

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)

APPELLANT: DANNY LALICH

APPLICATION NO'S: A30/08/368
A30/08/369

PANEL: MR D MOSSENSON (Chairperson)
MR P HOGAN (Member)
MS P HOGAN (Member)

DATE OF HEARING: 21 AUGUST 1997

DATE OF
DETERMINATION: 20 NOVEMBER 1997

IN THE MATTER of appeals by Mr D Lalich against the determinations of the Western Australian Turf Club Stewards on the 16 June 1997 imposing concurrent disqualifications of 3 years for breach of Australian Rule of Racing 175(h)(i), and of 2 years for breach of Australian Rule of Racing 175(h)(ii).

Mr C McLeod, instructed by Talbot & Olivier, represented the appellant.

Mr RJ Davies QC represented the Western Australian Turf Club Stewards.

BACKGROUND

On the 16 June 1997 the Stewards of the Western Australian Turf Club conducted an inquiry into a report from the Australian Jockey Club Analyst relating to the samples taken from the racehorse CASEY which was trained by Mr Lalich. CASEY had been presented to race in Race 7 the Grafton Electrics Class Two Handicap over 2200 metres to be run at Northam on the 12 June 1997. Acting on a report from racecourse investigator Mr Ron Goddard and his assistant Mr Greg Mackintosh, CASEY was withdrawn prior to the race and urine and blood samples were ordered to be taken from the gelding. The

preliminary screening of the blood sample by the Australian Jockey Club Laboratory indicated a plasma total carbon dioxide reading of 40.1 plus or minus 1.2 millimoles per litre. The 2 reserve blood tubes of samples were sent to the Racing Analytical Services Ltd for confirmatory analysis. The report from the latter showed the blood sample to have a plasma total carbon dioxide reading of 39.0 plus or minus 1.2 millimoles per litre.

During the course of a rather extensive inquiry Dr Symons the Veterinary Steward gave evidence. Dr Symons referred to the fact that the 'Guidelines for the Classification of Prohibited Substances', produced under the auspices of the Principal Clubs, categorise large doses of sodium bicarbonate or other alkalinising agents giving rise to a plasma TCO_2 in excess of 36.0 mmol/l as being Category 2 potent performance/behaviour affecting substances. This category is the second most serious category of the 4 categories spelt out in the Guidelines.

Mr RJ Goddard, the Racecourse Investigator, also gave evidence before the Stewards. Mr Goddard read a report prepared for the inquiry in which he stated that in the company of Mr Macintosh he kept Mr Lalich under constant surveillance from early in the afternoon on the 12 June 1997. He observed Mr Lalich drive to 104 Withers Street, Northam. Mr Goddard described what happened subsequently as follows:

'There were no horses in the float when he returned. Mr Lalich and Mr Viskovich alighted from the vehicle and Mr Lalich removed some ropes from the side door of the float and then walked into the yard and walked the brown horse with the white star on the forehead to the float. After a few minutes the horse was put on the float. Mr Lalich then drove it towards the Northam Race Club towing the float and Mr Viskovich a passenger in the vehicle. When about 500 metres from the Northam Racecourse, Mr Lalich stopped his vehicle, he alighted from the drivers door and Mr Viskovich alighted from the vehicle. Mr Lalich walked to the rear of his vehicle where he met Mr Viskovich. I observed Mr Lalich open up the rear section of his vehicle and remove a white coloured bucket type container from the right rear section of his vehicle. He also removed a length of tubing and some other items, I could not quite identify which he handed to Mr Viskovich. Both Mr Lalich and Mr Viskovich disappeared from my sight towards the left front of the float. There is a door in that section of the horse float. The time then was about 1.34p.m. While Mr Lalich

