23 December 2020

**DECISION**

**HARNESS RACING VICTORIA**

**and**

**FRED POSGATE**

**Date of hearing:** 3 December 2020

**Panel:** Justice Shane Marshall (Deputy Chairperson) and Mr Robert Abrahams.

**Appearances:** Mr Nicholas Murray appeared on behalf of the Stewards.

 Mr Fred Posgate represented himself.

**Charge:** Australian Harness Racing Rule (“AHRR”) 149(1) states a driver shall take all reasonable and permissible measures during the course of a race to ensure that the horse driven by that driver is given full opportunity to win or obtain the best possible placing in the field.

**Particulars of charge:** Fred Posgate, driver of The Verginian pleaded guilty to a charge pursuant to rule 149(1). The particulars of the charge being that there was both a reasonable and permissible opportunity for Mr Posgate to restrain The Verginian and obtain cover behind Bulldog Macray (A MacDonald) for a considerable distance into the front straight on the first occasion near the 1800m, passing the winning post on the first occasion near the 1600m and furthermore approaching and passing the 1200m. Mr Posgate’s failure to do so in the Stewards view was the main contributing factor in The Verginian tiring over the latter stages of the event to finish in 10th and last position to be beaten approximately 84 metres. In accordance with the HRV Minimum Penalty Guidelines, Stewards took into the account Mr Posgate’s guilty plea, clear prior record under the applicable rule, frequency in which he drives, the current regionalisation structure of racing and the degree of culpability which was assessed to be mid to high range in the circumstances. Mr Posgate’s licence to drive in races was suspended for a period of 5 weeks to commence midnightFriday 17 July 2020. A subsequent veterinary examination of The Verginian revealed no apparent abnormalities.

**Plea:** Not Guilty

**DECISION**

Mr Posgate has appealed to the Tribunal against a decision by the Stewards to suspend his licence to drive for five weeks in respect of the manner in which he drove his horse “The Verginian” (the horse) in race 1, The Euston Club Pace, at the Mildura Harness Racing Meeting on Friday, 10 July 2020.

Mr Posgate was charged with a breach of Australian Harness Racing Rule (“AHRR”) 149(1) to which he pleaded guilty. He has now pleaded not guilty to the charge and the penalty.

The hearing before us today is a complete rehearing of the relevant issues and the Tribunal is not bound by any findings of the Stewards which were made during the inquiry on 10 July 2020.

AHRR 149(1) states “a driver shall take all reasonable and permissible measures during the course of a race to ensure that the horse driven by that driver is given full opportunity to win or obtain the best possible placing in the field”.

The particulars of the charge are set out in paragraph 4 of the Stewards submissions. The Verginian led from the start of the race until shortly prior to the winning post with a lap to go, when it was eventually headed by Bulldog Macray, driven by Mr McDonald. Prior to that point The Verginian was challenged strongly for the lead by Bulldog Macray on several occasions, but Mr Posgate chose not to restrain his horse and take a trail behind Bulldog Macray. The Stewards submit there were both reasonable and permissible opportunities for Mr Posgate to restrain his horse and obtain cover behind Bulldog Macray in the front straight on the first occasion near the 1800m, passing the winning post on the first occasion, passing the 1600m, and again approaching and passing the 1200m. The Stewards state that Mr Posgate’s failure to do so was the main contributing factor to his horse tiring over the latter stages of the race to finish in last position, beaten approximately 84m from the eventual winner. Bulldog Macray fought on well to finish third in the race.

We have heard verbal submissions from Mr Murray on behalf of the Stewards and from Mr Posgate and we have read all the documents provided to us by Mr Posgate, the transcript of the Stewards inquiry, the submissions of the Stewards and the other documents provided by them and the various decisions provided by the Stewards and summarised in their submissions. We have also watched the race on several occasions.

During the Stewards inquiry, Mr Posgate gave evidence that his horse had been working “like a champion at home” and he was very surprised at its performance. He stated that “he’s working so well at home that I had no hesitation in holding the lead.” In the subject race Mr Posgate allowed the horse to run along on a loose rein without any restraint.

However, Mr Posgate also gave evidence that The Verginian has “a big problem”, as he is “an extremely nervous type “and “when he was pressured so much as he was then I think he just gave up the ghost and the nerves got to him.”

Mr Posgate also stated that the horse has done well leading in the past and he had no hesitation in wanting to lead on him.

We see from The Verginian’s race record, provided by the Stewards, that he has had 87 lifetime starts for two wins and 10 placings. His last win was in January 2018. On 28 June 2019 at Mildura he was driven by Mr Posgate when he led and withstood two challenges, led at the bell, but tired in the latter stages of the race to be beaten by 76.8m. Mr Postgate was suspended by the Stewards as a consequence of his driving tactics. The performance of The Verginian in that race was very similar to his performance in the subject race.

We note on the last three occasions that The Verginian ran a place prior to the subject race, (24 July 2019, 6 September 2019 and 26 June 2020) he showed gate speed at the start of the races and took up a position behind the leader in all three races. In the race on 6 September 2019, The Verginian led initially and then was restrained to take a sit behind the horse that was challenging it for the lead. Of these three races, Mr Posgate only drove The Verginian in the race on 26 June 2020.

