APPEAL - 614

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**MARK REED**
APPLICATION NO:	**A30/08/614**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)**
DATE OF HEARING:	**18 AUGUST 2004**
DATE OF DETERMINATION:	**18 AUGUST 2004**

IN THE MATTER OF an appeal by Mark Reed against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 30 April 2004 in convicting for breach of Rule 252 of the Rules of Harness Racing.

Mr D Sheales appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

On Monday, 29 March 2004, during a race meeting at Gloucester Park, the Stewards requested a urine sample from trainer/driver Mark Reed. Mr Reed had five drives at the meeting. Chemistry Centre (WA) reported that the urine sample indicated the presence of methylamphetamine and amphetamine at a concentration of 0.11 mg/litre and 0.08 mg/litre respectively.

The Stewards opened an inquiry on 28 April 2004. Mr D Sheales, Barrister, assisted Mr Reed throughout the inquiry. At the resumption of the inquiry on 29 April 2004, the Chairman of Stewards announced as follows:-

> "Mr. Reed during the meeting at Gloucester Park on Monday 29th March, 2004 you were carrying on the licensed activity of driving THE HUMILIATOR in Race 2 at 12.40pm, SO SECURE in Race 3 at 1.15pm, training and driving ITS RANDELL in Race 4 at 1.50pm, driving LOOKSLIKELIGHTNING on (sic) Race 5 at 2.27pm and NUETS KID in Race 6 at 3.07pm. Between you driving in Races 5 and 6 you provided a sample of urine at 2.40pm.
>
> Rule 252 states under the heading Presence of Alcohol or Drug of Abuse:
>
> *A person shall not have any alcohol or drug of abuse in his or her body when carrying on or purporting to carry on a licensed activity or official duties at (sic) meeting.*
>
> Part 2 of the rule says:

Sub rule (1) does not apply to an official or employee of a club whose official duties at a meeting are unrelated to the care and control of horses or the conduct of a race.

In accordance with the dictionary Schedule one of the rules which states:

A drug of abuse means a drug within the scope of that expression as used in the document published by Standards Australia and titled "Recommended practices for the collection and detection and quantitation of drugs of abuse in Urine" number AS4308-1995 and any subsequent amendment or replacement of that document.

Methylamphetamine and amphetamine are drugs of abuse as detailed in "Procedures, collection, detection and quantitation of drugs of abuse in urine".

...

Rule 252 – Local Rule 252 states under the heading "Sample as evidence of offence"

Where an analysis is made of a sample of a person's breath, blood or urine and the sample is taken within 2 hours of an alleged offence then the quantity of alcohol or drug of abuse indicated by analysis of the sample is deemed to be the quantity of alcohol or drug of existing at the time of the alleged offence.

Mr. Reed, Mr. Horsten's report provides prima facie evidence of an offence therefore the Stewards are issuing a charge against you under the provisions of Rule 252.

The specifics of the charge are that you had drugs of abuse in your body, namely Methylamphetamine and Amphetamine when carrying on the licensed activity of training and driving at Gloucester Park meeting on Monday 29th March, 2004."

Mr Reed pleaded not guilty to the charge.

The Chairman then stated:-

"Local Rule 252A provides you with a defence to the charge. That rule states under the heading "Defences"

It is a defence to an alleged offence against Rule 252 for the person to prove:

the person gave to the Stewards prior to the alleged offence written notice in the prescribed form of the alcohol or drug; following receipt of the notice, the stewards gave approval for the person to remain on course; and

the quantity of drug or alcohol indicated by analysis of the sample was not in excess of that prescribed for the person by that person's medical practitioner and is consistent with the detail provided by the person upon the prescribed form as required by paragraph (a)."

Now the Stewards understand that you requested a three week adjournment to have the testing data reviewed by an expert and the Stewards are willing to accede your request however, I have indicated in my correspondence to you dated 23rd April, 2004, we will consider invoking the provisions of Rule 183 and invite you to make submissions in that regard."

