Queensland Racing Appeals Panel

DECISION

Racing Integrity Act 2016, sections 252AH, 252BM

Review application number	RAP-109	
Name	Mathew Neilson	
Panel	Mr K O'Brien AM (Chairperson) Mr P O'Neill (Deputy Chairperson) Ms L Hicks (Panel Member)	
Code	Harness	
Rule	Australian Harness Rules Rule 170(4)(b) *A driver shall not: - Attempt or allow his foot or leg to be placed in the immediate vicinity of the hind legs of the horse he Is driving*	
Penalty Notice number	PN-010439	
Appearances & Representation	Applicant	Self-represented
	Respondent	Queensland Racing Integrity Commission W Kelly
Hearing Date	3 September 2024	
Decision Date	3 September 2024	
Decision *(delivered ex tempore)*	Pursuant to 252AH(1)(c) the Racing Decision is set aside & a decision of not guilty is substituted	
Case References	*Briginshaw v Briginshaw & Anor* 1938 60 CLR 336	

Reasons for Decision

[1] Mr Matthew Neilson is a licenced harness racing driver. On 25 August 2024, following his drive on Digby Demon in Race 6 on the Lockyer (Gatton) Harness Racing program, Mr Nielsen was found guilty by Stewards of an offence against Australian Harness Racing Rule 170(4)(b).

[2] Pursuant to section 252AB of the *Racing Integrity Act 2016* he now comes before this Panel seeking a review of that determination of guilt. AHR 170(4)(b) provides that a driver shall not attempt or allow his foot or leg to be placed in the immediate vicinity of the hind legs of the horse he is driving. The particulars of the charge alleged that the Applicant allowed his foot to be placed in the immediate vicinity of the hind legs of Digby Demon, the horse he was driving.

[3] At the Steward's Inquiry the Applicant maintained that his foot had slipped accidentally from the stirrup pad and that his conduct had not been deliberate. Before this Panel, the Applicant maintains that he did not breach the rule. He maintains that his right foot had become detached from the sulky stirrup as his horse hung in and paced roughly after being unbalanced on the uneven grass surface of the track.

[4] Notwithstanding his evidence before the Stewards, he was found guilty of the offence. No reasons were given by the Stewards for that finding.

[5] He sets out in his Application for Review that this was the first time that Digby Demon had raced on a bumpy grass surface or had raced on a right-handed track. This was in fact the first time that this track, which had been used on the previous Tuesday for an eight horse Thoroughbred program, had ever been used for any harness racing trial or race.

[6] The Applicant is a very experienced trotting driver, having been a professional driver for some 25 years with more than 20,000 drives, including thirty Group One winners. In his professional opinion, the track was unsafe for racing. Pacing horses normally compete on shell grit or dirt tracks and are usually not familiar with grass tracks such as this. The Thoroughbred meeting of the previous Tuesday had been held on a soft track, which the Applicant considers had not recovered by the trotting meeting. The Applicant's submissions in this regard find support in the statement of Mr Patrick Kynoch, a committee member of the Lockyer Valley Gatton Turf Club. Mr Kynoch states[1]:

> *During the course of last Sunday's harness program, probably because of my position on the Race Club committee, several people mentioned to me how bad the racing surface was for trotters.*
>
> *I explained that the track the previous Tuesday had run an 8-race thoroughbred program on a soft track which no doubt would have played some part in the standard for the trotters subsequently.*
>
> *From what I was told at the trots there was dissent from some drivers about the standard of the track for trotters and their sulkies. There was a fall in the first race at the trots. I was told this didn't happen at the trots until after the fall in the first race.*
>
> *I can only go on what people told me, but it was quite a talking point at the trots the way that trotters weren't used to racing there or even racing on any of the few other grass tracks.*

