

Appeal Board convened under the Equestrian Australia Limited By-Laws as modified by the By-Laws of the World Equestrian Games 2014.

Parties

Briana Burgess (Applicant)

Equestrian Australia Limited (Respondent)

Date: 6 August 2014

Venue: The offices of Lander & Rogers, 123 Pitt Street, Sydney, New South Wales.

Composition of the Board of Appeal

Mr Warwick Hunt, Chair

Ms Maryjane Crabtree, Deputy Chair

Mr Michael Hartung, Member

Parties and their Representatives

Briana Burgess by Peter and Elizabeth Burgess, Legal representative - Murray Deakin, K&L Gates

Equestrian Australia Limited by Grant Baldock and Chris Webb; Counsel assisting – Richard Redman.

Preliminary Matters

- 1 The Chair indicated the experience and background of the Board members and no challenge was made to the composition of the Board.
- 2 The Chair acknowledged the exceptional circumstances, namely the Applicant's absence being in Europe with her horse, La Scala, and the high stakes of the Appeal, as justifying legal representation of the Applicant. The Respondent had already consented to the Applicant's legal representation.
- 3 The Chair noted the service by the Applicant of an amended Notice of Appeal, and neither the Board nor the Respondent expressing any concerns in regard to the revised Notice was taken to be the relevant Notice for the Appeal.
- 4 Mr Baldock provided an appeal bundle of relevant documents, by consent, and also tendered a further document, being the letter confirming that the CEO of Equestrian Australia Limited (EA) had provided written approval of the determination by the Dressage Selection Panel (DSP) to remove the Applicant from the team list under Clause 7.3.1 of the Selection Policy 2014 World Equestrian Games Dressage (Selection Policy).

The Respondent's Opening and Argument

Mr Baldock presented EA's chronology of the relevant events commencing at the announcement of the World Equestrian Games (WEG) Dressage Team Long List on 24 June 2014; progressing through the first selection event at Fritzens, Austria; dealing with Hayley Beresford's circumstances; the events preceding the second selection event at Deauville, France; the Applicant's withdrawal from that event on 24 July; the decisions of the DSP on 28 July regarding the granting of extraordinary factors exemptions for the Applicant and for Kristy Oatley (with her second horse Louisa) resulting in their single scores (from Fritzens) being treated as their average score for ranking purposes; the naming of the Applicant in the WEG team having regard to that ranking and the subsequent determination by the DSP under Clause

7.1.3 of the Selection Policy to remove the Applicant from the team list. In the course of this chronology, Mr Baldock referred to the Veterinary opinions of Mr Graeme Potts, Australian Team Vet and Dr Klaus-Peter Neuberg, the Australian Dressage Vet (collectively "the Team Vets"), noting that only one written report was available to the DSP members at the time of their decision. He also referred to the Minutes of the DSP and the discussion between one of the Team Vets, Mr Graeme Potts, and the Chief Selector, Mr Richard King, on the morning of 29 July, and the role that conversation played in the decisions made by the DSP on that same day.

This chronology of events was not disputed and the parties agreed that the sequence of the DSP decisions had been:

- 1 To grant an exemption for extraordinary factors under Clause 7.1 of the Selection Policy in favour of the Applicant.
- 2 To name the Applicant in the WEG Dressage Team under Clause 2.3 of the Selection Policy. Accordingly the Team selected was:

Mary Hanna	Sancette	Average score: 70.850%	1
Lyndall Oatley	Sandro Boy	Average score: 70.550%	2
Briana Burgess	La Sacala	Average score: 68.820%	3
Kristy Oatley	Ronan	Average score: 68.760%	4
- 3 To remove the Applicant from the Team List under Clause 7.3.1, with prior written approval of the CEO of EA.
- 4 To add Maree Tomkinson and Diamantina (average score: 67.360%) as the fourth member of the Team previously selected, to replace the vacancy created by the removal of the Applicant.

The Applicant's Opening and Argument

Mr Deakin handed up a written chronology of events and indicated his intention to take the Board through those events, to present some up to date veterinary opinion on the current condition of La Scala, and to highlight the way in which the DSP had departed from the intended application of the Selection Policy.

