

**DETERMINATION AND REASONS FOR DETERMINATION OF THE
RACING PENALTIES APPEAL TRIBUNAL**

APPELLANT : Trevor WARWICK

APPLICATION NO. : A/30/08/126

PANEL : Mr J. Syme (Acting Chairman)
Ms P. Hogan (Member)
Mr F. Robins (Member)

DATE OF HEARING : 22 April 1993

IN THE MATTER OF an appeal by Mr Trevor Warwick against the determination made by the Stewards of the Western Australian Trotting Association on 22 March 1993 that he was guilty of an offence under Rule 364(a) of the Rules of Trotting and the subsequent imposition on him of a penalty of disqualification for a term of one year.

Mr M McCusker, QC, instructed by Mr J O'Halloran, appeared for the appellant.

Mr R J Davies, QC appeared for the respondent.

The charge against Mr Warwick was laid pursuant to Rule 364 of the Rules of Trotting (the Rules). The particulars of the charge were:

"That as trainer of The Storm Boy, an acceptor for Race 4, the Peter Newman Discretionary Handicap, at Gloucester Park on 27th November 1992, the pre-race blood sample upon analysis was found to contain the substance carbon dioxide at the level of 36.6 millimoles per litre of plasma which is in excess of the prescribed maximum quantity under Rule 365B of 35 millimoles per litre of plasma and therefore it is deemed that a drug capable of producing carbon dioxide has been administered." (P.141 Transcript of Stewards' Inquiry)

The Storm Boy was entered to participate in Race 4 at Gloucester Park on 27 November 1992. Before the race, two pre-race blood samples were taken from the horse. The samples gave a TCO² reading in excess of 35 millimoles. The horse was withdrawn and an inquiry opened.

On the afternoon of 27 November 1992 the Rules of Trotting were amended by deleting the definition of "drug" and substituting a new definition; by deleting the definition of "prohibited substance" and substituting a new definition; and by inserting a new rule, 365B. The new definition reads as follows:

"'Drug' in relation to a horse entered for a race means:

- (a) any substance capable of affecting the central or peripheral nervous system, the cardio-vascular system, the respiratory, alimentary/digestive, muscular/skeletal or urogenital systems, or the physiological buffering capacity of the body of a horse;
- (b) any hormone, vitamin administered other than orally, analgesic, tranquilliser, stimulant, depressant, anti-inflammatory drug or coagulant; and
- (c) any other substance used as an ingredient in formulating or preparing a drug or prohibited substance referred to in paragraphs (a) or (b) for the purpose of rendering the same in a form suitable for application, ingestion or administration.

"'Prohibited substance' in relation to a horse entered for a race has the same meaning as 'Drug'.

"365B. For the purpose of these Rules, where a sample from a horse is found to contain a substance described in this Rule in excess of the maximum quantity appearing opposite the substance then the horse shall be deemed to have had administered to it a drug or a drug capable of producing that substance.

Substance	Maximum Quantity
Carbon Dioxide	35 millimoles of Total Carbon Dioxide per litre in plasma
Cortisol	250 ng/mL in plasma, 1,000 ng/mL in urine."

These amendments came into effect by way of publication in the *Government Gazette*, it appears at about 3.45pm (p.22 Transcript Stewards' Inquiry) on 27.11.92.

Under Rule 1 of the Rules "Publicly Announced" is defined as "means and includes advertised or notified by advertisement...".

The amendments were made in direct response to the decision of the Supreme Court of Western Australia in the case of *Chambers* (Lib no 920602) which was handed down on 20 November 1992. In *Chambers* the Full Court of the Supreme Court considered the definition of "drug" as it was prior to the amendments which came into effect on 27 November 1992. The earlier definition of "drug" included the contents of paragraphs (a), (b) and (c) of the recently amended definition of "drug". However, the earlier definition also made specific reference to -

Any substance autogenous or prohibited by the Controlling Body, whether entirely or beyond prescribed levels, shall be deemed to be a drug or prohibited substance for the purpose of these Rules. For the purpose of determining whether any substance is a drug or prohibited substance under this definition any measure, level or quantity of such substance found by analysis on a horse, shall be deemed irrelevant unless such substance is an endogenous substance in a horse, or the substance has been declared by the Controlling Body to be a drug or prohibited substance if found in the horse to be present at a level prescribed by the Controlling Body.

The Controlling Body hereby declares the following to be prohibited substances:

- (1) Any quantity of sodium bicarbonate or other agent or agents which modify the physiological buffering capacity of the body of the horse, whether alone or in a mixture of substances, which when ingested by a horse is found to have produced a bicarbonate concentration, or total carbon dioxide concentration or blood alkalinity reading of a level to be determined by the Controlling Body or higher level....."