[1] Witness statement, Annexure A, Application for Review

[7] The Respondent has argued before this Panel that section that AHR 170(4)(b) creates an offence of "strict liability" and, in support of that contention, makes reference to AHR 170(5) which provides that a driver who fails to comply with any provision of AHR 170 is guilty of an offence. That sub rule, however, is merely the offence creating provision and it does nothing to create a position of strict liability. AHR 175 is directed to the situation where there has been "a failure to comply" with some provision contained within AHR 170

[8] In the case of AHR 170(4)(b), this means a situation in which the driver has allowed his foot or leg to be placed in the immediate vicinity of the hind legs of the horse being driven. There can be no offence unless it is proven that the driver allowed his foot or leg to be so placed. Given this need to establish some element of fault and intention on the part of the driver, AHR 170(4)(b) cannot be regarded an offence of strict liability.

[9] As indicated above, the Stewards found the Applicant guilty of the offence. However, they provided no reasons for that determination. The responsibility of proof lies with the Respondent and the level of that proof is of course, in accordance with the balance of probabilities as that phrase was explained by the High Court in *Briginshaw v Briginshaw*[2].

[10] The meaning of the word "allow" may vary according to the context in which it is used. In the context of AHR 170(4)(b). it should, however, be given its primary meaning of permitting something to occur- that something being the placing of the foot or leg in the immediate vicinity of the horse's hind legs. This requires some conscious or deliberate conduct on the part of the driver. For there to be an offence against the Rule, it is not enough that the driver's leg or foot might at some stage come free, it must be placed deliberately or intentionally by the driver in the "immediate vicinity" of the horse's hind legs.

[11] This Panel must, of course, form its own view of the evidence and there are several matters to be considered in determining whether we can be satisfied of the Applicant's guilt to the required standard. They may be summarised as follows:

- The Applicant has been consistent throughout in denying any suggestion that he deliberately pushed his foot towards the hind legs of Digby Demon and in maintaining that his foot slipped from the footpad on the sulky and that his efforts to regain the footrest were prevented by the rough surface of the track. There is nothing to contradict his claim in that regard.
- There is no evidence to contradict the account given by the Applicant. He has been the subject of some criticism because he did not report any problem with a loose footrest to the Stewards, but it is to be said that he only became aware of that issue after the Inquiry and sometime after he had been found guilty of the offence and fined. In any event, there was no obligation of any kind upon him to do so.
- Importantly, there is here no allegation that the Applicant deliberately pushed his foot towards his drives hind legs or made contact with the horse's hind legs[3].
- There is no doubt on the evidence that the track was in a bumpy, even rough condition, following as this meeting did so closely after a thoroughbred meeting. There had previously been a fall in the first race on the programme that day. This was a grass track with which the Applicant's horse was unfamiliar. These matters, and the statement of Mr Kynoch, lend support

[2] *Briginshaw v Briginshaw*[2] 1938 60 CLR 336.

[3] Respondent Outline of Argument para 16

to the Applicant's account of how foot came free of the sulky footpad. The footage of the incident has been viewed closely by this Panel. In our view the action of the Applicant in the final forty metres or so of the race is consistent with his account. In any event, given the requirements of proof, we could not be satisfied that the Applicant's foot was in the "immediate vicinity" of the hind quarters of Digby Demon.

- It is argued for the respondent that the Applicant had opportunity to replace his foot on the foot pad had that been his intent. This incident took place over a distance of about 40 metres and occurred over a period of less than 3 seconds. It is enough to say that a close viewing of the race footage does not cause the Panel to doubt the Applicant's account.
- Finally, so far as the evidence is concerned, the Applicant is a very experienced driver, having ridden in more than 20,000 races. This is the first occasion upon which he has been charged with a breach of this Rule.

[12] Regarding these matters in their accumulation, this Panel is not comfortably satisfied that the offence is established on the evidence. Therefore, pursuant to section 252AH(1)(c) of the Act, the decision of the Panel is to set aside the racing decision and substitute a determination of not guilty.