Mr Deakin noted that the Team Vets' opinion on 26 July indicated that La Scala would likely recover quickly from the injury, and that the Team Vets had contemplated a review by the Applicant's own vet, the administration of Intra-venous anti-inflammatory treatment on 25 and 26 July, and a review by the Team Vets on 11 August. Mr Deakin argued that the timing of the determination made by the DSP interrupted the course of review contemplated by the Team Vets. He noted that in the reports of the Team Vets dated 31 July (a report and a summary which were not available to the DSP at the time of making its decision) improvement was noted from 3/5 lameness to 1/5 lameness. He submitted that the decision of the DSP to comply with the timetable annexed to the Selection Policy, calling for "Final Vet checks" on 28 July and a team announcement on 29 July was unnecessary, premature and forced the DSP to make a decision in the absence of information which, in the course of the timeframe contemplated by the Team Vets, would have permitted the DSP to make better informed selection.

He posited that it had been open to the DSP to take the "happy middle ground" of announcing a team, based on the rankings under Clause 2.3 of the Selection Policy, subject to a subsequent veterinary review which, if necessary, might have led them to make a decision to remove the Applicant under Clause 7.3.1, should La Scala fail to satisfy the Team Vets of his improvement and fitness to perform at the required standard.

Mr Deakin then tendered a report from the Applicant's private vet, Dr Julius Wegert, dated 5 August, and a follow-up email discussion, the effect of which he submitted established that La Scala, having had a period of treatment under Dr Wegert's supervision stabled at his clinic, was fit to train and compete over

the following weeks. Further, Dr Wegert's report confirmed that no FEI listed medications had been administered to the horse during the treatment period.

Mr Deakin accepted that for the Applicant's appeal to succeed, she must show that the DSP failed to apply the selection processes properly. He contended that:

- 1 That the DSP appropriately granted special dispensation to the Applicant under Clause 7.1.
- 2 Having granted that dispensation, the Applicant's single score from the first selection event stood as her score for ranking purposes.
- 3 This score placed her third in the rankings of the combinations on the WEG long list after both selection events.
- 4 Under Clause 2.3, as the third ranked rider, the Applicant must be included in the WEG team, the language of Clause 2.3 being mandatory.

The Chair tested this proposal by asking if the mandatory inclusion would also apply if a horse were "dead lame", and Mr Deakin agreed that it would so apply, subject to the removal power of Clause 7.3.1.

Mr Deakin submitted that having included the Applicant in the WEG team, if the DSP was entitled to exercise a discretion under Clause 7.3.1 on 29th July, it had been premature in doing so, as before doing so, it would need to have clear and unequivocal opinion on the condition of the horse, which was, at 27 July, unavailable to it.

Mr Deakin submitted that the requirement to make the decision on 29 July was self-imposed, as the DSP could have pursued the potential to seek an extension of time to make its decision, and that the materials showed that had it done so, the Board of the EA was supportive of granting an extension. However, inexplicably, the DSP had withdrawn that request. In complying with the original timetable, the members prevented themselves from properly evaluating the condition of La Scala, and led themselves into the position where they gave undue weight to the verbal comments of Mr Potts, relayed to the Chief Selector and then by him to the other members of the DSP.

Mr Deakin referred to inconsistencies between the verbal comments of Mr Potts, as relayed by Mr King, and the written reports of 31 July, and submitted that the DSP had consequently been compromised in their decision making process.

Mr Deakin further submitted that the decision making process of the DSP was flawed because it failed to have all horses on the list examined on the "Final Vet Checks" date of 28 July. However, he then accepted the information proffered by the Respondent in response that all horses were given Final Vet Checks on 26 or 27 July as their event schedule permitted.

Mr Deakin concluded that if the DSP had wanted to permissibly remove the Applicant under Clause 7.3.1, it ought to have reached an unambiguous view that La Scala would be unable to perform to the required standard at the WEG competition, not at the time of making the decision.

Mr Deakin discussed the categorisation of the injury as being "acute" rather than "sub-acute" or "chronic" and invited the construction that an acute injury ought to have provided less concern to the DSP.

On the proper construction of timing of the inability "to perform to the required standard", Mr Deakin relied with approval on the position of Jacqui van Montfrans of the DSP who had in earlier DSP discussions considered the effect of Clause 7.3.1 as relating to the question of whether La Scala would be fit to compete at WEG rather than at the present time. Mr Deakin additionally submitted that further time and review was necessary to inform such a decision.

Mr Deakin contended that the DSP ought either to have:

- 1 Postponed the decision under Clause 2.3; or
- 2 Made a decision under Clause 2.3, subject to the right of removal under Clause 7.3.1.

However, he submitted that instead, the DSP had put themselves in a position in which it was impossible to apply the Selection Policy properly. As a result, the DSP failed to:

- 1 Take into account the acute nature of the injury.
- 2 Properly apply Clause 7.3.1.
- 3 Act consistently with its own precedent, in which the DSP had given Hayley Beresford a period of two weeks to prove her horse's fitness, following the grant of a dispensation from competing at the first selection event. A similar period of time should have been allowed to the Applicant.

Mr Deakin outlined that the relief sought by the Applicant would cure the defective application of the Selection Policy by the DSP, such relief being to reinstate the Applicant on the WEG team list, subject to veterinary review on 11 or 12 August, at which time the horse will either be proved fit, or otherwise present as justifying its removal from the list under Clause 7.3.1.

The Evidence of Mr Richard King, Chief Selector

Then followed a discussion about the evidence to be drawn from Richard King if he were to be telephoned, and Mr Baldock outlined:

- 1 That Mr King could establish the nature of the formal assessment of La Scala's fitness to compete at WEG relevant to Clause 7.3.1.
- 2 The importance of the assessment being of La Scala's ability in the circumstances not merely to be sound enough to pass a trot up, but to be fit to compete at the required level to yield a score in excess of 68% of positive marks in the relevant dressage test.
- 3 The content of the lengthy telephone discussion between himself and Mr Potts on 29 July.
- 4 The relevance of the opinions of the Team Vets as opposed to the opinions of the Applicant's private vet.

Mr Baldock also submitted that Clause 2.3 cannot be read in isolation from the whole policy, it is mandatory as to the dates and the application of rankings, but the second part of the clause relating to the two selection events must be considered alongside the factors of discretion made under Clause 7.

Mr King was telephoned and the Chair put a series of questions to him:

- 1 Apart from applying the letter of the Selection Policy, were there any other factors influencing the DSP to make its decision on 29 July?

Mr King responded that the DSP was strongly of the view that delaying the decision would not improve the selection outcome and that the condition of La Scala was unlikely to improve in the potentially available timeframe.

- 2 Why did the DSP not proceed with the request to extend the time for making their decision?

Mr King said that the opinion of Mr Potts, as conveyed to him in the telephone call on the morning of 29 July, had "hardened" on his estimation of the severity of the injury and its impact on the ability of La Scala to compete at his full potential.

- 3 If there had been a longer period of time before WEG 2014 began, would the DSP have been more likely to allow the Applicant two weeks to re-present La Scala, as it had done with Hayley Beresford?

Mr King said that was possible, and it was the short remaining window for the horse to recover fitness and to work back up to peak performance before the WEG competition that influenced the DSP. He referred to Potts' opinion and the concern of the DSP about the horse's confidence to trust the injured leg in a high performance test.

4 Were the members of the DSP able to decide that La Scala could not perform at the required standard?

Mr King replied that the DSP were in significant doubt that La Scala could perform at the required standard and it had not been proved that he could.

5 Given that the parties were in agreement that the Applicant was selected at position three, then removed under Clause 7.3.1, and that the DSP then selected another team which had the effect of moving the fourth and fifth ranked riders up one place each, what effect did the exclusion from the team announced on 29 July have on the Applicant's status as a potential reserve?

