THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT:	**SHANE ANDREW BEARD**
APPLICATION NO:	**A30/08/536**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING:	**22 AUGUST 2001**
DATE OF DETERMINATION:	**13 SEPTEMBER 2001**

IN THE MATTER OF an appeal by Shane Andrew Beard against the determination made by the Stewards of the Western Australian Greyhound Racing Authority on 25 July 2001 imposing six months disqualification for breach of Rule AR106 of the Rules of Greyhound Racing.

Mr P E Harris, instructed by D G Price & Co, appeared for the appellant.

Mr M Kemp appeared for the Stewards of the Western Australian Greyhound Racing Authority.

BACKGROUND

The greyhound JARGON, trained by Mr Beard, won Race 2 at Mandurah on 4 June 2001. A post race urine sample taken from JARGON detected the presence of the prohibited substance *Diclofenac*. An analysis of the referee sample confirmed the presence of *Diclofenac*.

The Stewards charged the appellant with a breach of Rule AR106 by letter dated 2 July 2001. That Rule states:

> *"The owner, trainer or person in charge of a greyhound nominated to compete in an event, shall produce the greyhound for the event free of any drug."*

The specifics of the charge were:

> *"...that you, Mr Beard, being the trainer of the greyhound JARGON which was nominated to compete in an event, produced that greyhound to compete in Race 2 at Mandurah on 4 June 2001 and was found by the Stewards, upon analysis of a urine sample, to contain the drug Diclofenac, contrary to rule AR106."*

On 11 July 2001 the Stewards commenced an inquiry into the finding of the prohibited substance. Mr Beard pleaded guilty to the charge at the outset. The Stewards were then left to determine an appropriate penalty.

Submissions were heard from Mr Beard. In addition, expert evidence was put to the inquiry by Mr C Russo, analyst, Racing Chemistry Laboratory of WA and by Dr P Thomas, veterinary surgeon contracted to the Western Australian Greyhound Racing Authority. The Stewards then adjourned the inquiry to evaluate all the evidence and submissions put forward. Subsequently, by letter dated 25 July 2001, the Stewards notified Mr Beard that the penalty to be imposed was six months disqualification.

Extracts from that letter are reproduced here.

> *"The Stewards have carefully considered all of the relevant circumstances presented in this case in our process of determining an appropriate penalty in all of the circumstances. We have taken into account your early plea of guilt* (sic) *to the charge, your length and extent of involvement in greyhound racing and your financial and personal circumstances. We also recognise that the amount of Diclofenac detected was described by the analyst as being low and that this is your first offence in what has been a long history of registered involvement. We also note the professional manner in which you conducted yourself throughout the inquiry.*
>
> *Through the course of the inquiry we were able to probe, in detail, your explanation for the detection of Diclofenac in the greyhound JARGON after winning Race 2 at Mandurah on 4 June 2001. You offered that around the time of 4 June 2001 you were treating yourself with the substance known as Voltaren, which is known to contain Diclofenac. According to you, the Diclofenac came to be transmitted to the greyhound by way of the greyhound somehow coming into contact with the substance which you had administered to yourself by way of rubbing the Voltaren gel on your person. According to the course veterinarian and the analyst this scenario in itself was not ruled out as being impossible. In order for us to be satisfied that this was how the Diclofenac came to be detected in JARGON we attempted to obtain from you specific information surrounding the alleged accidental administration in order to ascertain the likelihood of it producing the result we were concerned with. Your explanation, however, lacked specific detail about when you were using the Voltaren gel on yourself and how this related to your contact with your greyhounds in general and JARGON in particular. You were not able to provide the inquiry with specific information on several key areas such as: When exactly you used the Voltaren gel? Whether in fact it was used on the day of the race or not? How soon after using it did you come into contact with JARGON? Whether you washed your hands or not prior to handling JARGON? Whilst we attempted to obtain answers to these vital questions you were not able to categorically provide a possible time of accidental administration, confirm a route of ingestion or even know for a fact whether you had washed your hands before*

