

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR D MOSSENSON (CHAIRPERSON)

APPELLANT: JOHN JAMES MILLER JNR
APPLICATION NO: A30/08/570
PANEL: MR D MOSSENSON (CHAIRPERSON)
MS K FARLEY (MEMBER)
MR W CHESNUTT (MEMBER)
DATE OF HEARING
& DETERMINATION: 21 AUGUST 2002

IN THE MATTER OF an appeal by John James Miller Jnr against the determination made by the Stewards of the Western Australian Turf Club on 6 May 2002 imposing 6 months disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr J J Miller Jnr represented himself.

Mr B W Lewis appeared for the Stewards of the Western Australian Turf Club.

On the 21 August 2002, after hearing evidence and arguments, the Tribunal unanimously upheld the appeal of Mr J J Miller Jnr. The conviction and 6 months disqualification, which were imposed by the Stewards of the Western Australian Turf Club on 6 May 2002 for breach of the Australian Rules of Racing 178, were quashed. I now set out my reasons for determination.

Background

- 1 A post race urine sample taken from THURSTON after it ran second in the BMW Perth Cup over 3200 metres at Ascot on 1 January 2001 revealed the presence of

Cimetidine. Cimetidine is a therapeutic substance which is prohibited under the Rules from being in a racehorse which has been presented to race.

- 2 A Stewards' inquiry into the matter commenced on 13 March 2001 and continued on 24 August 2001. The Stewards' panel comprised Mr F J Powrie (then Chairman of Stipendiary Stewards), Mr B W Lewis (Deputy Chairman of Stewards) and Mr R J Mance (Stipendiary Steward). Present were Mr P O'Reilly, Racecourse Investigator, and Dr P J Symons, Veterinary Steward. Called to the inquiry were the trainer Mr J J Miller Jnr and Mr D Capelli, the managing part owner of THURSTON.

- 3 The relevant laboratory certificates in respect of the samples were produced at the first Stewards' sitting as exhibits. The Rule dealing with the taking of samples states:

- '178D. (1) Samples taken from horses in pursuance of the powers conferred on the Stewards by AR.8(j) shall be analysed by only an official racing laboratory.*
- (2) Upon the detection by an official racing laboratory of a prohibited substance in a sample taken from a horse such laboratory shall:*
- (a) notify its finding to the Stewards, who shall thereupon notify the trainer of the horse of such finding; and*
 - (b) nominate another official racing laboratory and refer to it the reserve portion of the same sample and, except in the case of a blood sample, the control of the sample, together with advice as to the nature of the prohibited substance detected.*
- (3) In the event of the other official racing laboratory detecting the same prohibited substance, or metabolites, isomers or artifacts of the same prohibited substance, in the referred reserve portion of the sample and not in the referred portion of the control, the certified findings of both official racing laboratories shall be prima facie evidence upon which the Stewards may find that a prohibited substance had been administered to the horse from which the sample was taken.'*

After the Australian Racing Forensic Laboratory detected Cimetidine in THURSTON'S sample the Chemistry Centre (WA) detected the same substance in the reserve portion of the urine. Each of the required steps in Rule 178D had been complied with.

- 4 Following the resignation of Mr Powrie from his position at the Western Australian Turf Club the Stewards' panel dealing with the THURSTON sample was reconstituted. The new panel began sitting afresh on 12 November 2001. Sittings continued on 13 November 2001, 31 December 2001 and 6 May 2002. The replacement panel comprised Mr B W Lewis (Acting Chairman of Stewards),

Mr W J Delaney (Provincial Chairman of Stewards) and Mr R J Mance (Stipendiary Steward). At the commencement of proceedings on the 12 November 2001 the evidence previously received, comprising the transcript and exhibits, was all admitted and exhibited in the new inquiry.

- 5 Mr Miller attended all sittings of both inquiries except on 31 December 2001. Present at the hearing were Mr Capelli and Mr N N Botica, part owner of THURSTON. It is clear from the transcript (p298) Mr Miller was unable to attend on that occasion for medical reasons. Mr Miller had by then already been disqualified by the Stewards for failing to attend an unrelated Stewards' inquiry. The owners sought an adjournment both for themselves and by implication on Mr Miller's behalf. As it was uncertain as to how long Mr Miller's condition would prevail the Stewards resolved to proceed with the THURSTON inquiry in his absence. In the course of that December hearing the Stewards disqualified THURSTON from the Perth Cup. The Chairman of the inquiry announced the Stewards' findings in these terms:

'... Stewards believe a reasonable opportunity has been afforded to you the owners to present evidence and question witnesses throughout this Inquiry. We do not believe the line of questioning suggested regarding taking of evidence of expert witnesses in regard to the metabolism of cimetidine will benefit this Inquiry. Expert witnesses Dr Peter Symons, Dr S. Stanley and Mr C Russo all state that little is known regarding the metabolism of cimetidine in horses. Further Dr Stanley and Mr Russo have clearly indicated that neither the sample or the reserve portion were tested for metabolites. The rules of racing do not require metabolites of prohibited substances to be detected. For these reasons we do not consider it appropriate to grant any further adjournment. Throughout this Inquiry the owners have raised their grave concerns regarding the chain of custody and integrity of sample number 1501121 relating to THURSTON from the Perth Cup on the 1st of January 2001. Stewards have carefully examined all the facets of the procedure related to the collection, storage, transport and testing of the sample taken from THURSTON on January 1, 2001. The sample taken from THURSTON on the 1st of January 2001 was witnessed by Mr Bruno Malatesta, a licensed stable employee for Mr John Miller. Mr Malatesta signed the sample card stating he was satisfied with collection, packaging and sealing procedures. After being taken the sample was properly secured and was under the supervision of official persons. Sample number 1501121 was then sent to the ARFL as part of the batch of samples where it was received in good order on the 3rd of January 2001. The initial notification signed by Dr Stanley and dated 30th of January 2001 stated that sample number 1501121 was dated three one zero one. We accept Dr Stanley's explanation for this error, which was subsequently corrected. Similarly the sampling kit audit document with ID number ARF000946 advising that sample number 1501121 was returned in security bag number 658 was adequately documented albeit unsigned. We believe these issues to be clerical errors which do not in any way impunge (sic) on the integrity of the sample. We are further satisfied that the presence of cimetidine was detected in normal screening procedures. Following the notification of irregularity the ARFL sent the reserve portion of urine and control solution to the Chemistry Centre of Western Australia in a sealed bag for analysis. These samples were received on good order with the seals in tact, cimetidine was confirmed in the reserve portion of urine but not in the control. This indicates that there has been no

contamination at collection stage. Both the Australian Racing Forensic Laboratory and Chemistry Centre of WA are official racing laboratories under the Australian Rules of Racing. The Stewards are of the opinion that the allegations regarding the integrity of sample number 1501121 or the sampling and testing procedures are without any merit. We are completely satisfied with the findings of the ARFL and Chemistry Centre of Western Australia. Based on the evidence of Dr Peter Symons the Stewards are satisfied that cimetidine is a prohibited substance, a prohibited substance under the rules of racing. The Stewards are not required to actually prove the act when or the event by which the administration of the prohibited substance occurred. We rely on the evidentiary presumption of ARR178D Part 3 to prove this fact. Having come to these conclusions the Stewards then considered the provisions of Australian Rules of Racing 177 which state, I'll just read those to yourself, Mr Botica. It states any horse which has been brought to a racecourse which is found by the Committee of the club or the Stewards to have had administered to it any prohibited substance as defined in AR1 may be disqualified for any race in which it has started on that day. Do you understand what that rule is saying Mr Botica. That the detection of a prohibited substance may result in the disqualification of a horse from a race. Mr Botica after consideration of all the evidence presented throughout this Inquiry, the Stewards are exercising their discretion under ARR177 and we disqualify THURSTON from second placing in the BMW Perth Cup at Ascot on 1 January 2001 and we will amend the placings accordingly.' (T363-366).

- 6 At the next hearing on 6 May 2002 Mr Miller attempted to call Mr L Voak and Mr Cochrane from Clinipath, Western Australia's largest testing laboratory, to give scientific evidence. The Chairman of Stewards sought clarification from Mr Miller '...how that will help your case from here on in, given that THURSTON has been disqualified?' (T368). Mr Miller responded:

'Well, it's a matter, it's a matter of, from my point of view how, how cimetidine was detected in the sample. As I said you I was feeding another product called Ranitidine and I'm still bewildered as to how, as I said in the transcript on a prior occasion, had Ranitidine been found, well naturally I would have put my hand up and said no contest. Now it's disturbing to me and disturbing to other people that despite the fact that I was feeding that product, then all of a sudden this comes up that it's cimetidine. That's a worry to me and if you like to put yourself in my position, what would you be thinking?' (T368-369).

- 7 When the Chairman of the inquiry expressed bewilderment why Mr Cochrane was not present when Dr Stanley, official analyst for the Australian Racing Forensic Laboratory, gave evidence Mr Miller responded '...Unfortunately he wasn't able to be here'. (T369). Mr Miller also argued further documentation had been obtained since then and more information had been obtained. Mr Miller indicated the evidence he proposed to call would question some or all of the scientific evidence already called. The Chairman of the Stewards' inquiry then responded 'But we've already determined that matter Mr Miller' (T371). Mr Miller's response was not altogether surprising when he stated:

'Well it's been determined as far as the owners of the horse has gone. It hasn't been determined as far as I'm concerned. I mean what's going to happen to me?

...

Yeah, but see this, this, this evidence if you like to call it, or documentation or whatever was going to be presented on the 10th of, and or 31st of December. Because I wasn't able to attend, it wasn't available. I'm not saying it wasn't available, I wasn't here, so that's the reason that it wasn't produced at that time. (T371).

- 8 Mr Miller went on to explain that his 2 witnesses did not come to the inquiry on 31 December 2001:

'...because they were my witnesses that's why they didn't. They had, they had nothing to do with the, with the owners. I mean the owners hadn't requested them to come. Perhaps in hindsight it they had've, they may have come and they may've not. But they've had no contact with the owners.' (T374).

- 9 In refusing this request to allow the witnesses to be called the Chairman of the inquiry stated:

'Mr Miller we've considered what you have said to us and I wish to read part of a letter dated 19th October 2001 that was sent to yourself at 788 Baldivis Road, Baldivis. The fourth paragraph says that "Dr Stanley of the Australian Racing Forensic Laboratory will be present at this inquiry for the purpose of providing expert evidence and answering any questions from you or your expert witnesses in regard to that evidence. It is the intention of the Stewards to complete all questioning of Dr Stanley at this time. In order to achieve this aim, you should ensure that your expert witnesses and legal representative are available to attend this inquiry." Now that was exhibited at the inquiry as No. 5 on the 12th of November. Mr Miller, basic overview of this case is that you've had every opportunity to present scientific evidence and to question Dr Stanley and Mr Russo and also Dr Peter Symons. It is our decision that there will be no further questioning of those people.' (T380-381).

- 10 After a short adjournment Mr Miller was charged during the course of the May hearing as follows:

'Mr Miller, after considering the evidence this far the Stewards believe that you have a charge to answer under Australian Rule of Racing 178 and that Rule reads, ... "When any horse which has been brought to a racecourse for the purpose of engaging in a race is found by the Committee of the Club or the Stewards to have had administered to it any prohibited substance as defined in AR.1, the trainer and any other person who was in charge of such horse at any relevant time, may be punished, unless he satisfy the Committee of the club, or the Stewards that he had taken all proper precautions to prevent the administration of the prohibited substance." ...the particulars being that you as the trainer of THURSTON brought that gelding to the Ascot Racecourse on the 1st of January 2001 for the purpose of engaging in the BMW Perth Cup and following a post race urine sample taken from THURSTON the prohibited

cimetidine was found to have been administered to the gelding.' (T382).

- 11 Mr Miller pleaded not guilty to the charge. In his defence Mr Miller reiterated his position that he had further evidence and witnesses to be presented. After a further adjournment the Chairman announced the Stewards' findings in these terms:

'Mr Miller, the Stewards are satisfied that the administration of the prohibited substance cimetidine to THURSTON did occur sometime before the gelding was brought to Ascot on 1st January 2001 to race in the Perth Cup and given the evidence from pages 282 to 285 of the transcript and your statements today, the Stewards are not satisfied that you have taken all proper precautions to prevent the administration of cimetidine to THURSTON. As such, Mr Miller, we find you guilty of the charge.' (T385-386).

Mr Miller was disqualified for 6 months.

- 12 The owners of THURSTON did appeal against the horse's disqualification and consequent forfeiture of the \$55,000 stake money. On 25 February 2002 this Tribunal, constituted by Mr P Hogan as Presiding Member dismissed the appeal (Appeal 556 – Capelli, Botica & Johnson). In so doing Mr Hogan stated the appeal had no merit and the case before the Stewards was hopeless. Detailed written reasons were subsequently published.

- 13 By notice of appeal dated 17 May 2002 Mr Miller as the trainer of THURSTON appealed against his conviction and penalty for having breached Rule 178 of the Rules of Racing. The notice states:

*'The decision was against the evidence to convict. (Further grounds to be added when transcript is received)
Also against severity of the penalty.'*

The appeal hearing

- 14 At the appeal hearing the appellant sought leave to add the following grounds of appeal:

- (1) *I was ill and medically unfit to attend the enquiry on 31st December 2001.*
- (2) *The Stewards refused to provide me with information despite many requests to both enquiries.*
- (3) *The Stewards refused to hear my expert witnesses at the resumption of the enquiry on May 6th 2002.*
- (4) *The Stewards agreed to allow evidence, then when they convened a new enquiry refused to allow it.*

- (5) *Despite my objections the Stewards allowed the introduction of the proceedings of a previous enquiry into this enquiry.*
- (6) *At the new enquiry one of the Stewards Mr Delaney was not even a steward on the 1st of January 2001.*
- (7) *Dr Stanley the analyst refused to answer questions as to his methodology in testing.*
- (8) *Fresh material ascertained since the enquiry commenced and which I seek to introduce at the appeal.'*

Mr Miller's application for leave to add to his grounds was readily granted as it was unopposed by the Stewards.

- 15 Mr Miller then sought leave to call Mr J K Cochrane and to produce other evidence in the appeal. There was no dispute that Mr Miller was ill last December and unable to attend the hearing on 31 December 2001 when the Stewards dealt with the owners' position by disqualifying the horse and forfeiting the substantial stake money. As explained in paragraphs 7 and 8, at the Stewards' inquiry in May 2002 Mr Miller explained his position regarding Mr Cochrane as being his own witness and otherwise clearly disclosed his intentions regarding his further evidence. In denying Mr Miller's request the Stewards deprived Mr Miller of the opportunity to defend himself. The facts alleged in the added so called grounds of appeal 1, 2, 3, 7 and 8 (quoted in paragraph 14) lent support for me to have exercised the discretion to allow Mr Miller to present further evidence. Denial of natural justice considerations clearly indicated this to be a proper case to allow the appellant to call his expert and present other evidence at the appeal.

- 16 Mr Cochrane was called and duly sworn in. He told the Tribunal inter alia he is laboratory manager of Clinipath, he holds a science degree and has some 26 years experience involving organic chemistry, biochemistry, drug screening, toxicology and pharmacology. He proceeded to give a powerpoint presentation headed '*Cimetidine. The Finding of Cimetidine in sample 1501121 by LC/MC-MS*'. The written form of the presentation was tendered and marked exhibit A. The narrative part of exhibit A, excluding the 7 graphs, is reproduced in part as follows:

'Cimetidine

Cimetidine has not been found in a thoroughbred anywhere else in the world.

Cimetidine has largely been replaced by Ranitidine (Ulcerguard) which is 7 times more potent and far simpler to apply to the animal.

Mr Miller has testified on many occasions that he applied Ulcerguard to his horse prior to race day, ceasing application 4 days before running, which is the usual procedure for horses being treated for ulcers.

Cimetidine is a very difficult drug to detect by all usual screening procedures.

There is no available enzyme immunoassay, and it is notoriously difficult to detect using HPLC, the most common screening methodology.

In this case, the screening method has been concealed due to the alleged need for 'secrecy'.

LC/MS-MS is a very complex and accurate technique, using expensive and computer-enhanced equipment to detect unknown samples at extremely low levels.

The major advantage is the elimination of background "noise" thus enabling the target compound to be clearly identifiable.

The method produces an accurate "fingerprint" which enables exact identification of the target compound.

(7 graphs headed 'Authentic Reference Standard', 'Sample 1501121', 'Cimetidine from in Vivo sample', 'Simplified Reference Sample', 'Simplified 1501211', 'Simplified Cimetidine In Vivo' and 'Composite Simplified View' followed.)

Differences

- 1. Cimetidine typically shows bands at 95 m/z and 99 m/z. They are absent from the spectrum of the Authentic Reference Standard. This is because the fragments originate from a product of Cimetidine that is produced non-enzymatically, by acid hydrolysis, due to the strongly acid pH of the stomach.*
- 2. However the sample 1501121 also lacks these peaks. Although they may vary in intensity in different instances the absolute match of this sample with the reference sample indicates that this specimen is not of biological origin. It would appear to have been introduced to the urine after it was collected as it shows none of the characteristics of a biological specimen.*

Discussion

- 1. Due to it's extreme sensitivity, Tandem MS normally requires the use of a similar Internal Standard rather than the target compound because of the possibility of contamination.*
- 2. The acid hydrolysis of Cimetidine is well-documented. Because the product is not as biologically active, many additives to the gel coating have been developed in an attempt to slow down this process.*

Conclusion

- 1. The sample 1501121 did not originally contain Cimetidine. It was probably introduced to the sample on or about the 25th January 2001, The method was set up on the Thermo Finnegan LCQ Deca using Xcalibur software. The substance was curiously consistently mis-spelled "Cimetadine" by Dr Stanley throughout the procedure.*
- 2. The source of both samples appears to be the Alltech Standard Cat. No 01426 which was possibly ordered in in mid-January after notification from someone in Perth.*

3. As the so-called back-up sample was also in the laboratory it too was able to be deliberately contaminated. The reference laboratory was merely asked to confirm Cimetidine, which it duly did.

Recommendations

1. Chain of Custody procedures must be reviewed. Under no circumstances should a reference and back-up sample be sent together. The independent sample should be held securely in a neutral location.
2. Cut-off levels should be introduced, and drugs should be reported quantitatively when they are detected.
3. Screening and confirmation methods should be stated, in line with drug procedures throughout the world.
4. In the light of this finding, there should be a review of banned drugs. Efforts would be better directed to finding instances where the substance is dangerous to the animal or to the fairness of the sport.'

17 In the course of presenting his evidence Mr Cochrane advanced numerous additional telling propositions which all discredited the evidence which had been called by the Stewards at their inquiry. These included:

- *'But the big problem here is that right from the start they have refused to tell us how they actually came across cimetidine in the original sample. All we know is that they confirmed cimetidine later on but they never said why they went on to screen it and they said they needed to hold it for reasons of secrecy because the trainers would all go out and rot the system, things like that. But repeatedly and this has been very disturbing to me that they have not revealed their screening procedure.'*
- *it is surprising and unusual '...to find that somebody was suddenly finding Cimetidine at a screening procedure'.*
- *'...when we sample these graphs to people like Thermo Finnegan they've all said that it doesn't prove that this sample's ever been in the horse's system.'*
- *'...the big problem is, ...the reference standard and the unknown match each other virtually perfectly and I would expect if the horse's sample has been through the horse, that we would see a slight variation.'*
- *'...they don't look for metabolites. Most people when they look for drugs in humans we look for a metabolite which proves that it's been through the liver. Everybody in the world except the Australian Forensic Racing Laboratory says that that's a good way to prove if you've taken drugs.'*
- *'...the absolute match of the sample and the reference sample indicates that this specimen is not of a biological origin. It seemed to have been introduced to the urine after it was collected, it shows none of the characteristics of a biological sample.'*

- *'...Dr Stanley then went on to say that in his opinion it was consistent with a large dose of Cimetidine and I don't know, if hasn't quantitated, how he could have decided that.'*
- *'...if we go back to the chain of custody data that they actually sent the back up sample, the reference sample along with this sample to Sydney. So what I'm saying, if you'd spiked one sample why wouldn't you spike the other one while you're there. So to send it off to another laboratory and immerse it in this mess doesn't gel with me. I don't think...I certainly was very concerned that others labs might get dragged into this but as far as I'm concerned it would have all happened in Sydney, I don't think anybody else, and if they send it to another lab and just said find Cimetidine, that wouldn't have been an issue, they would have found it easily. So I have a concern about that which only leads me to my recommendations that the chain of custody procedures have to be reviewed. Under no circumstances should a reference and back up sample be sent together, that is just bad procedure. The independent sample should really be securely held in a neutral location, otherwise you are going to get cases like this again. Cut off levels should be introduced and drugs should be reported quantitatively when they are detected, that is just international procedure for drug detection, screening confirmation methods should be stated in line with drug procedures. Again they have not revealed, still refuse to reveal, how they screened it, so how they came to be looking for this one in a million substance in Sydney on this date has never been revealed...'*

18 When asked in cross-examination by Mr Lewis *'Is it your insinuation that the sample was concocted? Is that what you are insinuating?'* Mr Cochrane responded 'Yes'. The following dialogue then ensued:

LEWIS *And what leads you to that conclusion Mr Cochrane?*

COCHRANE *The lack of the m/z Peaks at 95 and 99 on the mass spectrograph of the sample.*

CHAIRPERSON *Sorry, can you explain that in simpler terms?*

COCHRANE *That would be the two red lines missing out of the graph that you saw on that procedure.*

CHAIRPERSON *Missing, but why does that lead you to the belief that it was concocted?*

COCHRANE *Because of the absolute resemblance between the reference standard and the standard in the unknown sample. I would have expected to see some difference between the two if it had been through a horse's system and we have maintained that from the very beginning and had that authenticated by other people.'*

- 19 Further, when asked by Mr Lewis '*...it is your assertion that Dr Stanley was contacted by a member of the Western Australian Turf Club, be it the Stewards panel or Racecourse Investigator Mr O'Reilly and was told specifically to look for Cimetidine, or to place Cimetidine in the sample?*' he answered '*I believe he must have been informed to find it, if he didn't screen for it and find, I don't believe that you would walk up to an unknown sample and perform LC/MS-MS on it for one substance without having a reason to. Now he hasn't stated that he screened it and found it, has said that he has to hide that method for reasons of secrecy so that the only conclusion I have is the one that's emerged through these proceedings, that some strapper or something provided information but I don't quite understand that part of it, but I have heard that's a possibility*'.
- 20 I asked the Stewards' representative whether he disputed Mr Cochrane's knowledge and experience and his capacity to give the evidence which he had presented. Mr Lewis answered he did not dispute Mr Cochrane's qualifications.
- 21 Earlier in the appeal proceedings Mr Lewis had already responded to my question that the Stewards had come to the appeal hearing anticipating Mr Miller would seek to call Mr Cochrane.
- 22 The allegations made by Mr Cochrane were extremely serious and damning. Mr Cochrane's evidence contradicted much of the material relied on by the Stewards at their inquiry. If given credence Mr Cochrane's assertions and conclusions could undermine the Stewards' findings and upset the Stewards' determination. In the light of these observations, the cross-examination of Mr Cochrane that ensued can, at kindest, be described as very limited in its scope, superficial in its approach and ineffectual in its outcome.
- 23 The questioning from the Stewards in no way addressed or even sought to challenge the grave allegations that were made or the serious conclusions the Tribunal was being invited to draw. Further, there was never any suggestion by the Stewards that they were taken by surprise by this evidence, that they needed time to consider their position, that they wished to call rebutting evidence or they needed to take counsel before proceeding further with the appeal process.
- 24 But Mr Cochrane's evidence was not all that the appellant relied on. Mr Miller also pointed out the fact that Dr Symons' '*Collections of Post Race Drug Samples Standard Operating Procedures February 2001*' is dated subsequent to when the sample was taken. Further, Mr Miller produced a document from Thermo Finnegan (ex 'B'). Adopting the words used to describe it by Mr Lewis this document '*basically says the graphs did not prove the presence of Cimetidine*'. Mr Lewis had no objection to that document going into evidence.
- 25 As previously indicated despite the severity of Mr Cochrane's allegations, the significance of his evidence overall and the fact that it already vindicated Mr Miller's position the reaction from the Stewards was surprisingly brief and incredibly bland. This comment not only relates to the cross-examination but also

can be said of the arguments raised in opposing the appeal. It is appropriate to quote the submissions presented on behalf of the Stewards in the appeal in full, namely:

'Yes, Mr Chairman. Mr Chairman, Members, this was not a conventional inquiry by any means. It was commenced in March and then held over. For some time the Stewards were dealing with another matter involving Mr Miller and the same horse from the same race. That particular matter was drawn out and prevented the Stewards from pursuing this particular inquiry. It was recommenced in August and adjourned to allow further material to be submitted. Following this sitting Mr Powrie, the then Chairman of Stewards, resigned and I took over the inquiry. Mr Bill Delaney was added to the panel. Extensive evidence was taken from Dr Stanley on 12 and 13 November and it would be the Stewards' contention that Mr Miller was given every possible opportunity to present his case at that particular time. The Stewards believe this provided the best opportunity for Mr Miller to present his case and Mr Miller should have availed himself of the opportunity to have all expert witnesses present and also legal representation would have been considered at that time. Right throughout this inquiry, Mr Chairman, the Stewards have had to answer accusations of impropriety. Every aspect of the testing methodology has been questioned, every aspect of the security related to the sample has been questioned, I believe Mr Chairman, without any foundation at all. A complete review of the transcript will highlight some minor anomalies, but in the Stewards' opinion they do not reflect the integrity of the sample and it has been insulting in some ways, Mr Chairman, to have our credibility questioned at the level it has been. The allegations that Dr Stanley placed Cimetidine in the urine sample are farcical and without any substance whatsoever. There was some evidence, Mr Chairman, that was not proceeded with but there was some evidence earlier in the inquiry that this particular horse may have received some Tagamet, which is the parent to Cimetidine. The Stewards never pursued that particular aspect of the inquiry as Mr Miller refuted the statements made by Paul Criddle and Mr O'Reilly upon their visitation to the stables. A factor that was very important throughout this inquiry was the failure of Mr Miller to maintain any records. Mr Miller kept no treatment records yet was adamant that THURSTON was receiving Ranitidine sometime prior to the race in question and that there was no Cimetidine on the property. Stewards did not locate any Cimetidine on the property, however Mr Miller was unable to substantiate his claims. Mr Miller was notified in mid-October of the intention of the Stewards to hold inquiries into these matters on 12 and 13 November and it was made very clear to him in the letter that he should have marshalled his forces basically at that time. Again Mr Miller failed to liaise with the Stewards and we received no notification of Mr Miller's intention to produce any expert evidence. The Stewards wrote that letter with the intention of expediting the inquiry and if further scientific evidence was to be presented the Stewards had the opportunity to present that evidence to their own experts and have then answer the queries as this matter had been prolonged for some time. A reading of the transcript will show that the Stewards went to every length to provide Mr Miller with every piece of information that was possible, everything from the laboratory that would benefit the inquiry was provided and there has been no surreptitious hiding of any material that would be detrimentally effective to Mr Miller. It's clear that Cimetidine was detected in both samples and both laboratories which is in contravention to the rules. Dr Stanley states that it was high in his experience although there was no quantification of that statement.

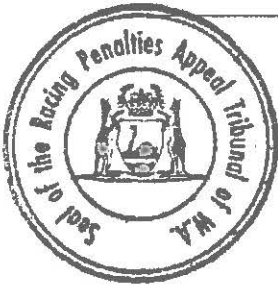
That is largely based on the fact that laboratories are not required to quantitate, they are merely required to detect. And quite simply Mr Chairman and Members, that did happen on this occasion. The introduction of Cimetidine into the horse will always remain in question and perhaps may never be answered. But it is clear that there was Cimetidine in the sample and as such Mr Miller was charged under ARR178 and as he did not convince the Stewards that he had taken all reasonable precautions to prevent the administration, he was found guilty on 6 May 2002. It would be the Stewards' contention, Mr Chairman and Members, that Mr Miller was granted every possible opportunity to present his case and as comments by Mr Hogan make out, eventually that this was a hopeless case. There was nothing proven by Mr Miller or his experts that anything untoward had happened. As such THURSTON was disqualified. Mr Chairman I really have nothing further to add on the merits of the charge or the reasons for guilt at this stage.'

- 26 As a consequence of what had unfolded at the appeal hearing the Tribunal was confronted with a great gulf between the evidence relied on by the Stewards and the evidence presented to it. The evidence received by the Tribunal largely came from Mr Cochrane who was a most credible and impressive witness. Nothing he said to us was challenged or shaken in the process. Much if not all of his telling testimony was not addressed in the Stewards' submissions in the course of the appeal.
- 27 The Tribunal must decide the matter on the balance of probabilities and according to the substantial merits of the case. As it has emerged it is inappropriate to deal with Mr Miller simplistically on the basis that THURSTON had already been disqualified for having a prohibited substance in the urine sample attributed to the horse. For Mr Miller to be denied the benefit of the evidence which he led to support his appeal would be inequitable and against good conscience.
- 28 Having been persuaded that it was appropriate for further evidence to be presented and that evidence having been received in full measure and virtually without any challenge the Tribunal is placed in a totally different position to the Stewards. Absent the evidence received at the appeal hearing there can be no doubt the Stewards were entitled to reach the conclusion which they did. After all, Rule 178D had been complied with and there was no cogent reason why the Stewards were not entitled to rely on the evidentiary presumption in the Rules. The Rules do not require quantification of the amount of drug detected, the identification of the screening procedure adopted nor the identification of any metabolites. However, in the light of Mr Cochrane's evidence it has been shown to be inappropriate to simply rely on the two laboratory certificates. The integrity of the sample was challenged by Mr Miller throughout the Stewards' inquiry. The 2 errors in handling the sample, referred to by the Stewards in their reasons (quoted in paragraph 5) as 'clerical errors' add another element of uncertainty, albeit very small, regarding the handling of the sample and the chain of custody.
- 29 Cimetidine is undoubtedly a prohibited substance under the Rules. It must not be administered and found in a race horse that is presented to race. The offence

