

Non Raceday Inquiry RIU v D C Fahey and J M Fahey - Reserved Penalty Decision dated 16 September 2019 - Chair, Mr R G

McKenzie

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE A JUDICIAL COMMITTEE

HELD AT CHRISTCHURCH

IN THE MATTER of the Rules of New Zealand Greyhound Racing Association

IN THE MATTER of Information No. A6656

BETWEEN PETER ROSS LAMB, Racing Investigator for the Racing Integrity Unit

Informant

AND DAVID CHARLES FAHEY and

JEAN MARIE FAHEY of Balcairn, Licensed Public Trainer Partnership

Respondents

Judicial Committee: Mr R G McKenzie (Chairman)

Ms O K Jarvis

Present: Mr P R Lamb, the Informant

Mr D C Fahey & Mrs J M Fahey, the Respondents

Mr S P Renault, Registrar

Date of Hearing: 30 August 2019

Date of Decision: 16 September 2019

RESERVED PENALTY DECISION OF JUDICIAL COMMITTEE

The Charges

[1] Information No. A6656 has been filed by Racing Investigator, Mr P R Lamb, against the Respondents, David Charles Fahey and Jean Marie Fahey, alleging that, "on the 28th June 2019, the Respondents, licensed trainers (in partnership) and persons in charge of the greyhound OPAWA HILARY who ran in Race 11 at the Christchurch Greyhound Racing Club meeting at Addington Raceway failed to present the greyhound to race free of the Category 1 Prohibited Substance, Codeine, being an offence under the provisions of Rules 61.1 and 61.3 and punishable pursuant to Rule 63.1 and 61.4 of the New Zealand Greyhound Racing Association Rules".

[2] Mr Lamb produced a letter dated 12th August 2019 from Mr M R Godber, General Manager of the Racing Integrity Unit, authorising the filing of the informations pursuant to Rule 66.2 a (Exhibit A").

[3] The informations were served on the Respondents on 13th August 2019. Mr Fahey completed the Statement by the Respondent on the information form indicating that the breach of the Rule was admitted.

[4] Mr & Mrs Fahey were both present at the hearing of the information and, following the reading of the charge and Rules to them, they confirmed that they admitted the charge.

[5] The charges were found proved accordingly.

The Rules

[6] The relevant rules provide as follows:

"61.1 The Owner, Trainer or Person in charge of a Greyhound Nominated to compete in a Race, shall produce the Greyhound for the Race free of any Prohibited Substance.

61.3 Without limiting any of the provisions of these Rules, the Owner and Trainer or person for the time being in charge of any Greyhound brought onto the Racecourse of any Club for the purposes of engaging in any Race which is found on testing, examination or analysis conducted pursuant to these Rules to have received a Prohibited Substance shall be severally guilty of an Offence.

61.4 Any Greyhound which competes in a Race and is found to be the recipient of a Prohibited Substance shall be Disqualified from that Race."

Facts

[7] Mr Lamb presented the following Summary of Facts:

1. The Respondents are Licensed Trainers and operate a training partnership under the Rules of New Zealand Greyhound Racing (GRNZ).
2. This partnership has operated for approximately 20 years.
3. They train 30-plus greyhounds from their kennels at Balcairn, North Canterbury and live on the property.
4. The Respondents train the Greyhound OPAWA HILARY, which is owned by Opawa Racing Ltd.
5. On 28 June 2019, OPAWA HILARY was presented to race in Race 11, 2019 Christchurch Casino New Zealand Stayers Cup (Group 1), at the Christchurch Greyhound Racing Club's meeting at Addington Raceway.
6. The greyhound finished 2nd in this race and was 7th favourite.
7. OPAWA HILARY earned gross stake money of \$6340.
8. The greyhound was post-race swabbed. Mr Lamb produced the RIU Sample Identity Record #148140 (Exhibit "B")
9. On 16 July 2019, NZ Racing Laboratory Services issued a certificate of analysis detailing the first sample positive to Codeine (produced as Exhibit "C")
10. Codeine is an opiate, commonly used for pain relief in humans.
11. Codeine is not a drug usually associated with the treatment of Greyhounds.
12. As Codeine is classed as an opioid drug, it would fall into Category-1 of the GRNZ Prohibited Substances list, i.e. substances that have the ability to negatively impact the performance of a greyhound. Mr Lamb produced a letter from Dr M L Jansen BVSc, Chief Adviser to GRNZ.
13. Another Greyhound trained by the Respondents was swabbed at the race meeting on the same night and it had returned a clear swab.
14. On 17 July, the Respondent David Fahey was interviewed at his property.
15. He could offer no explanation as to the presence of Codeine in the Greyhound.
16. The Respondent stated that OPAWA HILARY was fed nothing different nor had received any treatments that differed from his other greyhounds.
17. A search of his kennels and feed room failed to locate any items containing Codeine.
18. Subsequent inquiries found that a person assisting the Respondents with their greyhounds that afternoon and evening at the race meeting, was in fact taking prescribed Codeine medication for a recent work- related injury.
19. This person had direct contact with the greyhound, OPAWA HILARY, a number of times during the course of the afternoon and evening of the race meeting.
20. The "B" swab sample was subsequently sent for testing in Victoria, at the request of the Respondents.
21. This resulted in a Certificate being issued by the Racing Analytical Services Limited, Victoria, showing the urine 'B' sample to contain Codeine.
22. The Respondents have been licensed trainers for a number of years. They acknowledge a previous breach of the GRNZ Prohibited Substances Rule, being approximately 12 years ago.

Submissions of the Respondents

[8] Mr Fahey said that he and his wife were not entirely sure how OPAWA HILARY came to have Codeine in its system. However, he said, the most likely explanation was that the person who was handling the dog on the day, who had been in hospital after stabbing

himself in the stomach at his work as a butcher, had been prescribed and was using Codeine. Mr Lamb was able to confirm the hospitalisation and the prescribing of Codeine.

[9] As at the date of the race, they had never had Codeine near their kennels and were unaware that it was used on greyhounds. However, they have had it prescribed twice in the last month – once for a dog with a broken bone in its shoulder and again for a dog that had been attacked by other dogs.

[10] Mrs Fahey produced a letter dated 21 August 2019 (Exhibit “D”) signed by Lesley J Roberts BVSc, of Shirley Vet Clinic, which stated as follows:

“Codeine is not available in New Zealand as a Registered Animal Remedy. It is however regularly dispensed / prescribed as an effective treatment for severe pain in dogs, including greyhounds. This is “off label” use in the absence of an equivalent Registered Animal Remedy.

Having checked the client history, I can find no records of Codeine having been dispensed for animals under the care of Mr & Mrs Dave and Jean Fahey of 431 Terrace Road, Amberley, up to 31st July 2019”.

[11] Mrs Fahey said that OPAWA HILARY is a “hoover” – it will eat anything it finds. She accepted that it was unlikely that the Codeine was ingested by way of food. Another greyhound of theirs, tested on the same day, returned a clear sample. They were unaware whether that other greyhound had been handled by the same handler. With OPAWA HILARY, it was the first time that handler had handled in a Group race and he had been quite nervous.

Penalty Submissions of the Informant

[12] Mr Lamb presented the following penalty submissions:

1. The Respondents, Jean Marie Fahey and David Charles Fahey, are Licenced Trainers, in partnership, under the New Zealand Rules of Greyhound Racing (GRNZ).
2. They have been involved in the greyhound racing industry for many years, and operate a successful racing kennel in North Canterbury.
3. The Respondents have admitted one (1) breach of rule 61.1 and 61.3.
4. The circumstances are detailed in the above Summary of Facts, which has been agreed.
5. The charge, which the Fahey partnership has admitted, is an offence of “absolute liability”. It does not require that there be proof that the person concerned has acted deliberately in breach of the rules. The reasoning behind the imposition of offences of “absolute liability” is to ensure that however a breach may occur the person or persons responsible are held to account. As to the level of culpability, that is the opinion of the Committee reflected in the penalty that might be imposed.
6. Codeine is listed specifically in the GRNZ “Examples of Categories of Prohibited Substances” as a Category 1 Prohibited Substance. Chief Veterinary Advisor Dr Malcolm Jansen states: *In dogs, Codeine is poorly metabolised to morphine, sometimes not at all, and is excreted in the urine either unchanged or as codeine -6 glucuronide. Under the current drug classifications for greyhound racing, codeine is classified as an opioid drug in Category 1 substances that have the ability to negatively impact the performance of a greyhound.*
7. The GRNZ recommended starting point for a Category 1 offence is a 10-year disqualification.

8. Sentencing Principles –

The four principles of sentencing can be summarised briefly:

- Penalties are designed to punish the offender for his/her wrongdoing.

They are not retributive in the sense that the punishment is disproportionate to the offence but the offender must be met with a punishment.

- In a racing context it is extremely important that a penalty has the effect of deterring others from committing like offences.

- A penalty should reflect the disapproval of the Judicial Control Authority for the type of behaviour in question.

- The need to rehabilitate the offender should be taken into account.

The first principle is particularly important here.

Precedents -

9. RIU v GA Lawrence (02.03.2015) - 3x Morphine positives from an (initially) unidentified source. In this case the RIU sought a monetary penalty of \$3000 per charge with the JCA imposing a \$4000 fine and the three Greyhounds disqualified. This decision was appealed by the RIU (to have the charges quashed) following the subsequent identification of the source of the morphine being from

manufacturer contaminated kibble. The fine was reduced to \$2000.

RIU v E Duganzich (02.04.2019) – 3 x Dermorphin positives from an unidentified source. On this occasion, due to Expert opinion obtained by the RIU as to the effects of Dermorphin on a Greyhounds performance, the RIU sought a monetary penalty of \$10,000 fine (Category 4) or 6-month disqualification (Category 1). The JCA imposed a \$4000 fine and the 3 greyhounds disqualified.

These two cases in particular will assist the Committee on this occasion.

10. The following GRNZ cases (pre-penalty increase and Category guidelines) also involve Category 1 positives:

RIU v Allen (28.08.2014) – Morphine, one greyhound, poppy seeds from bread, \$2000 fine

RIU v Roberts (15.11.2012) – Morphine, one greyhound, poppy seeds from bread, \$2000 fine

NZGRA v McInerney (01.09.2010) – Codeine, one greyhound, source not identified, \$1500 fine

11. Penalty decisions for “Category 1” substances in the other two codes involving alleged contamination include:

RIU v Browne (01.09.2017) – Sotalol, NZTR, no clear explanation, \$4000 fine. Mrs Browne presented a thoroughbred horse to race with the prohibited substance Sotalol which is a human medication taken for abnormal heart rhythms. The medication was taken by a stable worker of which Mrs Browne was aware. Mrs Browne had a lengthy career in the thoroughbred industry and had an impeccable record. The breach was admitted by Mrs Browne and she was fined \$4,000 plus \$1,500 costs associated with the testing of the “B” sample and JCA costs of \$500

RIU v K & L Rae & K Williams (26.11.17)

Mr and Mrs Rae and Ms Williams presented a thoroughbred horse to race with methamphetamine at a very low level. Stable staff were tested with all persons providing clear results. Further testing conducted by the RIU found other licence holders at the Riccarton training centre were using methamphetamine. The breach was admitted and the JCA imposed no penalty other than the disqualification of the horse and \$1,250.56 costs associated with the testing of the “B” sample.

RIU v Chilcott (04.12.2013) – Tramadol, NZHR, possible human contamination, \$3300 fine

Ms Chilcott was charged with presenting a standardbred horse to race with a prohibited substance, namely tramadol. Ms Chilcott was legally prescribed the medication for a back complaint. She was initially unable to explain how the substance came into contact with her horse, however later believed it was through contact with the tongue tie of the horse after she took the medication. Ms Chilcott admitted the breach and she was fined \$3,300 and ordered to pay costs of \$1,400 to both the RIU and JCA.

Summary –

12. As in a number of these cases, there is no evidence in this case before the Committee to indicate that the drug was administered to either enhance or halt performance.

13. Category 1 Prohibited Substances are commonly known as “stoppers”. The intention for their use is to ensure that there was a negative impact on the dog and that it doesn’t perform well in its race. There is no evidence on this occasion of that being the case, as the dog finished 2nd, while being 7th favourite.

14. Analysis of TAB betting records revealed no unusual bets associated with the greyhound by either the Respondents or the dog’s owner.

15. Expert opinion from Dr Malcolm Jansen, Chief Veterinary Advisor to GRNZ states: *Although oral absorption of Codeine in dogs is quite low, it is rapidly cleared from the blood and would therefore be expected to appear in the urine quite rapidly, i.e within hours of administration. It is definitely possible that Codeine contaminated sweat could be licked by a dog and absorbed in sufficient quantity to be detected in urine.* This opinion supports a possible scenario which was put forward during the investigation into this matter. This avenue of enquiry has not been able to be proved or disproved.

16. Under Rule 61.4 the greyhound OPAWA HILARY is required to be disqualified from Race 11, The Christchurch Casino NZ Stayers Cup at the Christchurch Greyhound Racing Club’s meeting on 28 June 2019.

17. An order is sought for the prize money of \$6340.00 to be repaid by the connections of OPAWA HILARY - Opawa Racing Limited.

Mitigating Factors -

18. It is acknowledged that the Faheys and their employees have been fully co-operative with the investigation and the breach was admitted at the earliest opportunity after the “B” sample was tested and the result notified.

19. The Fahey training partnership has raced greyhounds throughout NZ for a number of years. There is only one previous acknowledged prohibited substance breach, occurring approximately 12 years ago.

20. The possibility is that this matter arises from human to greyhound contamination by an unsuspecting third party. This cannot be proved or disproved. It is acknowledged that this is a plausible scenario to which the Respondents had no input. Should that have been the situation, their direct culpability while not removed, is reduced.

Aggravating Factors -

21. The inability to identify, with any certainty, the source of the Codeine found in the swab sample of OPAWA HILARY. This implies a level of "carelessness" on behalf of the trainer(s) in not producing the Greyhound to race, free of Prohibited Substances.

Costs -

22. The RIU are seeking costs relating to the "B" Sample testing. An amount of \$1,200 is sought.

Conclusion -

23. Based on previous cases, the mitigating and aggravating factors as listed and the overall circumstances considered in this case, the RIU submits that a fine of \$5000 is appropriate.

Penalty Submissions of the Respondents

[13] The Respondents presented the following written penalty submissions:

