THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**JOHN JAMES MILLER JNR**
APPLICATION NO:	**A30/08/575**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MS A BRADDOCK SC (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING AND DETERMINATION:	**17 OCTOBER 2002**

IN THE MATTER OF an appeal by Mr J J Miller Jnr against the determination made by the Stewards of the Western Australian Turf Club on 4 June 2002 imposing 12 months disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr JJ Miller represented himself.

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

This appeal was heard and determined on 17 October 2002. By unanimous decision the appeal failed both as to conviction and penalty. My reasons for dismissing the appeal are as follows.

Reasons

Mr JJ Miller trained GROSVENOR LANE which ran in Race 2 over 1500 metres at Ascot on 24 November 2001. A pre-race blood sample taken from GROSVENOR LANE on analysis by the Australian Racing Forensic Laboratory in New South Wales revealed an elevated level of plasma total carbon dioxide. The level was certified to be 38.4 millimoles per litre subject to a measurement uncertainty of plus or minus 1.2 millimoles per litre. The Racing Analytical

Services Limited in Victoria reported a TCO_2 level of 37.7 subject to the same uncertainty in measurement. The threshold level for a prohibited substance under the Australian Rules of Racing is 36 millimoles per litre.

On 7 December 2001 the Stewards opened an inquiry into the matter. The process developed into a segmented affair with further sittings held on 28 December 2001, 1 February 2002, 24 May 2002 and 4 June 2002. During the final sitting, in the course of charging Mr Miller the Chairman of the inquiry observed as follows:

> *'Mr Miller at the last hearing you put up to the Stewards certain evidence in relation to the Beckman EL-ISE, now the Stewards understood what you were putting up to us and they have considered that, we've considered all the material and evidence that you've placed before us in relation to the correctness and suitability of the Beckman EL-ISE machine for testing TCO2 in horse racing. Also we have taken into account the evidence of Mr Cochrane, Dr Vogue (sic), Mr Stenhouse and Dr Symons. After full consideration of the evidence the Stewards are of the following opinion: 1) Beckman EL-ISE machine is in use throughout the racing world; 2) the Beckman EL-ISE has been in use for some ten years; 3) the Beckman EL-ISE machine is manufactured to measure amongst other electrolytes TCO2. For it to be acceptable to be used to measure TCO2 in equine blood it must be validated within the laboratory conducting analysis. This was done at the Australian Racing Forensic Laboratory; 4) Most importantly ARFL is accredited by NATA, under the terms of accreditation NATA assessed the methods used by the laboratory. After full consideration Mr Miller we accept that the Beckman EL-ISE as operated by the ARFL is correct and proper and as such we accept the reported findings in relation to this matter. Further to that Mr Miller we believe that you should at this stage of the inquiry be charged under Australian Rules of Racing 178 I'll read that rule to you "when any horse which has been brought to the race-course 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 AR1, 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". As I say you are charged under that rule the particulars of the charge are that you Mr Miller brought GROSVENOR LANE to Ascot Racecourse on Saturday the 24th of November, 2001 for the purpose of engaging in Race 2, the Emu Export 1500m with a pre-race blood sample taken from GROSVENOR LANE having detected in it a level of TCO2 in excess of 36mmole/L.'*

Mr Miller pleaded not guilty to the charge but was convicted. In finding the charge proven the Chairman announced:

> *'Mr Miller the Stewards have considered all the evidence in relation to the charge as previously stated we do accept the evidence of the ARFL and the use of the Beckman EL-ISE machine. Part of the Australian Rule of Racing 178 states "the trainer or 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". Now we've addressed that and we do find that you have been lacking in not taking all precautions. We see that you've employed unlicensed personnel and your son Raymond also unlicensed has been*

integrally involved in your stable as a fore-person as you see him. We also note that you feed substances which are capable of elevating TCO2 levels and in relation to this you (sic) procedure is of concern to the Stewards and the lack of care and thoroughness in the feeding regime is of particular concern to the Stewards, especially when sometime prior to this matter the Chairman of Stewards did discuss with you elevated levels of TCO2 with one of your other runners. Mr Miller the onus is clearly on you as a trainer to present your runners free of prohibited substances at the time of racing. After considering all the evidence and considering the charge we find you guilty as charged.'

Eventually the Stewards announced their penalty in these terms:

'Mr Miller, the Stewards have considered all that you've placed before us in relation to penalty. Firstly we consider this to be a serious offence. We see any breach of the prohibited substances rules as one that effects the integrity of racing which undermines the public confidence in racing. Taking into account the nature of the prohibited substance, elevated levels of TCO2 classified as performance enhancing substances. We've addressed your matter of record and that record shows that on the 13th of July, 2001 you were fined fifteen thousand dollars for the stomach tubing of THURSTON which then led to an elevated level of TCO2. This was appealed and was dismissed. Further on the 6th of May, 2002 you received a six month disqualification under AR178. This matter is being appealed and takes no part in our decision in relation to this matter. We have considered your age and long involvement in racing both as a jockey and then as a trainer. We've considered the provisions of AR196 and note that in W.A. positive results to elevated levels of TCO invariably lead to disqualification. After considering all these factors Mr Miller we have decided to disqualify you for a period of 12 months…'

Mr Miller appealed the conviction and penalty on the following amended grounds:

'(1) The decision of the stewards was against the weight of evidence.

(2) I was not guilty as charged.

(3) The stewards did not follow procedural fairness in their conduction of the enquiry, in their presentation of evidence and documentation at the enquiry.

(4) I was denied Natural Justice because I was given no opportunity to test evidence presented by the stewards because it was not provided until the 26th August 2002.

(5) The analyst who tested the alleged sample was not presented by the stewards for cross examination on the testing procedures and matters requested at the enquiry.

(6) Fresh evidence of a scientific nature that was not available at the enquiry.

(7) The stewards chose to ignore the evidence of my witnesses.

(8) *I was denied Natural Justice in that despite repeated requests to the stewards, I have not been provided with all requested information regarding the testing procedures of the alleged sample No B29490.*

(9) *I was medically unfit to attend the enquiry in December 2001 yet I was harshly and unjustly disqualified for not attending.*

(10) *I was denied Natural Justice in that despite my repeated requests to the Stewards of The Western Australian Turf Club, whose responsibility it was to provide the requested information. I further made these requests under the Freedom of Information Acts of FOI, Western Australia, Commonwealth of Australia, NSW and Victoria.*

(11) *I have complained to the National Association of Testing Authorities, (NATA), including requests under The Freedom of Information Act, they have provided some information which I wish to present.*

(12) *I appeal against the penalty handed down in this matter, the Penalty was harsh and excessive for the following reasons*

(a) *This would be my first offence for presenting a horse with a high Co2.*

(b) *I was unjustly disqualified in December 2001 until June 2002, a penalty of seven months disqualification and a ruined business which is an irrecoverable penalty.'*

As a general observation I note that Mr Miller's arguments in support of his appeal were unconvincing. Mr Miller's opening argument was as follows:

> *'... there was no evidence against me in this matter whatsoever. There's no evidence that I administered anything to the horse with intent that would elevate TCO_2 levels.'*

He went on to say '*There was no motive and no intention*'. This approach can have no merit in relation to the type of offence with which Mr Miller was charged. The state of mind of an accused can have no relevance to an offence under Rule 178. That Rule outlaws a horse from racing with a prohibited substance in it. When a horse has been presented to race the trainer is responsible even in the absence of any evidence as to how the prohibited substance found its way into the horse. The findings of two official laboratories of an elevated level of TCO_2 is sufficient for administration to be deemed to have occurred under the Rules. I completely agree with senior counsel for the Stewards that on the evidence before them *'No other conclusion could possibly have been reached'.*

Punishment can however be avoided for a breach of the Rule in question provided the Stewards are satisfied the trainer has taken proper precautions. This clearly on the evidence is not the case here. If anything the situation is almost the opposite with unlicensed persons in attendance and the horse having been tubed on race day.

Nothing which Mr Miller presents suggests an error on the part of the Stewards in their evaluation of the evidence, the manner in which they conducted the inquiry and their handling of the evidence and the witnesses.

Nothing has been presented by Mr Miller to throw doubt on the propriety of the conduct of proceedings. Mr Miller received a fair hearing. There was no denial of natural justice. There is no merit in the freedom of information argument raised. Equally the fresh evidence and lack of fitness to attend the inquiry at one of the sittings affords Mr Miller no assistance as they are irrelevant and lacking in any substance.

There is no merit in any of the grounds of appeal against conviction.

The grounds do not clearly identify one of the arguments which was raised at the appeal on conviction to do with the use of the particular testing equipment. As Mr Miller submitted during the appeal the Beckman EL-ISE electrolyte machine *'...was not to be used for testing equine plasma'*. Mr Miller's propositions regarding the use and application of the machine were no more than interesting. There is no merit in what amounts to a random attack on the machine. The equipment in question has been properly and appropriately used by independent laboratory experts for many years to test very many horses. There is nothing before the Tribunal to suggest the results of the testing are unsatisfactory.

As to penalty I am satisfied that nothing Mr Miller presents reflects an error on the part of the Stewards. The penalty has not been shown to be outside the discretionary range of penalties available taking into account all of the relevant circumstances including the level of precautions and seriousness of the matter.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA