

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR D MOSSENSON (CHAIRPERSON)

APPELLANT: ALBY FRANK BRATOVICH

APPLICATION NO: A30/08/597

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR RJ NASH (MEMBER)
MR AE MONISSE (MEMBER)

DATE OF HEARING: 1 & 8 JULY 2003

DATE OF DETERMINATION: 8 JULY 2003

IN THE MATTER OF an appeal by Mr AF Bratovich against the determination made by the Stewards of the Western Australian Trotting Association on 28 May 2003 imposing a 2 year disqualification for breach of Rule 190 of the Rules of Harness Racing.

Mr BR Whiteman represented Mr Bratovich.

Mr BJH Goetze appeared for the Stewards of the Western Australian Trotting Association.

This matter came on for hearing before the Tribunal on 1 and 8 July 2003. The Tribunal unanimously dismissed the appeal at the conclusion of the hearing. The following are my reasons for dismissing the appeal.

Background

On the 28 May 2003 the Stewards of the Western Australian Trotting Association conducted an inquiry into the analyst's findings of a total carbon dioxide level of 37.9 millimoles per litre in the blood sample taken from the pacer NEW YORK MINUTE prior to it

competing in Race 8 at Gloucester Park on 2 May 2003. The trainer of NEW YORK MINUTE Mr Alby Frank Bratovich was present throughout the inquiry. Mr Bratovich has held a trainer's licence for 25 years. Dr Tom Rieusset, the WATA veterinary consultant, Mr Charles Russo, manager of WA Chemical Centre and the owners of the pacer were called to the inquiry.

At the outset of the inquiry the Chairman of Stewards announced that the inquiry was to be conducted under the provisions of Harness Racing Rule 188 which deals with determination of prohibited substances. By that rule the Controlling Body is empowered to determine what constitutes a prohibited substance. By virtue of the Western Australian Trotting Association Act 1946 and Racing Restriction Act 1927, the Committee of the Western Australian Trotting Association is the controlling body in this State. Local Rule 188 specifies what prohibited substances are. That Rule states:

- (2) *The following substances when present at or below the levels set out are excepted from the provisions of sub rule (1) (G.G. 9th August 2002)*
- (a) *Alkalinising Agents, when evidenced by total carbon dioxide (TCO₂) present at a concentration of 36 millimoles per litre in plasma*

....

The Stewards are empowered under the Rules to test horses for prohibited substances (Rule 189). As a result of their testing of NEW YORK MINUTE they had obtained a reading of 37.9 millimoles per litre from the Western Australian Chemical Centre. This reading was minus the 1.2 millimole uncertainty measurement. The sample was then passed to the Racing Analytical Services in Victoria which reported a total carbon dioxide reading of 39 millimoles per litre \pm 1.2 millimoles per litre uncertainty measurement.

Early in the proceedings the Chairman of the inquiry read out Rule 191 to Mr Bratovich. That Rule states:

- (1) *A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in or on a horse at, or approximately at, a particular time, or in blood, urine, saliva, or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse is prima facie evidence of the matters certified.*
- (2) *If another person or drug testing laboratory approved by the Controlling Body analyses a portion of the sample or specimen referred to in sub rule (1) and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub rule (1) is conclusive evidence of the presence of a prohibited substance. (G.G. 27th Oct 2000).'*

Senior Steward Richard Oliver gave evidence in the inquiry of having attended Mr Bratovich's premises on the 6 May 2003. Mr Oliver informed Mr Bratovich of the elevated TCO₂ level and carried out a stable inspection. Mr Oliver prepared a report in which he noted the security in the stabling area was fairly high. Mr Bratovich advised Mr Oliver that only he and his licensed stablehand had access to NEW YORK MINUTE on the Friday of the race. The video which was taken of the stable inspection was played during the Stewards' inquiry. After it was played the Chairman of the inquiry said to Mr Bratovich *'You did say that it has to be drenched. I did hear you say that. What did you mean by that?'* (para 51). Mr Bratovich replied:

'Well I think to have a level as high as my horse has returned, most of the people that I - - let's say seek advice or have sought advice from or just general chit-chat, and I suspect that the Stewards panel would believe that to have a level as high as this under normal circumstances the horse would have had to have been drenched.' (para 52).

Dr Rieusset gave evidence that the TCO₂ level of 37.9 in the blood taken from NEW YORK MINUTE indicated that there had been the administration of a substance which was capable of causing such a high total carbon dioxide level. He further gave evidence that the time of administration would vary depending on the substance. Dr Rieusset informed the inquiry that some of the substances found in Mr Bratovich's premises could achieve the level in question and some fall within the alkalinising agent category. The sodium bicarbonate would whereas the other proprietary preparations given their normal amounts probably would not. The question from the Chairman as to whether a combination of all things would lead towards that level was answered 'Yes' by Dr Rieusset (para 69). Dr Rieusset also told the inquiry that the respiratory and musculoskeletal systems would be affected. If sodium bicarbonate was used the probable time of administration would be about 4 hours before. Dr Rieusset's evidence was that levels of the substance would affect the respiratory and musculoskeletal system which would buffer the blood against acidifying agents allowing the horse to maintain potential for a longer period (p7).

In attempting to explain why the level was as high as it was Mr Bratovich referred to the information he had received from his veterinarians, the condition of the horses, his feeding practices, the role the bicarbonate played as an aid to digestion and the purpose of the other substances. He concluded his description with the following:

'And really the juggling act that you're trying to perform is its that (sic) perhaps overfeeding the horse in one area but trying to neutralise the - - perhaps acidiness of the food that you're giving him, and I've been reasonably successful in keeping his grain content high or up, and keeping his - - and keeping him eating normally.' (para 89)

Mr Bratovich told the Steward that he had not *'...drenched this horse...'* (para 91). In continuing the explanation of NEW YORK MINUTE's condition Mr Bratovich stated:

'And each time, you know, upon reflection it's always been after he's had an upper respiratory infection or he's had a lung infection and is - - and I've always thought - - not - - sorry, not always thought, I've subsequently come to think that perhaps all these things have been stress related and then off a sudden (sic) I've had a - - you know, seemingly high Bi-carb, because I've transgressed by feeding the horse the almost copious amounts of Stamizene, Nutradex and those types of feed additives and - - by the way, and Bi-carb.' (para 97).

When asked about the amounts of the feed in relation to his use of the word 'copious' Mr Bratovich explained:

'Rather than measure the 100 - - the 100 mil - - I feed this out to about half a dozen horses and I would just simply pour it out and just say, that's 100 mil. So I wouldn't measure it out. So I'm probably being slack in not measuring exactly 100 mil - -' (para 121)

The exchange with the Chairman continued:

'CHAIRMAN If I can just stop you for one moment. You're being a little vague when you're saying copious amounts and then you've mentioned 100 mil - -

MR BRATOVICH: No, no - -

CHAIRMAN: - - and you've mentioned Nutradex and you've mentioned Stamizene. Now what I'm asking, in what quantities of Nutradex and Stamizene would you feed at any one time in each meal?

MR BRATOVICH: The simple answer I don't know.

CHAIRMAN: But it would be - -

MR BRATOVICH: But my educated guess would be that it would be somewhere between perhaps 100 mil, maybe 150 mils. The reason for that is that rather than use the measuring device on the side of the container, I simply would take - - perhaps that's - - I haven't got - - by the way, it's a time factor and this is where the slackness comes into it, I just simply go, dollop dollop, put it into a feed container, stir it up and feed the horse.

CHAIRMAN: So - -

MR BRATOVICH: So it's not a measured thing; it's simply not a measured thing. So there might be - - if I've got a horse - - and this is where my problem was. DEMORALIZER, who's a favorite horse of mine, probably would've got more, you know, just simply because he's - - I just would give him a bit extra. But that's the - - that's the error that I think that I'm - - I have made.

CHAIRMAN: Let me ask you this once again.

MR BRATOVICH: Yes.

CHAIRMAN: *You've just explained to the Stewards that your feeding procedures are NEW YORK MINUTE gets two feeds; gets a feed in the morning - - with these additives – alkalinising agents, if you like – morning and night. You're saying now that you mix or pre-mix Nutradex with Stamizene.*

MR BRATOVICH: Sure.

CHAIRMAN: *And you pour 100 to 150 mils both morning and night?*

MR BRATOVICH: *Thereabouts, yep.*

CHAIRMAN: *Is there any other alkalinising agent that you would put with that? In other words, would you have put sodium Bi-carb with that?*

MR BRATOVICH: Yes.

CHAIRMAN: *You - - and you fed that at the same time?*

MR BRATOVICH: *Yes. The feed - - by the way, the feed additives of the powdered nature, B complex, vitamin E, vitamin C, a measure which I - - has been pointed out to me by Dr Rose is not 30 grams, because I thought that I was feeding the horse 30 grams - -'*

CHAIRMAN: *Say that again.*

MR BRATOVICH: *Thirty grams of Bi-carb?*

MR BRATOVICH: *No, no, no. I thought I was feeding 30 grams of Bi-carb. Dr Rose pointed out to me I was actually feeding them 60 grams of Bi-carb.*

CHAIRMAN: *And that's twice a day?*

MR BRATOVICH: Yes.

CHAIRMAN: *Along with the Nutradex and the Stamizene?*

MR BRATOVICH: Yes.

CHAIRMAN: *And also - - what was the other thing that you said that feed the horses?*

MR BRATOVICH: *Electrolyte.'*

Dr Rieusset in responding to the Chairman's question to comment on the evidence above quoted and whether the feeding regime described would have an effect in the elevation of the TCO₂ to the level detected responded:

'I wouldn't think it would have an effect to this level, but I will point out to the panel that if in fact a horse never gets back to its normal level because it's been topped up all the time by further alkalinising agents, you can get a slight building each time. It never gets back to its normal level, but I would of (sic) thought that to get to the levels that we're dealing with, that regime whilst - - would probably elevate it to some degree. I doubt very much would get it to this level.' (para 154).

Dr Rieusset in studying NEW YORK MINUTE's results from the numerous TCO₂ tests the horse had experienced in the past was of the view that NEW YORK MINUTE was a normal horse (para 185). Mr Bratovich's evidence was that the race day procedure was the same as normal for the horse. Dr Rieusset was of the view that the feeding regime would not have caused the level of TCO₂ which was recorded at the time (para 236).

Mr Bratovich informed the Stewards that he had not kept a log book recording all administrations of substances and all drugs in relation to training his horses even though he knew he was required under the Rules to do so (para 308).

Mr Bratovich admitted tubing horses and of having '*recently made the mistake of putting the whole lot in together and - -*' (para 320), by which he meant 125 mls of Equimax. However, he absolutely denied drenching with alkalinising agents (para 332). Mr Bratovich acknowledged he was aware of the opportunities available and facilities to test the horses for drugs. Further, he did not support the horse and very little money was invested on the horse on the TAB.

After Mr Bratovich admitted that he had gone outside the recommended dosages of his veterinarians and that he had fed copious amounts, the Chairman of the inquiry asked Dr Rieusset whether that would have caused the TCO₂ level to rise to 37.9. Dr Rieusset responded:

'In my opinion, what was told us - - to us today, that the horse was fed at 7 o'clock in the morning and, as I've previously stated, I don't believe that that would have been the cause.' (para 481).

After the Stewards completed their inquiries and had considered the evidence, the inquiry reconvened and the Chairman of the inquiry stated:

'Mr Bratovich, we've considered all the evidence put forward by you as the trainer of NEW YORK MINUTE, and we have heard that this particular horse has a problem with dehydration and that is the reason you fed copious quantities of alkalinising agents outside the advice given to you by your vet Dr Hampton, who in fact is the manufacturer of some of the additives you feed. You also state when given an opportunity to have your horses tested at your cost to ensure you have not breached the rules in relation to TCO₂, you have not availed yourself of the facility to conduct elective swabs. It has been established that NEW YORK MINUTE previous to this day confirms that it is in the normal range of TCO₂ level. We have also heard from Dr Rieusset that the levels prescribed in the

horse's history state that it is of normal range and also that copious amounts fed by yourself would not and could not cause the elevation in TCO2 to reach the levels that it did. The Stewards therefore accept the findings of both laboratories on this occasion at the levels reported in excess of the levels allowed under the rule. Therefore we accept that NEW YORK MINUTE was presented for a race not free of a prohibited substance on Friday, the 2nd of March (sic) 2003. Therefore we are issuing a charge against you under rule 190 and that rules states:

"One, A horse shall be presented for a race free of prohibited substances." (para 499).

After Mr Bratovich pleaded guilty to the charge the Chairman of the inquiry stated:

'First of all, ... , I will read you local rule 256AA, which deals with penalties, and it states - - it's 256AA and its headlines are, "Penalties total carbon dioxide", and it says:

"A person who is convicted of an offence under rule 190 in respect of the prohibited substance total carbon dioxide (TCO2) is liable to a penalty of, A, in the case of a first such offence of, one, a \$5000 fine or, two, 6 months suspension."

In case of B, of a second - - in part B:

"In the case of a second such offence of, one, a \$7500 fine or, two, a 8 months suspension; C, in the case a third such offence of, one, a 15,000 and 3 months suspension or, two, a 6 months disqualification; D, in the case of a fourth or subsequent such offence of not less than 12 months disqualification."

And also it states:

"Unless the Stewards consider that special circumstances exist which justify the imposition of a higher penalty in which event the Stewards may impose a higher penalty."

Now having read that, do you want to put submissions to the Stewards in relation to a penalty?' (para 505)

Mr Bratovich told the Stewards he would prefer to pay a fine, that he was a part time trainer and that this was his first offence '*...under a TCO scenario...*'.

The Stewards announced their decision in these terms:

'Thanks, Mr Bratovich. Mr Bratovich, the Stewards have given careful consideration to the matter of penalty. The offence is a very serious breach of the Rules and, if allowed to go unchecked, would undermine the confidence of the racing public and have serious consequences for the Industry. You are sufficiently experienced to be aware of your obligations as a trainer, and the WATA has gone to great lengths to advise all trainers of the care required of them in relation to the use of drugs in horses, and they've made available facilities for trainers to assist them in ensuring that they produce their horses

drug free for racing. And if due care is exercised there really is no excuse for a trainer to fall into jeopardy of the drug rules. The Stewards do not believe that there are extenuating circumstances in this case and having accepted your plea of guilty to the offence under rule 190 in respect to the prohibited substance, namely total carbon dioxide, we must impose a penalty. Now the relevant provision of local rule 256AA, part A, in the case of a first offence a fine of up to 5000 or 6 months suspension unless – and I stress unless – we take the view that there are special circumstances existing which justify imposing a higher penalty than a \$5000 fine or a 6 months suspension. We the Stewards refer to the special circumstances among things - - among other things, either the person convicted or the special circumstances of the facts of the offence which would justify a higher penalty.

In this case your past record is a special circumstance which justifies a higher penalty than is set down for a first offence under sub rule A, because of your previous convictions relating to a prohibited substance and those convictions are - - your first offence was in March of 1979 with a horse FIERY FLUTE. The drug is not specified under our - - in our records but certainly you were disqualified for 12 months. Your second offence was January of 1985 with a horse RIVERGUM PRINCE. The drug was dexamethasone and you were disqualified for 6 months. Your third offence was January 1987 with a horse CARDINAL BIRD. The drug was caffeine. You were disqualified for 2 years and you appealed that. That was varied to 18 months. Your fourth offence was April 1991 with the horse INDOENA. The drug was oxyphenylbutazone. You were disqualified for 2 years. You were granted a stay and your appeal in June was varied to 12 months. You were re-licensed on 26th of June 1992. Shortly after that, your fifth offence was in February of 93 with a horse JUST STONE SOBER and the drug was salicylic acid, of which you were disqualified for 5 years, but however granted a stay. Your sixth offence February also in 1994 with a horse ROCK ON JASON. You appealed both of those disqualifications, of which I must - - I must admit - - I must say firstly that you were disqualified 5 years for ROCK ON JASON. At appeal - - you appealed both of those penalties in March of that year, of which both were dismissed. However, those penalties were altered to be served concurrently.

Also it's a fact that at the time of this offence being committed you already had a substantial record in relation to prohibited substances with a number of horses trained by you and, therefore, we the Stewards see that as a special circumstance in arriving at an appropriate penalty. For these reasons we believe the appropriate on this occasion is a disqualification of your licence for a period of 2 years.' (para 548).

The appeal

The grounds of appeal are expressed in the following simple terms:

'Severity of penalty. I am of the view that I should have been given the option of a \$5000.00 fine, being my first offence for TCO2.'

Mr Bratovich applied for and was granted a suspension of operation of the penalty.

Mr Whiteman argues on 2 fronts. The first that the penalty of 2 years disqualification is not open. The second as to the inconsistency of the penalty compared to other cases in that it is so excessive. The Tribunal was presented with the background to and history of Rule 256AA. In doing so Mr Whiteman called on his undoubted knowledge and experience as a member of the Western Australian Trotting Association Committee which introduced this Rule on 2 August 2001. It is argued previous convictions did not amount to special circumstances. It is claimed that the discretion in the Rule to impose a higher penalty than the one specified in the earlier part of the Rule only applied to paragraph (d) and there was no discretion open to the Stewards under (a), (b) or (c). Despite the fact the Stewards recognised this indiscretion to be a first offence under this particular Rule, the Stewards erred by not giving the appellant the opportunity to elect a monetary penalty.

In the course of his argument Mr Whiteman produced a copy of p56 of Westrot October/November 2001 issue. On that page the then President of the Association gave notice of the Committee's resolution to amend the Rules by inserting Rule 256AA. Sub-Rule 1 of the Rule as published in Westrot reads:

- (1) *A person who is convicted of an offence under Rule 190 in respect of the prohibited substance, total carbon dioxide (TCO₂), is liable to a penalty:*
- (a) *in the case of a first such offence, of:*
 - (i) *\$5,000; or*
 - (ii) *6 months suspension;*
 - (b) *in the case of a second such offence, of:*
 - (i) *\$7,500; or*
 - (ii) *8 months suspension;*
 - (c) *in the case of a third such offence, of:*
 - (i) *\$15,000 and 3 months suspension; or*
 - (ii) *6 months disqualification;*
 - (d) *in the case of a fourth or subsequent such offence, of not less than 12 months disqualification, unless the Stewards consider that special circumstances exist which justify the imposition of a higher penalty, in which event, the Stewards may impose a higher penalty.'*

That Sub-Rule as published in the Government Gazette of 10 August 2001 at p4214 and as appears in 9 August 2002 edition of the Western Australian Trotting Association of Harness Racing 1994 is set out somewhat differently from how it appeared in Westrot. The official version of the whole of Rule 256AA reads:

(1) *A person who is convicted of an offence under Rule 190 in respect of the prohibited substance, total carbon dioxide (TCO₂), is liable to a penalty:*

(a) *in the case of a first such offence, of:*

(i) *\$5,000; or*

(ii) *6 months suspension;*

(b) *in the case of a second such offence, of:*

(i) *\$7,500; or*

(ii) *8 months suspension;*

(c) *in the case of a third such offence, of:*

(i) *\$15,000 and 3 months suspension; or*

(ii) *6 months disqualification;*

(d) *in the case of a fourth or subsequent such offence, of not less than 12 months disqualification,*

unless the Stewards consider that special circumstances exist which justify the imposition of a higher penalty, in which event, the Stewards may impose a higher penalty.

(2) *Where a convicted person referred to in subclause (1) proves that he or she took reasonable and proper precautions to ensure that the horse was presented for a race free of prohibited substances then the Stewards may impose a lesser penalty than those specified in subclause (1).*

(3) *A convicted person referred to in subclause (1) may elect, at the time of conviction, which of the alternative penalties in paragraphs (a), (b) and (c) of subclause (1), as the case may be, is to apply, and if the convicted person fails to so elect then the Stewards shall determine the alternative to apply.'*

It is relatively clear from the setting out of the official version that the discretion vested in the Stewards to impose higher penalties in view of special circumstances in Sub-Rule 1 is not limited to (d), that is fourth or subsequent offences, but rather applies to all of the offences identified in that Sub-Rule.

I am fortified in this view having had the benefit of the production of the records from the Committee which relate to the Committee's resolutions and intentions on the matter including correspondence with the solicitor for the Committee who drafted the amendment to the Rules. That material confirms:

- in determining TCO₂ offences only TCO₂ offences count when it comes to deciding whether the offence in question is a first or subsequent offence
- the discretion which is contained at the end of Rule 256AA which is preceded by the word '*unless*' applies equally to a first TCO₂ offence as it does to a second or subsequent TCO₂ offence
- the Committee wished the Stewards to impose higher penalties in appropriate circumstances which, if so decided by the Stewards, then removed any discretion that otherwise would have been open to an offender to elect a fine instead of a suspension.

In this case the Stewards concluded that Mr Bratovich's past record of non-TCO₂ presenting offences constituted special circumstances which warranted a penalty in excess of \$5,000 or 6 months suspension. I fully accept that while the previous non TCO₂ convictions did not remove the penalty from the application of Rule 256AA, under the discretion they could be considered by the Stewards as to whether a higher penalty should apply.

The influencing factor, namely Mr Bratovich's previous drug convictions, can be summarised as follows:

	Date	Drug	Penalty
1.	3/79	Name not recorded	12 months disqualification.
2.	1/85	Dexamethasone	6 months disqualification.
3.	4/91	Caffeine	18 months disqualification (varied on appeal from 2 years).
4.	4/91	Oxyphenylbutazone	12 months disqualification (varied on appeal from 2 years).
5.	2/93	Salicylic acid	5 years disqualification.
6.	2/94	Not stated	5 years disqualification (on appeal 5 and 6 were ordered to be served concurrently).

Despite this poor history in relation to prohibited substance offences the treatment of NEW YORK MINUTE and other horses under Mr Bratovich's charge in the recent period can at best be described as cavalier and grossly indifferent. Despite the Association's efforts to inform trainers of the care required in relation to drugs, the drug testing service that was available and the obligation under the Rules to record treatments, Mr Bratovich continued to

maintain his training practices virtually oblivious to any of these aspects. As the above summary of the evidence of feeding practices reveals, Mr Bratovich made no effort to measure the feed additives and bicarb given to his horses. Further, he admitted being slack in this respect. He admitted going outside recommended dosages of his veterinarians. This clearly is not a case where it could be said the appellant qualified under Rule 256AA(2) as a convicted person who took reasonable and proper precautions to ensure NEW YORK MINUTE was presented drug free.

For these reasons I am not persuaded the Stewards were in error in deciding to deal with this offence as one involving special circumstances which warranted a higher penalty. In so deciding the Stewards quite properly removed the opportunity for Mr Bratovich to make an election under Sub-Rule (1)(a).

I am satisfied the penalty imposed by the Stewards was available to them on the evidence.

In all of the circumstances I have not been persuaded that the penalty imposed was too severe.



DAN MOSSENSON, CHAIRPERSON