1. We, the Respondents, Jean and Dave Fahey, have been training in partnership since 2001.
2. We have only had one other positive swab since we began as public greyhound trainers.
3. We confirm we have read the penalty submission prepared by Mr Lamb. Unless otherwise stated in this reply we acknowledge and accept the submission.
4. Our only other positive swab was from 10 April 2008, when AUSSIE OPAWA was mistakenly given "Scourban" in the withholding period. We immediately accepted full responsibility for administering a prohibited substance and co-operated fully with the greyhound enforcement authorities at that time.
5. From 1st August 2008 to 31st July 2019 we had 9379 starters without any other positive swabs. Of those starters we had 2647 winners of which we estimate 40-50% have been swabbed. The Respondents presented a schedule of swabs to winners trained by them over the last three months ("Exhibit E")
6. We have not been before the JCA for any serious behaviour breaches under the Rules of Racing of Greyhound Racing New Zealand.
7. As public trainers we are fully aware of the possible consequences of administering prohibited substances and take great care to ensure our racing greyhounds do not have access to any prohibited substances. We dispute the submission under Aggravating Factors (point 21) that there was carelessness. If we had suspected OPAWA HILARY had possibly ingested Codeine we would have scratched her from the race and consulted the raceday vet.
8. At the time of OPAWA HILARY's positive swab we were unaware that Codeine was a drug that could be used for the treatment of greyhounds. As public trainers we are fully aware of the dangers of giving human medicine or drugs to greyhounds as they could materially harm the greyhound.
9. Codeine is commonly prescribed for moderately severe pain in both humans and dogs. Category 1 Prohibited Substances under the rules of GRNZ are described as 'Substances that have the ability to negatively impact the performance of a greyhound'. Our question is whether Codeine would negatively impact the performance of a greyhound.
10. We confirm there was no intentional administering of Codeine to OPAWA HILARY. She did not have any injuries and was not under any treatment regime or had a change in feed before the date of the positive swab, therefore believe there was no intentional administering of codeine.
11. The two greyhound cases stated under point 10 of Penalty Submission, RIU V GA Lawrence and RIU v E Duganzich, refer to multiple Category 1 positive swabs. We have had a single positive swab and OPAWA HILARY has had two cleared swabs since her positive in June.
12. There has only been one other GRNZ related positive swab for Codeine in 2010 (Point 10 of the Informant's Penalty Submission) and the source of the contamination was not identified.
13. We understand that we must accept full responsibility for the accidental contamination which is a breach under the rules of Greyhound Racing New Zealand and accept any consequences of that offence.
14. The prize money of \$6,340 has been repaid to Greyhound Racing New Zealand on 2 September, the next business day after our hearing on 30 September 2019.

15. We accept that we will be required to pay the costs of \$1,200 relating to the "B" sample testing

Reasons for Penalty

[14] The penalty Rule is Rule 63.1.

63.1 Any person found guilty of an Offence under these Rules shall be liable to:

(a) a fine not exceeding \$10,000.00 for any one (1) Offence except a luring/baiting Offence under Rule 86; and/or

(b) Suspension; and/or

(c) Disqualification: and/or

(d) Warning Off.

[15] Greyhound Racing New Zealand has prescribed starting points for breaches of the Prohibited Substance Rule according to the category of the particular prohibited substance. In the present case, the prohibited substance, Codeine, is in Category 1 ("Substances that have the ability to negatively impact the performance of a greyhound"). The starting point for a Category 1 prohibited substance is disqualification for 10 years. The Informant did not seek a disqualification.

[16] As is more often than not the case in Prohibited Substance cases, there was no evidence from which we could establish conclusively how the Prohibited Substance came to be found in the greyhound, OPAWA HILARY. The Respondents submitted that the most likely source of the positive swab was the dog licking its handler, who had been taking Codeine, at the racetrack prior to the race and the Committee considered this to be the most likely explanation. We had the statement of expert, Dr Jansen, (para [12].15 above) confirming that codeine-contaminated sweat would appear in the animal's urine quite rapidly and be absorbed in sufficient quantity to be detected in a sample of that urine.

[17] The Informant accepted this a "possibility" or "plausible scenario" with no fault on the part of the Respondents, thus reducing their culpability. He did, however, believe that there was an implicit "level of carelessness" on the part of the Respondents. The suggestion of carelessness was refuted by the Respondents. They averred there was no intentional administration of Codeine, the dog having no injury requiring treatment, or change of feed, leading up to the race. However, it could be said that the Respondents should have been aware of the risk of a greyhound licking a person who was taking medication and, in not being so aware, they were guilty of negligence, even if only to a small degree.

[18] We found the Respondents' denial that they had administered the substance to OPAWA HILARY to be genuine and credible.

[19] In arriving at penalty, the Committee gained some assistance from the cases submitted by the Informant in his penalty submissions. The Respondents submitted that the cases of *Lawrence* and *Duganzich* could be distinguished on the ground that those cases both involved three greyhounds. The other three greyhound racing cases, referred to by the Informant, all pre-dated the introduction of the Prohibited Substance starting points and are, therefore, of limited assistance.

[20] In the *Lawrence* case, it was established that it was likely that kibble from Australia fed to the three greyhounds had resulted in positive tests to morphine. The Judicial Committee, at first instance, imposed fines totalling \$4,000. The fines were reduced on appeal to \$2,000 (\$1,000 on one breach and \$500 on each of the other two breaches). In the circumstances of that case, the Appeals Tribunal stated that it "doubted that Mr Lawrence had been guilty of negligence and that it is difficult to characterise his conduct associated with the breaches as culpable". The Committee has stated in para [17] above that the Respondents were guilty of some negligence in this case, albeit to a small degree.

[21] The Appeals Tribunal in *Lawrence* went on to say that, in the circumstances, the penalty should emphasise the need for deterrence and denunciation (notwithstanding the absence of culpable conduct) and the need to maintain integrity and public confidence in greyhound racing.

[22] The thoroughbred case of *RIU v Browne* (2017) is of assistance, in that it appeared that the likely source of the substance in that case, Sotalol, a medication used to treat and prevent abnormal heart rhythms in humans, was from a stable worker. The trainer, in that case, had also had a lengthy career in the racing industry and an impeccable record. The trainer received a \$4,000 fine.

[23] The Committee does not believe that the Penalty Guide starting point of 10 years disqualification is an appropriate starting point in this case. Compelling mitigating factors are the Respondents' frank admission of the breach, their conduct during the course of the investigation, their previous excellent record and the very low degree of negligence, if any. The Informant did not challenge the integrity of the Respondents as greyhound trainers.

[24] The Respondents have told us that, in the 11 seasons from 2008/2009, they started 9,379 greyhounds, for 2,647 winners. They estimate that 40-50% of those winners were post-race swabbed, with not a single one of those swabs returning a positive result. Further, they produced statistics showing that, in the months of June, July and August of this year, they trained 80 winners of which 37 were post-race swabbed and returned clear results. That record is nothing short of outstanding and is a significant factor in the Committee's arriving at the penalty in this case. In this regard, the Committee has not taken into account the previous breach which,

we were told, was some 12 years ago.

[25] Taking all of the above factors into account, the Committee is satisfied that a fine of \$2,500 is sufficient to emphasise the need for deterrence and denunciation and to maintain integrity and public confidence in greyhound racing.

Penalty

[26] The training partnership of Mr and Mrs Fahey is fined the sum of \$2,500.

Costs

[27] The Informant did not seek an order for costs and, since the hearing took place on a raceday, there will be no order for costs in favour of the Judicial Control Authority.

[28] The Respondents are ordered to pay to Greyhound Racing New Zealand the sum of \$1,200.00, being the costs of testing the "B" sample at their request.

Disqualification of Greyhound

[29] The Committee orders as follows:

1. That, pursuant to rule 61.4, OPAWA HILARY is disqualified from Race 11, 2019 Christchurch Casino New Zealand Stayers Cup at the meeting of Christchurch Greyhound Racing Club, held at Addington Raceway on 28 June 2019;
2. That, consequent upon the disqualification, the amended placings for the race are as follows:

1st 5 Dyna Weslyn

2nd 1 Perfect Result

3rd 2 Alotta Talk

4th 7 Shooters Hill

3. That the stake money of \$6,340 be repaid by the Respondents to Greyhound Racing New Zealand. We understand that repayment has already be made.

R G McKENZIE O K JARVIS

Chairman Panellist

Penalty: