status.
- [18] It is obviously of importance that tribunals such as this which impose penalties for offences should strive to achieve a level of consistency in the penalties that are imposed. There have been a number of particular cases identified here which is said to provide some guidance in this regard.
- [19] The first is a matter involving Driver Nathan Dawson, in race three at Albion Park on 28 March 2019. The circumstances as they are set out in the material indicate that Dawson, when approaching the 200-metre point, had leaned back in his sulky, and made contact with another horse which was trailing. Mr Dawson stated that when his horse was giving ground the horse with which he made contact had been racing over the back of his sulky for some distance and had struck his near side sulky wheel. He then deliberately leaned back in the sulky and thrust his helmet back in an attempt to fend off that trailing horse. Mr Dawson was charged with a breach of Rule 168(1)(e) to which he pleaded guilty and received a penalty of four weeks suspension.
- [20] The second matter is that of the driver A Sanderson in race four at Redcliffe on 16 September 2015. Mr Sanderson had leant back in his sulky and made contact with the head of a trailing horse at around the 400-metre mark. Mr Sanderson stated that that horse had connected his helmet on several occasions and in an effort to prevent this from recurring, he deliberately lent back in his sulky and thrust his helmet back in an attempt to fend off that horse. Mr Sanderson

⁵ See Document 15 - Index of documents – Offences under Rule AHR 168(1)(e) National

⁶ QRIC Harness Racing Penalty guidelines 2023 Para 3

was charged with a breach of Rule 168(1)(e) and pleaded guilty. After consideration, Stewards suspended his driver's licence for a period of four weeks.

- [21] There is no information provided as to the disciplinary record of either Mr Dawson's or Mr Sanderson, but both, as noted, pleaded guilty to the charge.
- [22] Reference is also made to the matter of driver John Stariha in Race seven at Albion Park on 30 April 2021. Mr Stariha was charged and pleaded guilty to an offence against AHR 168(1)(e) for his improper actions near the 1100 metre mark when another horse was racing over the top of the back of his sulky. He lunged back with his head, resulting in his helmet making contact with that horse, causing that horse to be checked momentarily, to shift out, and loose some ground. Stewards took into account the Mr Stariha's plea of guilty and his good record regarding this particular rule over a lengthy period of time. His licence was suspended for a period of 14 days.
- [23] The next matter involves driver Danielle Veivers in Race eight at Albion Park on 4 May 2021. Ms Veivers was "found guilty" of improper driving and her licence to drive was suspended for 14 days. She had thrust her head back approaching the 1400 metre mark of the race resulting in contact with another horse. The detail available of that incident is scant and it is not apparent whether Miss Veivers had pleaded guilty.
- [24] Finally, there is a matter of licenced driver Ricky Thurlow in Race two at Albion Park on 16 October 2021. Mr Thurlow moved his helmet in a backward motion at the 1100 metre mark, resulting in contact with the head of another horse causing that horse to race roughly for a short distance. In assessing penalty, the Stewards took into consideration mitigating circumstances in that the pace in the one wide line slackened. He received a penalty of 10 days suspension of licence.
- [25] There are some immediate observations to be made about these cases. Firstly, in the view of this of this Panel, none of those cases involve the level of "provocation" that was evident in this case. That element of mitigation was not present to the same degree in any of those cases. That is especially so of the cases of Dawson and Sanderson on which the Stewards appear to have focused. As indicated above, the Applicant was the only witness called at the Steward's hearing and his account of events has not been shown to be other than truthful. The conduct of the driver of Bertils Firefox in failing to properly restrain his horse contributed significantly to the ultimate incident and does much to reduce the degree of culpability involved in the Applicants offending.
- [26] This Panel must form its own view of the circumstances. We have referred to the features of mitigation which weigh in the Applicant's favour. The Panel does not accept that his failure to "shift wider on the track" can properly be said to amount to a circumstance of aggravation as that term is traditionally understood. He was entitled to his run and as he said at the hearing, the other driver has a duty of care and "shouldn't be running over somebody like that"⁷ Moreover, as Mr. Neaves rightly submits, the Applicant has his own duty to comply with the

⁷ Ibid lines 92-95

Rules including AHR 149(1) and should not have an obligation in these circumstances to effectively “put (himself) out of the race” as was suggested.⁸

- [27] The penalty guidelines refer specifically to issues of general and specific deterrence. The Applicant’s lack of relevant disciplinary history and the circumstances of the offence itself indicate that specific deterrence is not a factor of any great importance in this case. On the other hand, there is an issue of general deterrence to be acknowledged. Conduct of this sort must be regarded seriously if only for the potential harm, both to driver and horse, that can result.
- [28] Having regard to these matters and having regard also to the comparative cases to which we have referred, the Panel considers that the starting point here is something less than the four weeks licence suspension regarded by the Stewards. We consider in this case that the appropriate penalty could be reduced to one of ten days suspension of licence.
- [29] In the result pursuant to Section 252 AH(b) of the Act, the decision of this Panel is to vary the penalty imposed by reducing it to one of 10 days suspension of licence.

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⁸ Ibid Line 305