and Mr Viskovich were in, in the float, in the front of the float, Race 3 at Northam Racecourse commenced. After about three minutes Mr Lalich and Mr Viskovich returned to the open rear section of the vehicle. Where I observed Mr Lalich place the small white container in the right rear side corner of his vehicle with other items. Mr Lalich then closed the rear section of his vehicle and drove off towing the float with the horse in and Mr Viskovich as a passenger. He drove into the float area of the Northam Racecourse, where he unclipped the rear tail gate of the float, removed the brown horse from the float and walked it into the stall area. I checked the brands and markings of this horse and identified it as CASEY the same horse I observed Mr Lalich placing on his float from 104 Withers Street, NORTHAM a short time earlier. CASEY was in stall 102 near the Northam Race Club Office. In company of Mr Mackintosh I reported my observations to Mr Wagener the Stipendiary Steward in charge of the race meeting. I made inquiries at the Northam Race Day Office and was advised that Mr Lalich's three runners LADY SUPREMO, LIGHTSTORM and CASEY were paid up for prior to the running of the first race. On Mr Lalich reporting to the scale area to collect the saddle for CASEY being Number One in the Seventh Race, I asked him to accompany me to the Stewards Room which he did. At the Stewards Room, I outlined part of my observations to a Stewards Inquiry. On leaving the Stewards Room I attended Mr Lalich's vehicle and float which Mr Mackintosh had under surveillance since it arrived on-course with CASEY. In company of Mr Lalich and Mr Mackintosh, at my request Mr Lalich unlocked his Toyota Land cruiser. Mr Mackintosh and I then searched the vehicle, in the rear section of the vehicle I observed a drug, a rug covering the rear floor section. I removed the rug and observed a small white coloured plastic container in the right rear corner of the vehicle, a length of tubing, a funnel, empty plastic container, a plastic container marked baby oil and a small length of PVC piping with a light rope attached - commonly known as a nose twitch. I took possession of these items and Mr Lalich said, "I only saline drench my horses, I have nothing to hide, search the whole vehicle." I later marked the items for identification. Then with Dr P Symons I showed him the items in the swab box where he removed small amounts of liquid from the funnel, the tubing and the small white plastic container in my presence which he sealed. At about 4.40pm the 12th of June, 1997 I was present at the Northam Race Club's swabbing area where Dr P Symons swabbed CASEY after I identified the horse to him in the company of Mr Lalich. The samples were sealed and with the samples taken from the funnel, tubing and white container a short time later, Mr Macintosh and I escorted the samples taken from CASEY to the Perth Airport where they were dispatched to the Analyst at the Australian Jockey Club in Sydney NSW.'

In addition Mr Goddard stated that the tubing gear in question did have visual signs of recent use. The other racecourse investigator, Mr Mackintosh, told the Stewards of having observed the activity which took place 500 metres from the Northam racecourse where Mr Lalich had stopped his vehicle which was towing the float with CASEY inside it. He had an uninterrupted view across the grass using binoculars. Mr Macintosh clearly observed Mr Lalich carry items into and out of the float from his vehicle.

When asked by the Chairman of the Stewards what he had in his hand at the time of Mr Mackintosh's observation Mr Lalich claimed he had a white bottle containing water which he used to wash his hands after going into the float and grabbing the end of a rope which was dirty following the horse having urinated on the floor. When asked for an explanation as to why the horse returned such a high level, Mr Lalich stated '*I wish I could, I can't explain it, I've got no idea, I don't know, ...*'.

After considering the material presented at the inquiry into the matter the Stewards stated:

'Mr Lalich after assessing all the evidence that has been placed before us, Stewards have decided to charge you and I'll read you the particular rule, Australian Rule of Racing 175 which reads, "The Committee of any Club or Stewards may punish: part (h) any person who administers, or causes to be administered, to a horse any prohibited substance: (i) for the purpose of affecting the performance or behaviour of such horse in a race or of preventing its starting in a race; or (ii) which is detected in any sample taken from such horse prior to or following the running of any race." Now Mr. Lalich you are charged in terms of Australian Rule of Racing 175(h) part (i) in that you administered or caused to be administered an alkalinising agent or substance for the purpose of affecting the performance of the gelding CASEY engaged to run in Race 7 the Grafton Electrics Class Two Handicap over 2200m at Northam on Thursday the 12th June, 1997 prior to being withdrawn by the Stewards. Subsequent samples taken from the gelding having had detected in them a plasma TCO2 level in excess of 36 mmol/litre. Further, you are charged in the terms of Australian Rule of Racing 175(h)(ii) in that the sample taken from CASEY after the running of Race 7 the Grafton Electrics Class Two Handicap over 2200m at Northam on Thursday the 12th June, 1997 a race in which the gelding was engaged to run prior to being withdrawn by the Stewards had detected in it a plasma level of TCO2 in excess of 36 mmol/litre.'