Mr King replied that the DSP hasn't discussed the reserve position. Currently neither reserve horse has been passed sound. However, he would expect that if both pass sound, the Applicant would be in the fifth ranked position.

6 Given that there were three options for the DSP to take:

- (a) Extend the deadline for the decision; or
- (b) Do what they did; or
- (c) Include the Applicant in the team but set up a regime of satisfying the Team Vets of La Scala's fitness, with the potential prejudice of removal under Clause 7.3.1.

Why did the DSP not take the third option?

Mr King replied that at the time the DSP had to make their decision under the Selection Policy timetable, the DSP felt it could not include a horse that was unsound at the date that the announcement was to be made.

The Chair then asked, should the Appeal Board grant the relief sought by the Applicant, which is essentially to follow the third option outlined, what conditions should attach to the Applicant's reinstatement? Mr King was unable to comment on this without notice and consideration.

Mr Baldock had no questions of Mr King.

Mr Deakin asked:

1 How did Mr King categorise the injury as significant and serious given that only 10% of the tendon fibres were affected?

Mr King said that if the horse was his, and presented with this injury, he would regard it as significant.

2 How did Mr King evaluate the likely duration of the unsoundness?

Mr King said that Mr Potts had told him that there was a "high probability of tendonitis reoccurring, and that recovery would require a significantly longer period than two weeks".

Mr Deakin told Mr King that the characterisation of Mr Potts' opinion following the conversation was not reflected in similar terms in the subsequent written summary submitted to the DSP by Mr Potts and Dr Neuberg.

Mr King said that Mr Potts' opinion had hardened and the DSP had to make a decision that day. The DSP thought that even if the horse were to be re-examined, a two week period would not be sufficient to permit the horse to compete at his full potential. If his full potential was 68%, in line with his ranking score, and he was unlikely to reach that percentage, there was very little difference between his score and that of Maree Tomkinson's horse.

Mr King was released.

The Deputy Chair enquired whether the summary as at 31 July 2014 from the two vets had been sighted by Mr Potts and the Respondent confirmed that it had.

Closing Submissions by the Respondent

Mr Baldock submitted that, going through the timetable, the Applicant had not presented anything to indicate that the DSP erred in relation to the Selection Policy. The Applicant had asked for a dispensation and it had been given. She was included in the team pursuant to her ranking and subsequently removed on the basis of veterinary opinion, under Clause 7.3.1.

The Team Vets had inspected the Applicant's horse on three occasions, and every opportunity had been given to the Applicant. All other horses were examined and passed, drug free. Whether La Scala's injury was acute or significant is irrelevant, the DSP had the authority to remove an unsound horse from the Team List, with the CEO of EA's approval. Each of the three options available to the DSP were in line with policy, and the application of discretion under 7.1 had favoured the Applicant.

In summary, Mr Baldock submitted that the DSP had discharged their duty to apply the Selection Policy, and had done so without error.

Closing Submission of the Applicant

Mr Deakin submitted that the overall objective of the DSP is to ensure that the athletes and horses chosen are those likely to achieve the best possible result at the event.

Having regard to this objective, to exclude the third ranked combination on the incomplete evidence available at the time the DSP made its decision is not likely to achieve the best possible result.

The report of Dr Wegert establishes that La Scala is fit to compete at WEG level, and that is the most current assessment. For the Respondent to assert that the magnitude of the injury is not relevant to the exercise of its discretion under Clause 7.3.1 is an error. That clause requires the DSP to make an assessment of how the horse will compete at the event, to which issue the severity of the injury must be relevant.

The relief sought by the Applicant requires an appropriate assessment of La Scala's ability to compete and if he does not ultimately pass muster, then so be it.

The Applicant is just concerned to ensure that as the third ranked combination, she and La Scala are not unfairly excluded from the wonderful opportunity to compete for her country.

Reply of the Respondent

Mr Baldock raised two points:

- 1 He disputed that the DSP has not evidently tried to select the best team for WEG.
- 2 It is not relevant whether the DSP has committed an error of judgment, the Applicant must show that the DSP erred in application of the Selection Policy.

Reasons for Decision

The Appeal Board heard the submissions of the Applicant and the Respondent, reviewed the materials submitted by the Respondent, together with further materials handed up during the hearing of the Appeal (a letter from the CEO of Equestrian Australia Limited (EA) confirming his approval of the Dressage Selection Panel's (DSP) decision under 7.3.1, the Applicant's timeline, a table of dressage combination rankings and a report of Dr Wegert dated 5 August 2014 and ancillary email correspondence).

The Board have had the further benefit of a telephone call with the Chief Selector, Mr Richard King.

The Board was greatly assisted by the helpful, diligent and courteous approach taken by both parties, and the able representation of the parties by Mr Baldock and Mr Deakin.

The Relevant Factors

Briana Burgess, the Applicant, and her horse, La Scala, were named in the World Equestrian Games (WEG) Long List of Dressage Competition at WEG to be held in Normandy, France, in August and September 2014.

The Applicant competed La Scala at the first selection event at Fritzens in Austria between 4 and 6 July 2014. At this competition she obtained the score of 68.82.

La Scala suffered an injury to his right front flexor tendon just prior to the second qualifying event at Deauville in France on 24 July 2014.

La Scala was examined by EA Team Vets, Mr Graeme Potts and Dr Klaus-Peter Neuberg, and a course of treatment and review was recommended. Their opinion was written up in a report dated 27 July, which was provided to the DSP before its determinations of 29 July.

La Scala was re-examined by the Team Vets on 27 July 2014 and a report was written up dated 31 July, together with the document entitled "Summary as at 31 July 2014" which was seen by both Team Vets before being submitted to the Respondent. Relevantly, this document, or all its specific content, was *not* available to the DSP before its determinations of 29 July.

The DSP was required to follow the WEG Selection Policy Dressage (Selection Policy), which had as an annexure a timeline for the events of the selection process.

Apparently given the timeline proposed in that opinion, the DSP considered requesting an extension of the deadline for announcing the team to permit further time for review of La Scala's condition. Preliminary enquiry was made of the EA Board to ascertain the likely response to this course.

However, early on the morning of 29 July, the day prescribed in the timeline annexed to the Selection Policy, Mr Richard King spoke to Mr Graeme Potts about La Scala's condition.

Mr King understood, and reported back to the DSP, that Mr Potts' opinion of La Scala's condition "had hardened" on the severity of the injury, and the likely time for recovery that would permit the horse La Scala to compete at his full potential.

Mr King understood, and conveyed to the DSP, that if La Scala returned to full preparation for competition there was a "high probability of tendonitis recurring, and that recovery would require a significantly longer period than two weeks".

As a result, Mr King told the Board that the DSP had formed the view that even if La Scala were to be re-examined in two weeks, it would not have allowed sufficient time to permit a return to peak performance and therefore postponement of the team selection would not change the selection outcome. The DSP resolved to make its decision on 29 July. Mr King further reported that the DSP felt unable to include an unsound horse in the announced team. Therefore, the DSP resolved, on 29 July:

- 1 To make its team selection without delay.
- 2 Following the requirements of Clause 2.3 of the Selection Policy, to include the Applicant in the WEG Dressage Team as the third ranked rider, on the basis of the Applicant's single score from the first selection event, having previously applied a dispensation under Clause 7.1 of the Selection Policy.
- 3 On the basis of its understanding of the Veterinary opinion conveyed in the written report of the Team Vets dated 27 July and the oral account conveyed by Mr King of his early morning discussion with Mr Potts, to remove the applicant from the Team List under Clause 7.3.1.

Additional Information Available to the Appeal Board

The Appeal Board is seized of the following information not available to the DSP on 29 July:

- 1 Two additional reports written by the Team Vets, being a report of 31 July and a "Summary as at 31 July". These two documents differ in emphasis and effect from the expression of opinion taken into account by the DSP. In particular, the DSP understood that Mr Potts believed that "there was a high probability of tendonitis reoccurring" if La Scala recommenced full preparation for the WEG event. This phrase is not repeated in the written report nor in the summary of 31 July. Instead, the Team Vets observed that "there could no guarantees that tendonitis does not return when the soft tissues are placed under maximum athletic demand".
- 2 An updated report from the Applicant's private vet, Dr Julius Wegert, dated 5 August 2014, and a subsequent email exchange between Dr Wegert and Mr Deakin. La Scala had been under Dr Wegert's care since 27 July. The effect of these communications from Dr Wegert were that in his opinion, La Scala is now showing no lameness or response to flexion testing, and is now fit to train and compete, with intensive, supportive laser therapy. La Scala has not received any FEI listed medication while under the residential care of Dr Wegert (which he apparently had been since return from Deuville).

It is only permissible for the Appeal Board to have direct regard to this material as to the merits of the matter, if the Board is otherwise satisfied that the DSP failed to properly implement the Selection Policy.

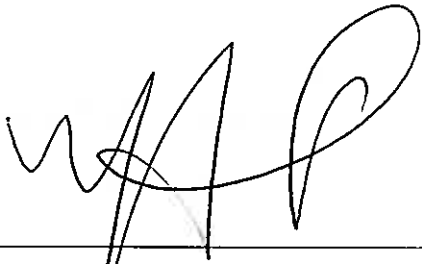
Findings

- The Appeal Board accepts that the DSP acted conscientiously to discharge its responsibility to select the best possible team for the WEG Dressage competition.
- The DSP's decision to apply the dispensation under 7.1 in the Applicant's favour was correct, given that the selection policy needed to be applied fairly across all members of the WEG long list. That similar dispensation had been earlier granted to Hayley Beresford and Jaybee Alabster meant a similar dispensation being granted to the Applicant and La Scala (and indeed Kristy Oatley and Ronan, as well) was a principled application of the selection policy.
- The DSP's decision to include the Applicant in the WEG Team under Clause 2.3 of the Selection Policy was correct. Indeed the PSG was *obliged* to make such a decision given the mandatory language of the relevant Clause.
- The DSP's decision to remove the Applicant from the WEG Team List under Clause 7.3.1 was incorrect in that, instead of reaching a properly informed opinion (if available on all the material then known to the DSP) that La Scala could not perform at the required standard at the WEG competition four weeks' hence, the DSP removed the Applicant from the Team List on the basis of *their doubt* that La Scala could perform at the required level. In effect, the Selection Policy was not properly implemented because the DSP unwittingly reversed the proper onus and consideration. Rather than being satisfied the subject combination *would* unable to perform at the required standard, the DSP considered it had not been proved that they could do so. The DSP also misdirected themselves by concluding that they could not include a horse that was currently unsound at the date of the Team announcements, in circumstances where it was open to them to seek an extension of the timeline to obtain more conclusive evidence of La Scala's condition and fitness to compete at the WEG competition itself, rather than his fitness at the time of the selection and announcement of the Team. A decision to postpone any consideration of excluding the Applicant and La Scala from the Team would have also been consistent with the way the Selection Policy was implemented in relation to having determined to give Hayley Beresford and Jaybee Alabaster a 2 week period to demonstrate soundness after the Fritzens selection event.

The Board therefore makes the following Orders:

- 1 It confirms, subject to compliance with directions set out below, the decision of the DSP made on 29 July confirming Briana Burgess and La Scala's selection as the third ranked combination in WEG Dressage Team.
- 2 It reverses the decision made by the DSP under Clause 7.3.1 of the Selection Policy on 29 July.
- 3 It directs the Applicant and the Respondent to collaborate such that the regime set out in the entirety of the second page of the joint report of the Team Vets dated 27 July be implemented.
- 4 It directs that unless the Team Vets advise the DSP at the conclusion of the regime referred to in paragraph 3 of these Orders, that the horse La Scala is unable to perform at the required standard given his veterinary presentation, the Applicant and La Scala retain their position as the third ranked combination of the WEG Dressage Team.

Date: 11 August 2014

A handwritten signature in black ink, appearing to be 'W. Hunt', written over a horizontal line.

Signed on behalf of the Appeal Board
Warwick Hunt, Chairman, Appeal Board