under Rule 178 is not proven or established automatically simply because a sample of urine which has been taken from a presented horse has this substance in it at the time of testing. Whilst it is clear the onus is not on the Stewards to *'...actually prove when or the event by which the prohibited substance occurred'* and they may rely on the evidentiary presumption, Mr Cochrane's evidence throws more than sufficient doubt on that presumption for it to be unsafe to rely on it as the basis for convicting Mr Miller. In all of the circumstances the evidence of Mr Cochrane and the other evidence presented at the appeal hearing significantly call into question the evidence relied on by the Stewards. The decision of the Stewards does not stand up to scrutiny when considered in the light of all of the evidence which was before the Tribunal. In light of the evidence presented at the appeal the Stewards' finding regarding administration (quoted in paragraph 11), namely that the administration occurred before THURSTON was brought to the course to race on Perth Cup day, is unsafe and unsatisfactory. That finding cannot be allowed to stand.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MS K FARLEY (MEMBER)

APPELLANT: JOHN JAMES MILLER JNR

APPLICATION NO: A30/08/570

PANEL: MR D MOSSENSON (CHAIRPERSON)
MS K FARLEY (MEMBER)
MR W CHESNUTT (MEMBER)

DATE OF HEARING
& DETERMINATION: 21 AUGUST 2002

IN THE MATTER OF an appeal by John James Miller Jnr against the determination made by the Stewards of the Western Australian Turf Club on 6 May 2002 imposing 6 months disqualification for breach of Rule 178 of the Australian Rules of Racing.

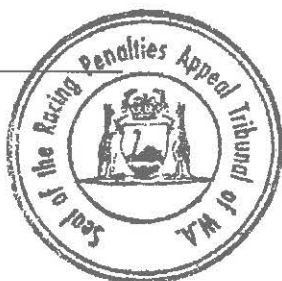
Mr J J Miller Jnr represented himself.

Mr B W Lewis appeared for the Stewards of the Western Australian Turf Club.

I have read the draft reasons of Mr D Mossenson, Chairperson.

I agree with those reasons and have nothing to add.

Karen Farley



KAREN FARLEY, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR W CHESNUTT (MEMBER)

APPELLANT:

JOHN JAMES MILLER JNR

APPLICATION NO:

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PANEL:

MR D MOSSENSON (CHAIRPERSON)
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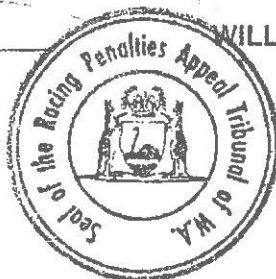
Mr J J Miller Jnr represented himself.

Mr B W Lewis appeared for the Stewards of the Western Australian Turf Club.

I have read the draft reasons of Mr D Mossenson, Chairperson.

I agree with those reasons and have nothing to add.





WILLIAM CHESNUTT, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR D MOSSENSON (CHAIRPERSON)

APPELLANT: JOHN JAMES MILLER JNR

APPLICATION NO: A30/08/570

PANEL: MR D MOSSENSON (CHAIRPERSON)
MS K FARLEY (MEMBER)
MR W CHESNUTT (MEMBER)

DATE OF HEARING
AND DETERMINATION: 17 June 2003

IN THE MATTER OF an application by the Stewards of the Western Australian Turf Club to reopen Appeal 570 made by John James Miller Jnr heard and determined on the 21 August 2002 wherein the Tribunal quashed a 6 month disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

Mr BJ Singleton QC appeared for Mr JJ Miller Jnr.

On the 17 June 2003, after hearing submissions from senior counsel for the both parties, the application by the Stewards of the Western Australian Turf Club to reopen Appeal 570 was refused by the Tribunal. Both Members concurred with my decision. My reasons for so refusing are as follows.

Background

- 1 After conducting an extensive inquiry into the discovery of the presence of Cimetidine in a post urine sample taken from THURSTON after it ran second in the BMW Perth Cup on 1 January 2001 the Stewards of the Western Australian Turf Club convicted the horse's trainer Mr JJ Miller Jnr and disqualified him from training for 6 months. Mr Miller successfully appealed the decision on the 21 August 2002.

At the appeal hearing Mr Miller was given leave to call expert evidence from the laboratory manager of Clinipath, Mr J Cochrane, and to present other material. The Stewards were not represented by legal counsel at the appeal. The Tribunal was informed that the Stewards had anticipated that Mr Miller would seek to call Mr Cochrane at the appeal proceedings (see paragraph 21 of my reasons for determination of Appeal 570).

- 2 The evidence given by Mr Cochrane was compelling. That evidence is summarised at paragraphs 16, 17 and 18 of the reasons.
- 3 Paragraph 24 of the reasons identifies the other 2 items of fresh evidence which were presented including a document from Thermo Finnegan (exhibit 'B'). That document was an email. It went into evidence without objection.
- 4 The basis for the application on behalf of the Stewards to reopen the appeal is the startling allegation made by Mr RJ Davies QC that Mr Voak had manufactured his own documents including exhibit B. The Tribunal was appraised of the evidence which was proposed to be lead to verify that the email purportedly from Wendy Weise of Thermo Finnegan (exhibit B) had been manufactured and that some of the other evidence before the Stewards was fraudulent. Senior counsel for the Stewards invited the Tribunal to reopen on the basis that the Tribunal's decision could not stand without the further questioning of Mr Cochrane and examination of the outrageous fraud that had been perpetrated.
- 5 Mr BJ Singleton QC in opposing the application pointed out that the underlying reason for the appeal having succeeded is to be found at paragraph 28 of the reasons. That paragraph reads:

'Having been persuaded that it was appropriate for further evidence to be presented and that evidence having been received in full measure and virtually without any challenge the Tribunal is placed in a totally different position to the Stewards. Absent the evidence received at the appeal hearing there can be no doubt the Stewards were entitled to reach the conclusion which they did. After all, Rule 178D had been complied with and there was no cogent reason why the Stewards were not entitled to rely on the evidentiary presumption in the Rules. The Rules do not require quantification of the amount of drug detected, the identification of the screening procedure adopted nor the identification of any metabolites. However, in the light of Mr Cochrane's evidence it has been shown to be inappropriate to simply rely on the two laboratory certificates. The integrity of the sample was challenged by Mr Miller throughout the Stewards' inquiry. The 2 errors in handling the sample, referred to by the Stewards in their reasons (quoted in paragraph 5) as 'clerical errors' add another element of uncertainty albeit very small, regarding the handling of the sample and the chain of custody.'

- 6 Senior counsel for the trainer went on to argue that in order for the application to succeed it must be established that:
 - any document used in the appeal prepared by Mr Voak was manufactured

- any such document was vital to Mr Cochrane's evidence and to the Tribunal's decision
- The Tribunal had acted on Mr Voak's document and that influenced the outcome
- The opinion of Mr Cochrane needed to be based on Mr Voak's material alone.

7 Further it was submitted that Mr Cochrane had expressed his opinion after reading the graphs and had formed his own opinion that something was wrong. Mr Singleton QC argued nowhere does Mr Cochrane say his opinion was based on exhibit B. At best there was only oblique reference by that witness to the role of that exhibit. Mr Singleton QC referred to page 11 of the transcript of the appeal where Mr Cochrane states that:

'It's a fairly simply chemical procedure, it just rearranges the molecular structure slightly and it is what you would expect to find. And this is why when we sample all these graphs to people like Thermo Finnegan they've all said that it doesn't prove that this sample's ever been in the horse's system'.

Reasons

- 8 I am persuaded by the argument and approach of Mr Singleton QC. In this most unusual application I am satisfied that the underlying questions to be answered are whether the material which is alleged to have been manufactured did influence the Tribunal and but for it would the Tribunal have decided not to uphold the appeal and overturn the Stewards' decision.
- 9 At the appeal hearing I was influenced by the evidence given by Mr Cochrane. Exhibit B had no impact on the substance of that evidence. Exhibit B was merely referred to in passing in my reasons to complete the record of the fresh evidence which had been presented.
- 10 The thrust of Mr Cochrane's evidence clearly was not in fact modelled on any document produced by Mr Voak or any of the other material Mr Davies QC claimed was manufactured. Rather, Mr Cochrane relied on his own expertise and his reading of the graphs. He gave expert evidence in his own right. His key findings were all his own views. The decision to uphold the appeal was based on Mr Cochrane's direct conclusions. All the other supporting material which is complained of and is under scrutiny, whilst it supported the propositions that had been presented, was not the basis upon which the decision was made to uphold the appeal.
- 11 It would require a most unusual case indeed for this Tribunal to be persuaded to allow an appeal to be reopened. The Racing Penalties (Appeals) Act does specify that a determination of the Tribunal in relation to an appeal is final and binding on the parties and not subject to further appeal or review (s14(1)(b)). Neither party was able to present any authorities to demonstrate one way or the other that this Tribunal, not being a court of record, is or should be regarded as *functus officio* once it has decided an appeal.

- 12 Despite the seriousness of the circumstances outlined by Mr Davies QC, in the light of the fact that the alleged tainted evidence played no role in the ultimate outcome of the Tribunal's determination, the Stewards' application to reopen should go no further before this Tribunal.



DAN MOSSENSON, CHAIRPERSON