The performance of The Verginian in running a place in these three races suggests to us that the horse can perform well when it is in a trailing position behind the leader. The Stewards, in their submissions, made several points including:

1. The lead time of the race was 42.1 seconds which is approximately 1.2 seconds quicker than the average lead time for the previous five-year period over the 2190m distance of the race.
2. The subject race was the lowest assessed National Rating event on the program and the lead time was the quickest lead time of the five races conducted over the 2190m distance at the meeting.
3. The first quarter of the last mile was recorded in 30.2 seconds which is 1.2 seconds quicker than the average recorded for the previous five years at Mildura over the relevant distance and was the quickest first quarter of the five races conducted over this distance at the meeting.
4. The second quarter of the last mile was recorded in 29.9 seconds, which is 1.2 seconds quicker than the average time recorded for this section at Mildura over the last five year period and for the relevant distance.
5. The first half of the last 1600m of the race was recorded in 60.1 seconds, which is approximately 2.5 seconds quicker than the average time recorded for this section of the race at Mildura over the last five year period and the relevant distance.

From these statistics, we accept that the race was run at a fast tempo for the class of horses involved, until the field reached the winning post with one lap to go and that Mr Posgate was aware of this as he stated so at the top of page 8 of the Stewards transcript.

The Stewards referred us to various decisions including the decision of Judge Goran in the case of Honan, the decision of Judge Williams in the case of Douglas, the decision of Judge McNab in the case of Mifsud and the decision of Judge Bowman in the case of Devcic. The Stewards quoted various passages from these judgments in their submissions. We are familiar with all of these decisions.

Mr Posgate referred us to the decision in the case of *McMullen v Racing Queensland Limited* [2012] QCAT 286. In the case of McMullen, the Board was concerned with the interpretation of rule 149(2) which states: “a person shall not drive in a manner which in the opinion of the Stewards is unacceptable”. In coming to its decision, the Board applied a test of what a reasonable and knowledgeable harness racing spectator might be expected to exclaim about driving tactics with words to the effect, “What on earth is he doing?” or, “My goodness, look at that”, or some such explanation. Although Rule 149(2) is similar in substance to Rule 149(1), it is not the Rule under which Mr Posgate has been charged.

The decisions referred to by the Stewards emphasise that, pursuant to Rule 149(1), a driver must at all times remember his responsibility to give his horse the full opportunity to win or gain the best possible place in the race. The Rule does not seek to punish a mere error of judgement or a split-second mistake, but driving tactics adopted in a race which are completely unreasonable so that they are regarded as culpable will be caught by the Rule. The Stewards have the responsibility to ensure that every horse is driven in a manner which will give it the best opportunity to finish in the best possible position in every race.

The case of Douglas related to a challenge for the lead in a race over an extended distance. At page 8, line 27, Judge Williams stated: “In the Tribunal’s view Mr Douglas can’t be excused for his inaction on the basis that the horse was simply running along under its own steam. Even if that was the case, the Tribunal is of the view that if restraint is called upon for a properly rated run, to give the horse it’s best reasonable opportunity, then that restraint must be exercised”.

A post-race veterinary examination showed that the horse had no obvious abnormalities and his heart rate was 96. In his submissions, Mr Posgate has submitted that, taking into account the findings in the veterinary report, the reason why The Verginian performed so poorly was that he had “thrown in the towel” and had stopped trying in the race. There was nothing Mr Posgate could do to rectify this and therefore he should not be found guilty of the charge. We accept Mr Posgate’s evidence that The Verginian is a nervous type of horse and this trait is well known to Mr Posgate. However, we refer to Mr Posgate’s evidence in the Stewards inquiry where he stated “when he was pressured so much as he was then I think he just gave up the ghost and the nerves got to him and he said that’s it I’ve had it you know” (page 4 lines 28-30 of the Stewards transcript).

The reason why The Verginian was “pressured so much as he was” was due in large part to the driving of Mr Posgate in not restraining his horse to take a trail behind Bulldog Macray during the race when there was ample opportunity for him to do so. As mentioned above, The Verginian has performed well and run places when he has been restrained behind the leader.

In addition, as stated above, in its race on 28 June 2019 at Mildura when it was driven in a similar manner by Mr Posgate to that in the subject race, it tired in the latter stages of the race to be beaten by 76.8m.

We reject the submission by Mr Posgate that the Stewards informed him that he should hand up the lead to a horse more favoured in the betting. We refer to the comments of Mr Murray in the transcript on page 9, lines 22 – 23 and 29 – 32, where he said “we’re not concerned about the starting price of the relevant horses” and “we place no weight on the starting prices of the relevant horses”.

Taking into account all relevant matters and submissions, it is our joint decision that we are comfortably satisfied that Mr Posgate displayed errors of judgement on several occasions during the running of the race by not taking reasonable and permissible opportunities that were available to restrain The Verginian to obtain a trail behind Bulldog McRae. The consequence was that he did not ensure that The Verginian was given full opportunity to win or obtain the best possible placing in the field. We therefore find that Mr Posgate breached Rule 149(1) in the manner that he drove The Verginian in the subject race and this is the decision of the Tribunal.

**PENALTY**

On the question of penalty, the Tribunal takes into account the previous transgressions of Mr Posgate under Rule 149(2) on 28 June 2019. We also agree with the Stewards that the transgression in this case was mid to high range. The original penalty of 5 weeks included a discount for a guilty plea before the Stewards. On appeal, the plea was changed to not guilty. The discount previously given ought to be removed. In the circumstances, we impose a penalty of 6 weeks suspension to commence at midnight on 12 December 2020, unless otherwise agreed between Mr Posgate and the Stewards.

We would add the following. Appellants are fully entitled to change their pleas. However, if a person receives a discount from the Stewards for a plea of guilty and then, an appeal, changes it to a plea of not guilty and is unsuccessful, that discount may well disappear. Of course, it will depend upon the circumstances of the individual case, but the Tribunal certainly does not encourage the obtaining of a discount followed by a fully contested appeal with the expectation that the original penalty will not be re-imposed.

Kathleen Scully
Assistant Registrar, Victorian Racing Tribunal