The appeal before the Full Court in *Chambers* was principally argued upon the basis that the Controlling Body had not set a level with respect to total carbon dioxide concentration. It was argued on the part of the Respondents to that appeal that the omission to prescribe a level was

irrelevant because there was evidence before the Stewards that sodium bicarbonate was a substance capable of producing carbon dioxide which in turn affected one or other of the horse's relevant systems. In his judgement, his Honour the Chief Justice stated, (at pages 33-34) -

"I am unable to accept this argument because sodium bicarbonate is an autogenous or endogenous substance. Consequently, it can only constitute a drug within that part of the rule which specifically refers to an autogenous or endogenous substance. The effect of the declaration is that sodium bicarbonate, whether regarded by the Controlling Body and an endogenous substance or as one specifically and separately prohibited, is only a "drug" for the purposes of definition if found to have produced a reading of the bicarbonate concentration, total carbon dioxide concentration or blood alkalinity of a level "to be determined by the Controlling Body". It follows that, in the absence of such a determination, sodium bicarbonate does not constitute a prohibited substance for the purposes of the definition."

The Controlling Body sought to overcome the difficulties with the definition as pointed out by the Full Court by not only setting a level contained within Rule 365B, but also by deleting any reference to autogenous and endogenous substances, along with any specific reference to total carbon dioxide concentration, within the definition of "drug".

At page four of the Transcript of the Stewards' Inquiry Dr Rieusset (Consulting Veterinary Officer WATA) was asked whether a TCO² level of 36.6 would be likely to affect a horse. The doctor's evidence was that -

"a level of that magnitude would...affect a horse's staying performance in as much as it would have a buffering effect on the lactic acid produced by the body. So in fact it would have an affect on the muscular-skeletal system and the cardiovascular system of a horse."

Such evidence is capable of bringing the TCO² level of 36.6 as found in a sample taken from The Storm Boy, within paragraph (a) of the definition of "drug", ie carbon dioxide (at the level of 36.6) is a substance capable of affecting the muscular-skeletal system and the cardiovascular system and the physiological buffering capacity of the body of the horse,

Rule 365B deems an administration of a drug or a drug capable of producing carbon dioxide to have occurred, when a sample from a horse is found to contain in excess of 35 millimoles of Total Carbon Dioxide per litre in plasma.

Ground 2.5

"There was no evidence before the second respondents on which they could properly rely to find or conclude that the sample taken from the horse contained a drug as referred to in Rule 364 or that the appellant was guilty of an offence under Rule 364."

It was argued by counsel for the Appellant that the deeming provision does not deem that the actual sample contained the prohibited substance (ie the substance which produced the carbon dioxide reading). Although Rule 365B does not deem the drug or a drug capable of producing carbon dioxide to be contained within the sample, Dr Rieusset's evidence describes the carbon dioxide, at the level at which it was found in The Storm Boy, as a substance capable of affecting various systems of the horse.

Under the definition of "drug", as amended 27 November 1992, carbon dioxide itself (as found in a blood sample at such a level whereby evidence is given that it is at such a level as to be capable of affecting a relevant system of the horse) is a "drug".

Ground 2.1 of the Grounds of Appeal would appear to be contained in paragraph (h) on page

3 of the Grounds for Appeal, namely:

By reason of the foregoing:

- (i) the Amendment is unreasonable; and
- (ii) the enforcing of the Amendment and the finding of the Second Respondents and the imposition of the penalty on the Appellant are unreasonable and contrary to the principles of natural justice.

Ground 2.2 reads "the Amendment is ultra vires and invalid because it:

- (a) has retrospective effect; and
- (b) is unreasonable."

The Tribunal is not persuaded that the amendment itself is unreasonable. The fact that it may be shown to have an "unreasonable" effect on a certain class of persons does not make the Rule unreasonable per se. There was no argument presented to support the contention that the amendment is ultra vires, nor was there any argument capable of sustaining the contention that the stewards acted contrary to the principles of natural justice.

Much was made of the fact that the legislation was amended at about 3.45 pm on the afternoon of the day of the relevant trotting meeting. It appears that this was approximately one hour before The Storm Bay was due to leave his stables to be presented at Gloucester Park two hours before his race. The Appellant's case is that he was not aware that a level had been set until his horse was in fact tested and a high level found. The Appellant sought to rely on the fact that following the decision of the Supreme Court in *Chambers* the Chief Executive of the WATA was quoted in *The West Australian* newspaper as saying, "the WATA will continue to take pre-race blood tests ... But no action would be taken against the connections of those horses (which exceeded the 35 mmol limit) until the new levels were set". It was argued that the statement implied that due notice would be given to all persons concerned with the setting of levels.

Mr Chambers was charged with breach of Rule 364 in relation to the presentation of one of his horses at a trotting race on 20 March 1992. There, pre-race blood tests revealed readings of 31.8 to 42 millimoles of carbon monoxide concentration in the blood. Mr Chambers' horse was withdrawn from the race due to the results of the pre-race samples.

The Appellant was reluctant to concede that he had any particular knowledge of the *Chambers* case. The Tribunal finds it difficult to accept that any person involved in the trotting industry, particularly to the extent that the Appellant is involved, would not be aware of the particulars of the *Chambers* matter.

The Appellant did indicate that he was aware that it had been an offence to use bicarbonate for 12 months (p.29 RPAT transcript).

The Tribunal had before it several newspaper clippings which appeared in *The West Australian* following the *Chambers* decision. One of those reports (reported 26/11/92) stated that a level had been set (indeed, the headline was "Bicarb Level Set") and that "any horse whose

bicarbonate level is more than 35 mml will be deemed to have been administered a drug and the trainer dealt with under the drug rules. WATA Chief Executive Rob Bovell said yesterday the new level would be in force at tomorrow night's Gloucester Park meeting." The Appellant denied any knowledge of that particular article and it was put forward on his part that it was contained in the Greyhound section of the sports page. This article was adjacent to racing and trotting results but was in heavier print which made it stand out to some extent, with the headline "Bicarb level set" in the usual bold letters used for headlines. The whole article was accentuated by a ruled line, making it stand out from the racing results. It is difficult to accept, particularly given the publicity surrounding the *Chambers* decision that the Appellant was not aware that such a level had been set and would be in force from 27 November 1992.

Even if the Appellant was not aware of the date of effect of the amendments to the Rules of Trotting; nor the fact that such amendments had indeed been made; or if he could not reasonably have been expected to be aware of such amendments, it is difficult to determine on the evidence before the Tribunal, whether the amendments in fact had a retrospective effect. It appears that the retrospectivity argument was based on the notion that the carbon dioxide found in The Storm Boy could only have arisen by virtue of the feed he had been given in the days leading up to the race. The Appellant's evidence was that The Storm Boy (as were all of his horses) was fed on 3 occasions on 27/11/92. "He was fed no different, he was...fed on 3 occasions on that particular day. Each occasion was exactly the same as the other horses...." (p.20 RPAT transcript). The Appellant gave evidence about feeding the horse and that it had potassium and Salcolite in its feed, that it did "have alkalisising agents to a degree", that all his horses were always given such "additives" (p.28 RPAT transcript) There was also evidence that certain substances containing alkalisising agents were "fed on a very small scale, to the horses in what you term the 'jog-up stages'. And as the high intensity of workload increases, so you intensify those particular products." (p.57 RPAT transcript) It would appear from such evidence that it is unclear as to when alkalisising agents were last fed to the horse prior to the race. It is also unclear whether notification of the level having been set at 35 millimoles per litre would have had any impact on the Appellants feeding program. After all, he was adamant that all of his horses were fed in the same manner, and it appears that none of the other horses produced the high TCO² readings.

Ground of appeal 2.6 is:

"If the Second Respondents were entitled to find that the sample taken from the horse contained a drug, they should have found that the Appellant had taken all proper precautions to prevent the administration of a drug to the horse and accordingly by virtue of Rule 364A(ii) was not guilty of an offence.

Under Rule 364A the onus is upon the trainer to satisfy the stewards that he took all reasonable and proper precautions to prevent the administration of a drug.

In this case the Appellant's argument appeared to be that in the lead up to this particular race he had fed his horses in the same manner as he had been doing for some time. His evidence was that he simply could not understand how the high reading was achieved. A proposition put forward by the Appellant's counsel was that the Appellant had fed his horses additives on an every day basis without realising that such additives could effect the levels of TCO² to the extent that occurred in The Storm Boy on 27/11/92. It was argued that it is impossible to take precautions when one doesn't know that a particular level has been set or is about to

be set. It was argued that "it should have been accepted that the trainer took all reasonable and proper precautions because during the days leading up to the race there is no evidence but that he fed the horse in the normal way and in accordance with the way that he fed the other horses in the stable..." (p.12 RPAT transcript) The evidence of the Appellant and the submissions made on his behalf went no further than that. There was no evidence upon which the stewards, or this Tribunal, could be satisfied that the Appellant took all reasonable and proper precautions to prevent the administration of a drug such that a level of 36.6 TCO² was found in the horse.

We confirm the finding of the Stewards that the Appellant was in breach of Rule 364. The Appeal against conviction is dismissed.



J F SYME, ACTING CHAIRMAN



F C ROBINS, MEMBER



P M HOGAN, MEMBER

21 JUL 1993



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Ms P. Hogan (Member)
Mr F. Robins (Member)

DATE OF HEARING : 21 July 1993

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This is the Tribunals unanimous decision:

The Tribunal is persuaded that these are unique circumstances which cannot be repeated unless the rules are amended again. The Tribunal has considered the Appellants record of over 30 years as a trainer and we can distinguish this case from those cited to us where disqualifications were imposed, particularly in view of the short period available to the Appellant to respond to the changes in the rules. In our view disqualification in these unique circumstances is too severe a penalty.

The disqualification is set aside and the Tribunal imposes the maximum fine available of \$2,000.

The fee paid on lodgement of the appeal is forfeited.



J F SYME, ACTING CHAIRMAN