handling the greyhounds. Having put your explanation to Dr Thomas, he was of the opinion that whilst it was a possibility it was not in his opinion likely under the circumstances put to him. According to the evidence you did provide, any Voltaren on your hands was such that it was undetectable to you and it would therefore appear unlikely that this minute quantity, even if contacted to the greyhound, could produce such a result. Given the evidence before us, or rather the lack of it in terms of specific details, we are not satisfied that your explanation explains how the Diclofenac came to be found in the urine analysis conducted. Even if your explanation had satisfied the Stewards, which it did not, the question would then be raised as to whether you were negligent in not taking adequate precautions to ensure that the drug you were using upon yourself was not accidentally transmitted to the greyhound. Whilst we do not need to address this question, given that your explanation has failed to satisfy us, it remains a concern and does not go in your favour that you cannot even tell us for certain whether you washed your hands after using the Voltaren gel upon yourself.

The detection of a drug in a greyhound which has competed and won an event whilst the drug was in its system is a serious offence. It is serious because it is detrimental to the image of the industry and has the very real potential to affect the confidence of the public that supports greyhound racing by investing on the outcome of races. Such sentiments were alluded to, by you, in Exhibit No. 7. It is therefore in the best interest of the industry that the Stewards ensure that the confidence of the betting public is maintained.

We have carefully considered your indication of preference for a fine in your circumstances rather than a period of disqualification or suspension. As already stated, we are aware of your personal circumstances and the likely effect a period of disqualification will have upon you. That said, we also note from the records that this Authority has never issued a fine in the circumstance of a parent drug being detected in the case of a Non-Steroidal Anti-Inflammatory (NSAID). This alone does not preclude the issuing of a fine should the Stewards feel under the circumstances that it be warranted. To this end we have carefully considered the previous authorities brought to your attention through the course of the inquiry as well as your submissions on this point. What these authorities reveal is that even with a therapeutic drug, when the use of such a drug affects the ability of a dog to race on its merits, matters of both general and specific deterrence require a period of disqualification in most cases. Clearly, with the parent drug being detected this indicates to us that the drug was in all likelihood having an effect upon the greyhound. Even in the case of Mr Moyle, which differs noticeably to yours in that his was the detection of only the last metabolite of Phenylbutazone, he stood to suffer hardship as a result of disqualification but was nonetheless disqualified, upon appeal, for a period of two months. What the authorities indicate in essence is that may other trainers with impeccable records, who stood to suffer financial and personal hardship, were meted out disqualifications for anti-inflammatories. The case of Mrs Robartson, which we note involved a corticosteroid as opposed to your NSAID but which was an anti-inflammatory, is the best example of this. Although you stated these previous authorities involved persons committing deliberate acts this is clearly not the case. As in your case, in most instances the explanation offered failed to find favour with the Stewards or no explanation was offered at all. Those previous authorities mentioned by you where fines were issued were not for anti-inflammatories and in the case of Mr Jeffries the expert evidence at the time indicated that the drug detected was at the tail end of an administration involving another preparation. In effect, this amounted to a detection of a metabolite only in that case. This is not the same as your case nor can an antibiotic, as was the case

with Ms Britton, be compared with an anti-inflammatory. The cases of Mr Jeffries and Ms Britton therefore have limited comparative value, as the drugs detected are not in the same class as Diclofenac. In truth your circumstance does not differ to any real extent from previous cases involving parent drug detections of anti-inflammatories where disqualification penalties were issued. We therefore feel that a fine of any value would not be an appropriate penalty in the circumstances we have before us.

It is clear that the appropriate penalty in these circumstances is to issue a period of disqualification. To this end we have not only considered your circumstances but have also carefully contrasted your circumstances with some of the previous cases mentioned for offences which involved anti-inflammatories. On the question of length of disqualification, the case of Mr Moyle is of little assistance as his did not involve a parent drug detection but rather the last metabolite only. Even in this instance, however, he was disqualified for a period of two months and therefore in your instance, given that yours involved a parent drug detection, a period of two months disqualification would be excessively lenient by comparison.

We have also considered the case of Mr Dagostino who had his penalty of six months disqualification for the NSAID Carprofen varied to two months upon appeal. This case differed to yours on several notable aspects. Significantly, the detection of Diclofenac was not as a result of you acting upon some veterinary advice. Furthermore, your explanation, unlike Mr Dagostino's, did not satisfy the Stewards and therefore this significant mitigation afforded to Mr Dagostino is not applicable in your case.

The case of Mr Black is of some assistance and involved a NSAID detection, namely Flunixin, which resulted in a nine month disqualification being issued. In his case, however, the charge involved negligence and also unlike your case the Stewards accepted his explanation. In your case there is no finding of negligence but neither do we have an accepted explanation for the detection of Diclofenac in order to make any assessment concerning how the substance was administered. That said, we do recognise that the case of Mr Black involved negligence on his behalf, which probably contributed to him receiving a penalty near the top of the range of previous penalties. Whilst you have not been found to be negligent neither have we accepted your explanation and in effect we are left with no explanation for the detection of what was a human drug in your greyhound. This is not only of concern to us but serves to limit any mitigation in your case.

The case of Mrs Robartson, which although involving a corticosteroid namely Dexamethasone, was also an anti-inflammatory. Her case has many similarities with yours in that her case also involved a low-level detection of an anti-inflammatory, her explanation for the detection was not accepted and she was also a long standing trainer with significant involvement and an impeccable record. When comparing your case with hers there appears to be little differentiation between the two and she received a six month disqualification that remained unchanged upon appeal.

Given all of the circumstances of your case and all of the previous authorities, we feel that the appropriate penalty in your case is a disqualification of six months."

On 25 July 2001 Mr Beard filed a Notice of Appeal with the Tribunal against the severity of sentence and applied for a stay of proceedings. The application to suspend the operation of the penalty was refused by the Tribunal Chairperson, Mr D Mossenson.

GROUNDS OF APPEAL

The amended grounds of appeal are:

"1. The Stewards fell into error in imposing a penalty of 6 months disqualification. Further or in the alternative, the penalty imposed was manifestly excessive in all the circumstances.

PARTICULARS

(i) the Stewards erred in failing to place sufficient weight upon the accidental nature of the drug administration.

(ii) the Stewards erred in failing to accept the Appellant's explanation for the presence of the drug notwithstanding the content of the evidence led in relation to that issue at the inquiry.

(iii) the Stewards failed to attach sufficient weight to the low dosage of the drug detected in the urine.

(iv) the Stewards erred in failing to attach sufficient weight to the therapeutic nature of the drug.

(v) the Stewards erred in failing to attach sufficient weight to the fact that the drug concerned was freely available without prescription.

(vi) the Stewards erred in failing to attach sufficient weight to the Appellant's early plea of guilty to the charge and to his full cooperation with the Stewards' Inquiry.

(vii) the Stewards erred in failing to attach sufficient weight on the fact that this was a 1st offence by a person who had held a greyhound owner/trainer licence since age 18 (DOB: 03.11.59) and has been licensed as a public trainer in Western Australia since 1997 without any serious infraction of the rules.

(viii) the Stewards erred in failing to consider the appropriateness of alternative penalties such as a fine and/or a period of suspension.

(ix) the Stewards erred in failing to give sufficient weight to matters personal to the Appellant in particular the fact that greyhound training was his sole source of income and that he was married with dependents to support."

PRINCIPLES OF APPEAL

The appeal principles to be applied by the Tribunal are well understood:

> *"An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error."*
> (***R -v-Tait*** (1979) 46 FLR 386 at 388-389.)

RELATING THE APPEAL PARTICULARS TO THE EVIDENCE

Particulars (i) and (ii) refer to the appellant's explanation for the presence of the drug, and the evidence on the point. Particulars (iii), (iv) and (v) refer to the level of seriousness of the drug and its dosage. Particular (vi) refers to the mitigatory effect of the plea of guilty, and particulars (vii) and (ix) refer to the appellant's personal circumstances. Finally, although it is not particularised, it is said that the penalty imposed was manifestly excessive. That is, bearing in mind the mitigatory effect of all of the above facts, the penalty in its type and length was so far outside the range of penalties commonly imposed as to manifest error. Particular (viii) can be considered under this head.

PARTICULARS (i) and (ii)

It is said by these two particulars that the Stewards should have accepted Mr Beard's explanation that the administration was accidental. It is said that the expert evidence on the point did not permit the Stewards to find otherwise. If particular (ii) was made out, particular (i) would necessarily be made out as well.

Mr Beard said that the administration was accidental. He explained the background at T7. On 26 May, he suffered an injury to his leg. He began to use a medication on his injury, called Voltaren. He used it by rubbing it onto the injured part of his leg. He continued to use the Voltaren through the time when the offence was committed. The Voltaren was in gel form, designed for application by rubbing on to the affected area. Voltaren contains the non-steroidal anti-inflammatory drug called *Diclonefac*, and it is for human use.

Mr Beard offered the opinion that the Voltaren might have been ingested by the dog by way of the dog licking it off Mr Beard. If it happened that way, then the administration was accidental, because Mr Beard did not mean to do it. As Mr Beard said at T8:

> ***"MR BEARD*** *So the only...the only reason I can say...I don't use Voltaren on the dogs and I never have and...ah...the only reason is it's either rubbed off my leg or the dog's...I've had it on my hand, like forgotten about...I've either rubbed it before I've gone to do the dogs, it's still on my hands, he's either licked it or it's come off through there..."*

The Stewards asked Dr Thomas, a veterinary surgeon, about the likelihood or otherwise of Mr Beard's explanation being correct. At T30, the following exchange took place between Dr Thomas and Mr Borovica, the Chairman of the Inquiry:

"DR THOMAS *...so that you know the greyhound would have to lick you know sort of probably at least a...a grape size to get sort of around10 milligrams, or 5 milligrams into its body because not all of this is absorbed into the body.*

MR BOROVICA *Right , okay. I'm getting the impression from what you're saying that it would ... it would be an unlikely thing.*

DR THOMAS *It would be likely?*

MR BOROVICA *Unlikely sorry.*

DR THOMAS *Ah ... yeah ..."*

There was other evidence on the point as well, and the Stewards dealt with the matter fully in their findings. Their conclusion was:

> *"According to the evidence you did provide, any Voltaren on your hands was such that it was undetectable to you and it would therefore appear unlikely that this minute quantity, even if contacted to the greyhound, could produce such a result. Given the evidence before us, or rather the lack of it in terms of specific details, we are not satisfied that your explanation explains how the Diclofenac came to be found in the urine analysis conducted."*

I am quite unable to see how the Stewards could have been mistaken in not accepting Mr Beard's explanation. Dr Thomas said it was unlikely that the administration occurred the way Mr Beard said. The Stewards went further than that, as they were entitled to do. They considered all the evidence, and did not accept the explanation at all. The Stewards were the fact finders, not the expert witnesses. In my opinion, particular (ii) is not made out. That being so, it follows that particular (i) is not made out.

PARTICULARS (iii), (iv) and (v)

The common point made with these particulars is that the drug was not in the category of the most serious type. The fact that there was a low level detected in my view did not take the matter any further for the appellant. No evidence was given as to the effect if any of that particular level. Dr Thomas did say at T31 that the level was extremely low, but he gave no evidence of effect. However, it is self evident that the detection was of the parent drug, not a metabolite. For this reason, the Stewards found that it was most likely that the drug was having an effect. In my view, particular (iii) is not made out because the low level was not proved to be something in favour of the appellant. At best, it was a neutral fact.

Particular (v) refers to a piece of evidence going to make up the fact contained in particular (iv). The point sought to be made is that the drug was not is the most serious category. In my view, that is a relevant consideration, but the Stewards did take it into account. Dr Thomas said at T31 that it is a non-steroidal anti-inflammatory drug. The Stewards asked Dr Thomas to give them the names of other drugs in that category. They asked so that they could properly categorise the drug in order to fix an appropriate penalty. It is not to the point to assert that the Stewards failed to give sufficient weight to the nature of the drug. Once they had properly categorised the level of seriousness, then all that remained was to fix a penalty within the appropriate range for that category. Whether the penalty arrived at was outside that range is the subject of a different particular of the appeal, considered later. In my view, particulars (iv) and (v) are not made out.

PARTICULARS (vi), (vii) and (ix)

The plea of guilty and the appellant's personal circumstances were taken into account. The Stewards' reasons for decision referred to these factors. Once it is seen that the relevant facts were taken into account, it is a difficult thing for the appellant to demonstrate that there was an error in not *"attaching sufficient weight"* to the relevant facts. All that the appellant has done is to argue that there was error on the part of the Stewards. No objective facts were raised in respect of these particulars at the appeal hearing. Accordingly, particulars (vi), (vii) and (ix) are not made out.

It then remains to consider particular (viii), together with the overriding assertion that the penalty itself was so far outside the range as to manifest error.

PARTICULAR (viii) and THE RANGE OF PENALTIES

The Stewards went to some lengths to identify a range of penalties. They referred to a number of previous decisions, and brought these cases to Mr Beard's attention at the hearing. Mr Beard referred to two previous cases of which he was aware, in which trainers were fined for drug offences. Clearly, the Stewards were aware of the necessity to impose a penalty that was consistent with penalties imposed for other offences of the type.

The Stewards' reasons for decision indicate that a period of disqualification is the penalty most often imposed for offences of this type. A period of anywhere between two and nine months was identified in the cases referred to. The case of ***Robartson*** (Appeal No. 507 delivered on 29 September 2000) itself identified a number of relevant cases on the question of penalty. In that case, a penalty of six months disqualification was not set aside on appeal. The Chairperson of this Tribunal said at page 14:

> *"The fact that in the more recent period both the penalty provision has changed and the amount of the fine has been increased collectively are not factors, in the light of all the circumstances of this case, to warrant treating this offence in terms of the type of penalty any different from Phillips, Moyle, Polczynski, Simpson, Lindsay and Norwell. This long line of authorities going back to 1984 demonstrates that other trainers with impeccable records were meted out disqualifications for anti-inflammatories."*

In this appeal, counsel for the appellant tendered to us reports of penalties imposed for similar offences in other states of Australia. Those reports indicate that South Australia favours imposition of a disqualification of three months, together with a fine of about $500. New South Wales favours imposition of a fine of about $220, or even a type of good behaviour bond. Whilst I accept that consistency in penalty Australia wide might be a desirable object, I am not persuaded that it is necessarily so. Further, even if it were, I am of the opinion that nothing has been demonstrated to indicate that the Western Australian approach is not the one to be followed.

CONCLUSION

For all of the above reasons, I would dismiss the appeal.

Seal of the Racing Penalties Appeal Tribunal of WA

PATRICK HOGAN, MEMBER

APPEAL - 536

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A MONISSE (MEMBER)

APPELLANTS:	**SHANE ANDREW BEARD**
APPLICATION NO:	**A30/08/536**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING:	**22 AUGUST 2001**
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Mr M Kemp appeared for the Stewards of the Western Australian Greyhound Racing Authority.

I have read the draft reasons of Mr P Hogan, Member. I agree with the reasons and conclusions and have nothing to add.

A E Monisse

ANDREW MONISSE, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL - 536

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANTS:	**SHANE ANDREW BEARD**
APPLICATION NO:	**A30/08/536**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A MONISSE (MEMBER)**
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I have read the draft reasons of Mr P Hogan, Member. I agree with the reasons and conclusions and have nothing to add.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL - 536

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANTS:	**SHANE ANDREW BEARD**
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Mr M Kemp appeared for the Stewards of the Western Australian Greyhound Racing Authority.

This is a unanimous decision of the Tribunal.

For the reasons published the appeal is dismissed.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.