Upon laying the charge the Stewards asked Mr Lalich *'Now Mr Lalich do you understand the nature of both charges?'* to which Mr Lalich replied *'I do'*. After Mr Lalich pleaded not guilty the Chairman of Stewards asked:

'Seeing that you've pleaded not guilty, is there any further witnesses or any other evidence that you wish to place before us?'

Mr Lalich responded: *"I can't, I can't say any more than that. I got, I can't bring up anything."*

The Chairman then asked: *"If there's nothing else, I'll ask you to wait outside one more time please. No further witnesses or anything."*

Mr Lalich replied: *"Not to my knowledge."*

The Stewards found Mr Lalich guilty of both charges. It was then put to Mr Lalich:

'It is now for the Stewards to arrive at an appropriate penalty. Is there anything that you wish to place before us in regards to penalty, keeping in mind that the Stewards under the rules have the power to fine, suspend or disqualify. Now also is there, you may quote your record, financial situation or anything else you think may assist us in, in coming at an appropriate penalty?'

Mr Lalich reacted by briefly referring to his personal financial circumstances, the fact that he relied solely on racing as a living, his other personal family circumstances and the effect of losing his licence, the fact that he had been training since 1981 and had never had any prior trouble.

The Stewards deliberated on the question of penalty and then concluded:

'Mr Lalich after considering everything that was placed before us, in the opinion of the Stewards,

- you have produced no credible explanation for the horse CASEY returning a level in excess of 36 mmol/litre in plasma.*

- *The observations of our trained Investigators, we believe, are wholly reliable. These observations have removed any doubts whether an outside party could be involved.*
- *We have no doubt after hearing expert evidence from both the AJC Analyst Dr. Alan Duffield and Turf Club Veterinary Surgeon Dr. Peter Symons that the administration must have taken place when you Mr. Lalich were in charge of CASEY.*
- *The time and place of administration can only indicate that this was a planned and deliberate attempt to flaunt the rules.*
- *An offence of this nature striking at the very heart of the credibility of racing.*

It is now the decision of the Stewards Mr. Lalich on the first charge under ARR. 175(h)(i) to disqualify you for a period of three years. On the second charge ARR. 175(h)(ii) to disqualify you for a period of two years, both these penalties to be served concurrently.'

Mr Lalich appeals against both of the convictions and the 2 penalties. Six grounds of appeal are raised in relation to each separate offence. The amended notices of appeal in respect of each offence are virtually in identical terms. The grounds of appeal in respect of the conviction for breach of Australian Rule of Racing 175(h)(i) (Appeal 368) is as follows:

1. *The Stewards erred in finding the appellant guilty of offences contrary to both ARR 175(h)(i) and ARR 175(h)(ii) as they alternate (sic) offences and not cumulative.*
2. *The conviction was against the evidence and the weight of the evidence in that there was not any, of (sic) any sufficient, evidence that the appellant administered, or caused to be administered, an alkalisising agent or substance to "Casey", in that:*
 - (a) *the period of approximately 3 minutes when the appellant was not under direct observation by the investigators was not an adequate period of time in the circumstances to administer a sodium bicarbonate solution to "Casey" sufficient to produce a plasma TCO₂ concentration of 39-40 mmol/litre;*
 - (b) *the concentration of sodium bicarbonate solution reported in the tube, funnel and container was not consistent with an administration of a sodium bicarbonate solution necessary to produce a plasma TCO₂ concentration of 39-40 mmol/litre.*
3. *The Stewards erred in being reasonably satisfied as to the accuracy of the Racing Analytical Services Ltd and AJC Laboratory test results*

having regard to the absence of any evidence as to relevant factors relating to the accuracy of that result such as:

- (a) sample storage;*
 - (b) effects of transport;*
 - (c) delays; and*
 - (d) centrifuge operations.*
4. *Further, or in the alternative, the Stewards erred in relying upon exhibit J and/or accepting the evidence of Dr Duffield as to the results of the swab washes in respect of the tube, funnel and container as the evidence was not collected in the presence of the appellant and/or in accordance with established procedures and guidelines.*
5. *Further, or in the alternative, the appellant was denied natural justice in that he was not permitted to ascertain the source of information leading to the investigators observing his movements so as to give the appellant an opportunity to prepare and/or adduce evidence to establish that another person was responsible for the administration of the prohibited substance.*
6. *Further, or in the alternative, the penalty was unduly harsh and excessive and that the Stewards failed to give any, or any sufficient weight, to:*
- (a) the appellant's prior good record;*
 - (b) the crushing effect that the penalty would have upon the appellant and upon his family by reason of his deprivation of income;*
 - (c) there was no need for the Stewards to alter the placings and therefore betting on the race was not affected and the racing and betting public were not disadvantaged;*
 - (d) no harm was inflicted on the horse;*
 - (e) the tariff for prior suspensions imposed for breaches of ARR 175(h).'*

Following a hearing on the 12 August 1997 I refused Mr Lalich's application for suspension of operation of the penalties.

THE APPEAL HEARING

In introducing his argument counsel for the appellant submits that this is an unusual case for various reasons including:

1. the fact that Mr Lalich has no prior convictions

2. the Stewards committed a significant error of convicting Mr Lalich for alternate offences
3. the admitted failure by the Veterinary Steward of complying with the guidelines and procedure regarding washing samples which make the results meaningless
4. the incongruity between an alleged administration at 1.30pm on the day of the race 500m away from Northam Racecourse when the horse had prior to being taken to the Racecourse been kept at a property where no one was present and
5. the fact that the tipoff to the Stewards was not revealed which denied the appellant the opportunity of offering an explanation.

Very early in the proceedings senior counsel for the respondent conceded ground 1 of appeal and acknowledged that the second charge should not have been made. However, it was put to the Tribunal that this fact does not alter the efficacy of the conviction for breach of Rule 175(h)(i).

On the basis of this concession Appeal 369 succeeds.

As to ground of appeal 2 counsel for the appellant refers the Tribunal to various references in the transcript with a view to supporting the propositions that in all of the circumstances it was inappropriate for the Stewards to have convicted on the face of the evidence including the fact that for a period of approximately 3 minutes the appellant was not under direct observation by the investigators. This was the period of time which elapsed when, on the way to the Racecourse, Mr Lalich stopped his vehicle, alighted and accessed the float in which CASEY was travelling whilst he was armed with various equipment. This was said to be insufficient time with a nervous horse to enable administration of sufficient sodium bicarbonate solution to produce the concentration found in the horse. Further, the concentration of sodium bicarbonate solution reported in the tube, funnel and container was not consistent with an administration of sodium bicarbonate solution necessary to produce the concentration of the substance that was found.

Leave was granted to the appellant for Mr MA Page, a senior lecturer from the School of Pharmacy at Curtin University of Technology, to be called to give evidence. Mr Page produced a report which addresses two issues. The report concludes that published research clearly indicates that a dose of approximately 400-500 grams of sodium bicarbonate given prior to 7.00am could be expected to result in a TCO₂ concentration of around 40 millimoles per litre up to 12 hours later. The second relates to the concentrations of bicarbonate recorded in the tubing, funnel and bucket/bottle. The conclusion is that the drench referred to as 'Harry's salts' contains 27.5% of sodium bicarbonate having been administered through the tube, and assuming that the salts were dispersed in 2 litres of water, the residue of the tube would correspond to a dose of about 26 grams of Harry's salts.

The clearest impression I got from the cross-examination of this witness was that it is not necessarily a lengthy process to tube a horse and administer a dose of sodium bicarbonate of the magnitude detected in this matter.

The next person called in the proceedings was Mr Mackintosh who explained that he and Mr Goddard had been keeping Mr Lalich under surveillance due to suspicions going back a considerable period of time which were aroused by higher than normal levels of TCO₂ in Mr Lalich's horses. The surveillance on this occasion was not a new event. Rather it was a continuation of ongoing observations.

Dr Symons, was also called by the appellant to give evidence. He was asked to identify the swabbing procedure check list, collection of samples for TCO₂ testing and centrifuge operation documents. When asked by counsel for the Stewards '*Were these samples taken properly*' he answered '*Yes*'. Dr Symons was not re-examined.

In drawing conclusions on the evidence, senior counsel for the Stewards argued there are 2 possibilities. The first is that the appellant had administered something to CASEY. The second that someone else carried out the administration. According to senior counsel there could be no argument that a substantial dose of alkalinising agent was administered before the horse was

sampled. There was no informant with an axe to grind. This was a 2200 metre race where the substance would be considerably performance enhancing. The substance dissipates once the horse has run. At least 2 to 3 hours was required to get the level up. The surveillance was both detailed and uninterrupted. No one was observed at the yard prior to the horse leaving for the racecourse. What occurred inside the float was not observable. The evidence of the appellant and Mr Viskovich was completely at odds with that of the 2 observers. The credibility and reliability of the 2 observers' evidence was accepted by the Stewards. There is no good reason why it should not have been. That evidence was entirely capable of persuading the Stewards on the balance of probabilities that the drenching did occur. It was further argued nothing was presented by the other side to upset the logic and persuasiveness of these propositions.

Counsel for the appellant does rely on the discrepancies between the report which was presented to the Stewards who conducted the race meeting and the evidence subsequently presented at the Stewards' inquiry. However, I am satisfied the two reports are entirely compatible and consistent. The first was not an attempt to produce a full report but rather was prepared in a hurry in order to stop the horse from racing.

I agree with the propositions put by Mr Davies QC that this is a very powerful circumstantial evidence case. The timing entirely fits in. Between 1.30pm to 3.30pm 200 grams administered by tube would reach the level in question in an average sized horse. I am satisfied that Mr Lalich did administer a substance to CASEY by tube in the float at the time he stopped his vehicle 500 metres from the Racecourse which resulted in the high readings which were detected by the laboratories.

DETERMINATION AS TO CONVICTION

Ground 1 - Two Offences.

There is no indication from a close examination of the transcript that Mr Lalich did not understand the nature of the complaints that were made against him by the Stewards despite the fact that he was wrongly charged with and purportedly convicted of 2 separate offences. Nothing indicates that he was

in any way confused or taken by surprise as a consequence of the 2 charges having been laid in respect of what can only be a single offence. The concession that the second charge should not have been laid and the consequential successful outcome of that appeal in no way affect the validity of the first conviction. This ground of appeal fails.

Ground 2 - Against the Evidence

The Stewards had the clear evidence of the observations by the 2 investigators. In addition they had the benefit of the exhibits which were the very equipment one would use to drench a horse. The evidence clearly indicates that no one else was present at the stables with access to the animal prior to it leaving for the Racecourse on the morning in question. All of the relevant facts collectively are sufficient to demonstrate a very strong circumstantial case against Mr Lalich. The Stewards were entitled to accept the evidence of Messrs Goddard and Mackintosh rather than Mr Lalich and his assistant Mr Viskovich. As to the period of 3 minutes there was no evidence before the Stewards that the drenching could not occur in that period of time. In this regard the evidence of Mr Page went against the appellant because in effect one can infer from what Mr Page said that the appellant could well have been able to carry out the task in the time available. As to the residue of sodium bicarbonate which was passed through the equipment the mere presence of that substance in the equipment is a further circumstantial fact enhancing the evidence. For these reasons this ground fails.

Ground 3 - Accuracy of the Results.

There was no challenge by Mr Lalich at the inquiry before the Stewards as to the accuracy of the test results. Dr Symons gave unchallenged evidence that the samples were taken properly. This case is distinguishable from the *Binskin* case (Harness Racing Appeals Tribunal of NSW decided 9 May 1997 by Judge Thorley) as there is no issue as to the validity of the procedure. The Stewards do not have to rely on Rule 178(d)(iii). As I am satisfied the Stewards did not err in arriving at their conclusion as to the accuracy of the test result this ground fails.

Ground 4 - Inadequate Collection of the Sample.

There are in fact no official guidelines which require the collecting of evidence in the presence of the trainer or in any other official manner in regard to wash samples. Commonsense dictates that swab washes, where practicable, should be collected in the presence of the trainer concerned. Dr Symons was quick to admit that he had not proceeded in usual manner on this occasion. However, on its own in the circumstances of this case it does not suggest that the Stewards were in error in relying on exhibit J and in accepting the evidence of Dr Duffield. Mr Davies QC argues that the collection of the evidence in the presence of the appellant was not required by a domestic tribunal in the absence of a query. *Binskin's* case is criticised on the basis that the evidence in that matter was not allowed and was put aside. I am satisfied that in fact there was no error at all and as it was only a matter of form which was not strictly followed this ground has no merit.

Ground 5 - Denial of Natural Justice

Following the evidence having been presented as to the background circumstances leading to the surveillance, namely the fact that Mr Lalich had aroused suspicion for some time and was therefor under ongoing observation by the racecourse investigators, Mr McLeod did not pursue this matter.

Accordingly I am satisfied that Appeal 368 as to conviction fails and should be dismissed.

DETERMINATION AS TO PENALTY

The respondent relies on the 5 factors particularised in the appeal notice on the question of penalty and the argument that the proximity to the Racecourse was irrelevant for an 'intent' offence. The following decisions are referred to in relation to tariff:

G Harper (Appeal 165) where the winning horse recorded a level of 37.1 mmol/l. The penalties imposed for breaches of Rules 175 and 178 resulted in 2 concurrent disqualifications each of 6 months which, on appeal, were reduced to 4 months.

R Brown (Appeal 319) with an unplaced horse where the original penalty of 3 months was reduced to 1 month. In this case the matter of *Vicki Lane* is referred to, where the Stewards imposed a disqualification of 6 months, as well as *P Garner* where a 6 month disqualification was imposed.

Charles (Appeal 344), which was a trotting case, where the level was 37.9 and the penalty of 2 years disqualification was imposed for a second offence, and

a recent caffeine case (being a category 1 drug) where the Stewards had imposed a penalty of 1 year disqualification.

I agree with the argument raised on behalf of the Stewards that Mr Lalich's case is the worst type of administration offence. It involves a deliberate act on the trainer's behalf for the express purpose of affecting the performance of a horse about to compete in a race. The unlawful conduct took place on the way to the course shortly before the race. It was only through good fortune that the administration was detected, unlike many other cases. It is argued that in such a presenting case as this one a severe penalty is required as a general deterrence in relation to an offence that is difficult to detect. It is also argued for the Stewards that the penalty imposed was clearly within the range.

I am satisfied the Stewards clearly did know the various matters relied upon which were personal to the appellant without actually having to announce them in their findings. The question of the good record and the effect of the penalty were canvassed immediately prior to the adjournment to decide penalty. At p65 of the transcript Mr Lalich was asked for anything that will help his cause. At the conclusion of which the Chairman stated '*All right then we'll take all that into consideration*'. It is reasonable to assume that, having been invited to do so and having indicated an intention to comply, these factors were taken into account even though they were not expressly referred to in the decision.

I consider the factors (c) and (d) referred to in ground 6 are irrelevant to this particular offence.

The determination in *Slater* (Appeal 359) was handed down on 13 October 1997 being subsequent to the conclusion of the appeal hearing in this matter. Because of the relevance of the *Slater* matter I directed the Registrar to forward a copy of the reasons for determination and an invitation to the parties to comment on them. In *Slater* the 12 month disqualification for breach of Rule 175(h)(ii) was reduced to 8 months in respect of a winning horse. The 2 plasma tests resulted in TCO₂ readings of 37.7 and 37.9. In my reasons in *Slater* the facts of that case are fully described. All of the appeal decisions relied on by Mr McLeod in this appeal as well as other decisions are closely analysed. No useful purpose will be served in detailing the *Slater* facts or re-analysing those decisions again other than to state that, unlike Mr Lalich, Mr Slater was fully cooperative with the Stewards. Not only did Mr Slater plead guilty to the charge but he volunteered information during the course of the preliminary investigations and during the Stewards' inquiry. I am satisfied that the Stewards were quite entitled to reject Mr Lalich's version of the facts and in particular his denial that he actually administered the substance to the horse in the float some little distance away from the Racecourse prior to presenting the horse to race.

Mr McLeod's written submission dated the 21 October in response to the invitation to comment on *Slater* states:

1. *Reference is made to the decision of the Racing Penalties Appeals Tribunal ('RPAT') in Appeal No. 359 - Gavin Phillip Slater v WATC Stewards.*
2. *In that case the appeal was upheld and a disqualification of 12 months was reduced to 8 months.*
3. *As regards Mr Slater's case it is noted:*
 - (a) *he had been a licensed trainer for only 2 years;*
 - (b) *it was submitted that a suspension would affect his livelihood as he had no other source of income (page 4 of Reasons of Mr D Mossenson's (Chairperson) ('the Chairperson's Reasons');*
 - (c) *the prohibited substance detected was also sodium bicarbonate;*

- (d) *the sodium bicarbonate had been administered to the horse by way of tubing on race day;*
 - (e) *the Tribunal concluded that Mr Slater deliberately set out to improve the horses prospects of success in the race by elevating the level of sodium bicarbonate to excess: (the Chairperson's Reasons pages 13, 21 and 22; Member Monisse Reasons ('the Member's Reasons') at page 3;*
 - (f) *the subject horse won the race and winnings were affected, a factor which was regarded in both the Chairperson's Reasons (pages 11, 21, and 22) and the Member's Reasons (page 3) as being an aggravating factor;*
 - (g) *Mr Slater's conduct was regarded as being at the upper end of the level of seriousness for such offences: page 22 of the Chairperson's Reasons;*
4. *Although the RPAT appeared to accept that a penalty of disqualification in excess of those imposed previously should have been imposed on Mr Slater, at page 23 of the Chairman's Reasons it was said it was difficult to understand how the Stewards could have concluded that they were entitled to impose a penalty of 12 months' disqualification, being double the harshest penalty previously applied in this State, for the TCO2 offence.*
 5. *The Chairperson was of the view that being on the upper end of seriousness for this type of administration, a penalty of 9 months would be appropriate but for the existence of mitigating factors.*
 6. *Member Monisse considered a penalty of 10 months would be appropriate but reduced the penalty to 8 months, inter alia, on the basis that Mr Slater had a good background with no adverse record in the racing industry (page 3).*
 7. *As regards Mr Lalich's case, it also involved the administration of sodium bicarbonate which the RPAT accepted was administered by tubing the horse on race day to improve its prospects of success.*
 8. *However, in contrast to Mr Slater's case:*
 - (a) *prior to June 1997, Mr Lalich has been a horse trainer for 16 years with no adverse record in the racing industry at all;*
 - (b) *there was not the aggravating aspect of the horse winning the race and winnings being affected;*

- (c) *the penalty received by Mr Lalich was six times the harshest penalty previously applied in this State for a TCO² offence.*
- 9. *Whilst Mr Lalich did not, as Mr Slater did, plead guilty, he did co-operate fully with the Stewards and, for example, permitted inspection and seizure of items from his car on request to do so being made.*
- 10. *If a penalty of 9 - 10 months' suspension for a TCO² offence at the upper end of seriousness would have been appropriate for Mr Slater but for the existence of mitigating factors, then the 36 months' suspension imposed on Mr Lalich was clearly unduly harsh and excessive, particularly in light of the mitigating factors being:*
 - (a) *his prior good record;*
 - (b) *the crushing effect that the penalty would have upon him by reason of deprivation of income;*
 - (c) *there was no need for the Stewards to alter the placings and therefore betting on the race was not affected and the racing and betting public were not disadvantaged; and*
 - (d) *no harm was inflicted on the horse.*

Mr Davies QC replied in writing to these submissions in the following terms:

1. *The clear findings of the Stewards at page 65-66 of transcript clearly provide a basis for the severe penalty imposed.*
2. *What is emphasised there clearly removes this case from comparison with all others. The seriousness of this offence is to be found in the deliberate, calculated, devious, conduct surrounding the administration of this performance enhancing substance.*
3. *The Appellant additionally sought strenuously to have the horse permitted to start. The effect would have been to thwart detection of his conduct.*
4. *It is submitted for the Appellant that he co-operated. A proper view of the total picture presents a contrary picture of attempted deception.*

5. *Appeals are not to be decided by comparison with other cases, but in any event, this case is vastly different from that of Slater.*
6. *The Tribunal did not in Slater hold that there was an established maximum penalty for administration of this substance. Nor could it for to do so would be to 'legislate'. The maximum penalty is life disqualification.*
7. *It is to be noted that penalties of many years disqualification for deliberate administration of what was the common performance enhancer (caffeine) have been imposed in the past.*
8. *As to the attempt for the Appellant to use the decision in Enright, it is submitted that no meaningful comparison has or can be made.*
9. *Nothing in either of the Appellants further submissions in any way demonstrates patent or latent error on the part of the Stewards in the exercise of the discretion vested in them.*
10. *They correctly assessed that the seriousness of this offence was in the challenge to the image of racing; the conduct 'striking at the very heart of the credibility of racing: (their words TR66).'*

Further written submissions were also received on behalf of Mr Lalich subsequent to the decision having been reserved in this matter relating to a fine imposed on Mr Webster of \$1,000 and a 12 month disqualification on Mr Enright.

After carefully considering all of the evidence, submissions and other material that is before the Tribunal, including the written submissions which were received after the decision was reserved, I am satisfied that the Stewards did err in imposing a disqualification of 3 years duration on Mr Lalich. Such a penalty is too severe compared with other penalties which have been imposed even allowing for the more serious nature of the offence, the level detected and the lack of co-operation by Mr Lalich with the investigators and the Stewards.

I agree with the written propositions made on behalf of the Stewards that this case clearly is not comparable with the other cases in terms of the seriousness of the offence. Despite that fact I am also satisfied in all of the circumstances

that the original penalty cannot be justified. I consider disqualification for a period of 2 years to be long enough in the light of all of the relevant circumstances. Such a length of disqualification will clearly convey to the industry that a deliberate unlawful attempt to gain an advantage in racing such as occurred in this case cannot be tolerated by the industry.

For these reasons I would allow Appeal 368 as to the penalty and would substitute 2 years for 3 years as the period of disqualification.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: DANNY LALICH

APPLICATION NOS: A30/08/368 & A30/08/369

PANEL: MR D MOSSENSON (CHAIRPERSON)
MS P HOGAN (MEMBER)
MR P HOGAN (MEMBER)

DATE OF HEARING: 21 AUGUST 1997

DATE OF DETERMINATION: 20 NOVEMBER 1997

IN THE MATTER OF appeals made by Mr D Lalich against the determinations of the Western Australian Turf Club Stewards on the 16 June 1997 imposing concurrent disqualifications of 3 years, for breach of Australian Rule of Racing 175(h)(i), and of 2 years for breach of Australian Rule of Racing 175(h)(ii).

Mr C McLeod, instructed by Talbot & Olivier, represented the appellant.

Mr R J Davies QC represented the Western Australian Turf Club Stewards.

APPEAL 368

For the reasons published the appeal against conviction is dismissed and the appeal against penalty is allowed. The Tribunal sets aside the 3 year disqualification and substitutes a 2 year disqualification.

The fee paid on lodgement of the appeal is forfeited.

APPEAL 369

For the reasons published the appeal is allowed and the penalty is quashed.

The fee paid on lodgement of the appeal will be refunded.

D. Mosson



D. MOSSENSON, CHAIRPERSON

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS P HOGAN
(MEMBER)

APPELLANT: DANNY LALICH

APPLICATION NOS: A30/08/368 & A30/08/369

PANEL: MR D MOSSENSON (CHAIRPERSON)
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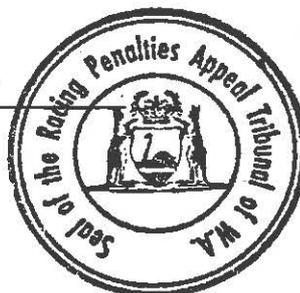
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Mr C McLeod, instructed by Talbot & Olivier, represented the appellant.

Mr R J Davies QC represented the Western Australian Turf Club Stewards.

I have read the draft reasons of Mr D Mossenson, Chairperson. I agree with the reasons and the conclusion and have nothing to add.

Pamela M. H.



PAMELA HOGAN, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN
(MEMBER)

APPELLANT: DANNY LALICH

APPLICATION NOS: A30/08/368 & A30/08/369

PANEL: MR D MOSSENSON (CHAIRPERSON)
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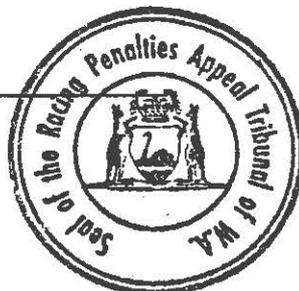
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I have read the draft reasons of Mr D Mossenson, Chairperson. I agree with the reasons and the conclusion and have nothing to add.

P. J. Hogan



PATRICK HOGAN, MEMBER