After Mr Sheales on behalf of the Appellant made submissions to the Stewards on Rule 183, the Chairman stated:-

"Now there is no formulated process in relation to Rule 183 however, when deciding whether to invoke the rule we acknowledged that it is obligatory for us to consider this case on its merits and apply our discretion cautiously. The Stewards are very mindful of your

circumstances Mr. Reed and the effects on your livelihood. We note the submission regarding the Analyst's reports and the likely outcome of the inquiry. Upper most in our minds is the need to protect the integrity and good image of harness racing. This is a serious matter and it is not appropriate for a person charged in these circumstances to carry on licensed activities whilst the inquiry is in progress.

The Stewards have carefully considered your submissions and decided to invoke Rule 183 parts (a) and (b) and effective forthwith you shall not drive or otherwise take part in a race and no horse trained by you shall be nominated for or compete in a race. Our decision to invoke the provisions of Rule 183 should not be seen in any way as a pre-judgement of the matter. Against this decision you have 14-days in which to exercise your right of appeal to the Racing Penalties and Appeals Tribunal."

Mr Sheales immediately requested that the inquiry be continued the next day. The Stewards acceded to the request.

At the final sitting of the inquiry on 30 April 2004, after further evidence was adduced, the Chairman of Stewards made the following pronouncement:-

"The Stewards accept that the methodology used by Mr. Horsten did detect the substance as reported and we are satisfied the drugs were in Mr. Reed's system. Therefore we find the charge sustained however, considering the evidence carefully, particularly that the levels detected may be possibly be the result of inadvertent ingestion, under the provisions of Rule 256 (6) we will enter a conviction but not impose a penalty."

Rule 256(6) states:-

"Although an offence is found proven a conviction need not necessarily be entered or a penalty imposed."

Mr Reed lodged a Notice of Appeal on 14 May 2004 against the conviction. The grounds of appeal are:-

- Interpretation of Rule 252.
- Inaccuracies and inconsistencies of procedure both by Racing Chemistry Laboratory + WATA Stewards policy's (sic).

The *Racing Penalties (Appeals) Act* ("the Act") does not provide for an automatic right of appeal in circumstances when a person is convicted of an offence but no penalty is imposed.

Section 13 of the Act states:-

"(1) A person (in this Part referred to as "the appellant") who is aggrieved by a determination, or a finding comprised in or related to a determination, of RWWA, of a steward, of a racing club, or of a committee –

(a) imposing any suspension or disqualification, whether of a runner or of a person;

(b) imposing a fine;

(c) which results, or may result, in the giving of a notice of the kind commonly referred to as a warning-off; or

(d) in relation to any other matter, where the Tribunal gives leave to appeal,

may, within 14 days after the making of the determination, or in the case of a notice of warning-off the giving of the notice, appeal to the Tribunal."

Accordingly, on 12 July 2004 the Registrar advised both Mr Reed and the RWWA Chairman of Harness Racing Stewards that an application for leave to appeal will have to be made before the appeal can be heard. In these circumstances, the Chairperson of the Tribunal agreed that the application could be made at the outset of the proceedings before the Tribunal. Should leave be granted, then the substantive appeal would follow immediately.

Amended grounds of appeal were submitted to the Registrar on 17 August 2004 as follows:-

GROUND 1:

That the Respondents misdirected themselves in interpreting Rule 252 in finding that "drug of abuse" as defined in the Dictionary contained within Schedule 1 of the *"Rules of Harness Racing 1999"* incorporated no aspects of Australian Standard AS 4308 – 2001 other than sections 1.1 and 1.3 of that Standard.

GROUND 2:

That Chemistry Centre (WA), either on their own motion or at the direction of the Respondents, when undertaking testing and analysis of the Appellant's sample demonstrated that:

(a) It was not aware of the requirements of ISO/IEC 17025, the standard to which the National Australian Testing Authority ("NATA") requires compliance for accreditation; and

(b) As a result was in breach of that standard's technical requirements when testing the Appellant's samples, that standard requires compliance with the Australian Standard; and

(c) It was not sufficiently aware or aware at all of the contents of the Australian Standard generally; and

(d) It was not sufficiently aware or aware at all of the contents of the Australian Standard as to quality control for both initial and confirmatory testing and disputed results; and

(e) It had failed to maintain it's (sic) independence from the Respondent regarding the handling, storing and integrity of the two samples provided by the Appellant; and

(f) It was not aware or sufficiently aware of the alleged protocol developed internally by the Respondents for the handling and opening of second or "referee samples";

and by these actions behaved illegally and in the alternative denied the Appellant procedural fairness.

GROUND 3:

That the actions of the Respondents between the giving of the sample by the Appellant and the Appellant's notification by the Respondents of an alleged positive result; those actions being:

(a) They were not sufficiently aware or aware at all of the contents of the Australian Standard; and

(b) They were not sufficiently aware or aware at all of the contents of the Australian Standard as to quality control for both initial and confirmatory testing and disputed results; and

(c) The directing of Chemistry Centre (WA) to ignore the Australian Standard regarding procedure, testing, analysis and reporting; and

(d) The directing of Chemistry Centre (WA) to open the "referee sample" prior to notification of an alleged positive result to the Appellant; and

(e) The directing of Chemistry Centre (WA) to open the "referee sample" at all;

(f) The failure to notify any persons liable to be tested as to the protocol developed internally by the Respondents for the handling and opening of second or "referee samples"; and

(g) The failure to notify Chemistry Centre (WA) as to the protocol developed internally by the Respondents for the handling and opening of second or "referee samples";

those actions were illegal and in the alternative denied the Appellant procedural fairness.

Ground 1

Part 14 of the Rules of Harness Racing (WA) ("the rules") sets out general offences. One of those offences is created by Rule 252, which is in the following terms:-

> *"A person shall not have any alcohol or drug of abuse in his or her body when carrying on or purporting to carry on a licensed activity or official duties at a meeting."*

Schedule 1 to the rules comprises a dictionary. In the dictionary, drug of abuse is defined as follows:-

> *"A drug of abuse means a drug within the scope of that expression as used in the document published by Standards Australia and titled "Recommended practices for the collection and detection and quantitation of drugs of abuse in Urine" number AS4308-1995 and any subsequent amendment or replacement of that document."*

After a sample has been analysed, Local Rule 252 applies. That rule is in the following terms:-

> *"Where an analysis is made of a sample of a person's breath, blood or urine and the sample is taken within 2 hours of an alleged offence then the quantity of alcohol or drug of abuse indicated by analysis of the sample is deemed to be the quantity of alcohol or drug of abuse existing at the time of the alleged offence."*

There are exceptions to the application of Rule 252 and Local Rule 252. The exceptions are created by Local Rules 252B and 252C. Those two local rules provide for cut-off points in relation to alcohol and cannabis. Below certain levels, a person is deemed to be free of alcohol and cannabis respectively for the purposes of Rule 252.

Standards Australia is a body which publishes documents called Australian Standards ("AS"). Standards Australia has published a standard entitled "AS/NZS 4308:2001 – Procedures for the collection, detection and quantitation of drugs of abuse in urine." That standard is the standard referred to in the dictionary which comprises schedule 1 to the Rules of Harness Racing (WA).
AS 4308 lists drugs of abuse. By clause 1.1(b), Sympathomimetic amines are drugs of abuse. By clause 1.3.21, sympathomimetic amines include methylamphetamine and amphetamine. The standard also contains what is referred to interchangeably as a "cut-off value" or a "cut-off level"

The testing process is in two stages. There is first an immunoassay initial test, which is in section 4 of the standard. By the first paragraph of clause 4.8, if the result is greater than the cut-off level in table 1, there must be a confirmatory test.

The second paragraph of clause 4.8 is in the following terms:-

> *"If a sample result is less than the cut-off value, then the drug shall be reported as "not detected" (see Clause 6.1(f))."*

The confirmatory testing is in section 5. Clause 5.7 provides that the cut-off values in table 3 should be used.

Reporting of results is provided for in section 3.

The cut-off value for both amphetamine and methylamphetamine is 300 ug/L in respect of immunoassay initial test cut-off levels (table 1). If the result is greater, confirmatory testing is required. The cut-off value for both amphetamine and methylamphetamine is also 300 ug/L in respect of confirmatory testing (table 3). If the result is less than that, the drug is to be reported as not detected.

It is clear that the second paragraph of clause 4.8, although it is in the section relating to initial testing, applies to the confirmatory test. That is because within itself it refers to clause 6.1(f), which requires reporting of the confirmatory test.

The first report to the Stewards (exhibit 15) was dated 16 April 2004. The author of the report, Mr Russo, did not give evidence as he was away on holidays. Mr Russo's deputy, Mr Horston, gave the relevant evidence in accordance with the common practice. The report is in letter form, it is a short letter of one page only. It does not contain the internal working documents and notes, nor does it have to. There is a list of the drugs tested for. Noted next to each of them is the phrase "no drugs detected". Separately from that list is a paragraph in the following terms:-

> *"Testing indicated the presence of methylamphetamine and amphetamine in the sample of urine at less than 300ug/L."*

It is clear that in writing his report, Mr Russo had in mind AS 4308, because he referred to 300ug/L, which is the cut-off level used in the standard. Mr Horston confirmed that the laboratory used the Australian standards as a guide (T9).

Following receipt of the letter of 16 April, the Stewards requested a further report from the Chemistry Centre. The further report was provided, again by way of short letter, dated 22 April 2004. It was called an "amended report." The setting out was in much the same terms, with a list of the drugs tested for. Noted next to each of them is the phrase "no drugs detected". Separately from that list is again a similar paragraph as in the earlier report, this time in the following terms:-

> *"Testing indicated the presence of methylamphetamine and amphetamine in the sample of urine at a concentration of 0.11 mg/litre and 0.08 mg/litre respectively."*

Mr Russo had taken the further step of reporting the actual levels, because he had been specifically asked to do so.

It was on the basis of both reports that the Stewards charged the Appellant with the offence against Rule 252.There was no dispute that those levels were the levels detected. There was no dispute that in terms of AS 4308, the readings were below the cut-off levels for each drug.
In a preliminary submission, counsel for the Appellant had submitted that the inquiry should not proceed, as the available evidence indicated levels below the cut-off, and therefore the drugs were not drugs of abuse. It was a type of "no case to answer" submission. The Stewards rejected the submission, saying at T20:-

> *"It is the Stewards view that reference to the standard in the dictionary does not extend to the cut-off levels contained in the standard ..."*

Earlier than that, at T5, the Stewards had made their view known during submissions. They referred to clauses 1.1 and 1.3, and said:-

"... and that's the extent that the standard applies to the Rules ..."

In short, the Stewards found that a drug of abuse was anything which was listed in the standard, and no regard was to be paid to the cut-off levels. The Appellant's argument at the inquiry, and here on the appeal, is that the cut-off levels do apply. The drugs detected were not drugs of abuse. In my opinion, this ground is made out.

As noted above, AS 4308 contains both a list of drugs and a cut-off level in relation to drugs. By clause 4.8, the drug shall be reported as not detected where the level is below the cut-off. In my opinion, it is clear that where the detection is below the cut-off level, the drug is not a drug of abuse for the purposes of AS 4308.

Clause 4.8 is a deeming provision. If a legal draftsperson were to try to adopt the same end, in statute or rules, then it may well be actually written using that terminology of "deemed". But AS 4308 is a scientific rather than a legal document, for use by scientists and not lawyers. The scientists report to bodies applying laws or rules. The method adopted to achieve the deemed result is to require the scientists to report to the relevant body that the drug looked for is not detected where it is below the cut-off level.

Because AS 4308 is subsidiary to the rules, it is open for the rules to adopt that standard in whole or in part. Clearly the rules have adopted AS 4308 at least in part. That is so because the rules say, in the dictionary:-

> *"A drug of abuse means a drug within the scope of that expression as used in the document published by Standards Australia and titled ... AS4308 ..."*

The question then becomes what is meant by the phrase "within the scope of". In my opinion, that can only mean the drugs mentioned (listed) within clauses 1.1 and 1.3, together with the cut-off levels referred to. That is the plain meaning of the phrase, it being an all encompassing expression. The direction contained within the standard to not report the drugs as being detected means that they are deemed not to be drugs of abuse. They are therefore not within the scope of the standard.

In their reasons for rejecting the submission, the Stewards pointed out that Rules 252B and 252C contain deeming provisions specifically in relation to alcohol and cannabis, whereby quantities detected below a certain level mean that the person is deemed to be free of that substance. (The level stipulated for cannabis is in fact different than that mentioned in AS 4308.) The Stewards' reasoning was that because the rules in two cases stipulate a cut-off level, then if a cut-off level was intended for other drugs it would have been included in the rules as well. No cut-off level was intended for other drugs because it is not specifically provided for in the rules. For a number of reasons, I do not find that reasoning to be persuasive.

Firstly, although it is correct to reason that the rule makers intended to exclude other drugs from having specific cut-off levels in the rules, that does not mean that there are no cut-off levels for those other drugs. It simply means that if there are other cut-off levels, they are not to be found in the rules. If there are other cut-off levels, they may be found in the standard itself. They are in fact to be found within the standard because the rules use the all encompassing phrase "within the scope of", and because clause 4.8 is a deeming provision. Secondly, by specifying two particular cut-off levels in the rules, the rule makers were doing no more than adopting parts of AS 4308 with modifications. There is nothing wrong with that process, as the standard is subsidiary to the rules and it can be adopted in a modified form if desired. That is exactly what has occurred here.

The Australian standards are not statute laws or the rules of an organization. They are available for use by any body which wishes to adopt them, and they can be adopted in a modified form. During the course of argument before me, reference was made to Rule 81B(f) of the Australian Rules of Racing. The reference was made by way of example, because those rules also use the scheme of adopting AS 4308. It was submitted on behalf of the Stewards that if the rules here intended to apply cut-off levels, then they would be written in similar terms to AR 81B. That rule specifically refers to the concentrations. It is in the following terms:-

> *"(f) All other substances listed in ... standard 4308, at the relevant concentrations set out therein."*

The comparison made is a useful one, however it tends to lend support to the Appellant's argument rather than that of the Respondent Stewards. The expression used in the rules "within the scope of" means the same thing as the definition in the Rules of Racing, namely the drugs listed in AS 4308 at the concentrations set out. There is no relevant difference.

Reference should also be made to Local Rule 252 which provides that the quantity of the drug of abuse indicated by the analysis is deemed to be the quantity existing at the time of the alleged offence. That local rule has no application in the circumstances of this case, because the drugs found were not drugs of abuse within the definition.

For all of the above reasons, I uphold ground 1.

Grounds 2 and 3

Ground 2 alleges that the Chemistry Centre carried out certain actions, and by those actions behaved illegally and in the alternative denied the Appellant procedural fairness. Ground 3 alleges that the Respondent Stewards carried out essentially the same actions, with the same result. The particulars of grounds 2 and 3 allege a departure from appropriate standards. If there is found to be such a departure, then the evidence obtained can be held to be inadmissible. As I said in ***Strempel (Appeal 549)*** :-

> *"Evidence which is otherwise relevant to an issue in dispute can be excluded or given little weight in the exercise of a discretion. The discretion is most often exercised in criminal cases. (Cross on Evidence Paragraph 11125).*
>
> *...*
>
> *That there is a discretion in courts to exclude evidence on grounds of public policy has been recognised in such cases as* ***Ridgeway -v- The Queen*** *(1994 - 1995) 184 CLR 19, and* ***Pavic -v- The Queen; The Queen -v- Swaffield*** *(1998) 192 CLR 656. The rationale behind that policy is that courts have an implied power to protect their processes. (****Ridgeway -v- The Queen*** *per Mason CJ, Deane and Dawson JJ at page 31). That same rationale and principle can be applied to the processes of this Tribunal, in reaching the conclusion that the evidence in this case ought to be given little weight."*

The question to be answered, before any discretion to exclude is exercised, is whether the Stewards departed from appropriate standards in their gathering of evidence.

The thrust of the Appellant's point in both of these grounds is that the Chemistry Centre opened and tested the "referee sample" without notice to the Appellant, thereby depriving him of the safeguard of having that referee sample tested himself. A question therefore arises whether there is such a thing called a referee sample, and what is its purpose?

The rules contain a procedure within themselves for the collection of a human urine sample. It is contained within a section of the rules entitled "Rules Related Policies & Procedures" ("PP"). PP 28 is a set of guidelines for taking a human urine or breath sample. Clause 7 of PP28 requires the

human urine sample to be placed in equal parts into a first and a second container. Clause 8 requires both containers to be sealed with tamper proof security seals. Thereafter the rules are silent as to how the two containers are to be dealt with.

The Appellant's submission is that the rules adopt the whole of AS 4308, including the particular clause dealing with sampling. Clause 3.3.3 of AS 4308 sets out the collection procedure for that particular standard. The urine sample is to be placed in equal parts into a first and second bottle. The sample in the second bottle is called the referee sample. Both bottles are to be sealed with tamper proof seals. The standard goes on to say how the two bottles are to be dealt with. By clause 3.5 (c), one bottle is to be used as the laboratory test portion. The other bottle is to be stored until required to be used as the referee sample. By clause 6.3, where the result of testing is challenged, the referee sample shall be made available for testing. In summary, the referee sample is collected and made available to the person giving the sample if he or she wishes to challenge the result obtained from the laboratory test portion.

In this case, the Chemistry Centre opened and tested the second container/referee sample. They did this at the request of the Stewards, without reference to the Appellant. The position was explained by the Chairman of Stewards at T44:-

> *"Mr Sheales it is standard procedure that Harness Racing in this jurisdiction that the human sample is split at the time of taking. One of the samples is tested. If the laboratory report to the stewards the presence of a drug or substance then the laboratory is instructed to test the second sample."*

Counsel for the Appellant made a submission at the inquiry that this amounted to an unfairness to the Appellant. It was a submission that the Stewards should exclude the evidence in the exercise of discretion on the grounds of public policy. Counsel's submission was that what was opened and tested was a referee sample, in terms of clause 3.3.3. The Stewards' position was that it was not a referee sample, it was simply a second container. Counsel's submission referred to the public policy reasons why there should be a referee sample. Those submissions are reflected in grounds 2 and 3 and their particulars.

In my opinion, this submission cannot be sustained. The rules do not adopt clause 3.3.3, nor any other part of AS 4308 apart from the definition of "drug of abuse". If there are reasons of policy to provide for referee samples, then the necessary safeguard should be included in the rules. It is not for this Tribunal to make the rules by way of discretionary exclusion of evidence.

Grounds 2 and 3 also complain that the Chemistry Centre and the Stewards were not aware of, and were in breach of, AS 4308 and another standard. In my opinion, this submission cannot be sustained either. The factual basis for the submission arose from the cross-examination of the chemist, Mr Horston. The cross-examination was not of assistance, because it amounted to subjecting Mr Horston to a memory test on non scientific matters, namely the way the two Australian standards should be applied. That was of little assistance because, as Mr Horston pointed out in his evidence, the Chemistry Centre uses the Australian standards as a guide only. Secondly, as an expert scientific witness, Mr Horston could not be expected to give an authoritative opinion on the "legal" requirements of the standards.

The Stewards were the investigators, and as well the judges of fact. In order to carry out their investigation, they employed the services of the Chemistry Centre. There is nothing in the rules telling the Stewards who to employ, or how to go about obtaining the evidence. They chose to employ the Chemistry Centre. The Chemistry Centre carried out its normal operating procedures. Consistent with that broad scenario, the actions of the Respondent Stewards and the Chemistry Centre were not independent of each other. Nor should they be. The Stewards employed the Chemistry Centre. The Stewards requested testing and reports, to be used as evidence. The Chemistry Centre carried out the work in its normal fashion, and reported. In a commercial sense, the Chemistry Centre advertises its work as being of a high standard. By employing the Chemistry Centre, the Stewards seek to achieve a similar high standard in their investigations. Participants in

the industry can then have some confidence in the Stewards' investigations, which is a proper object.

The short point is that the rules do not adopt any part of the Australian standards except for the definition of "drug of abuse".

For these reasons, I do not uphold grounds 2 and 3.

PATRICK HOGAN, PRESIDING MEMBER

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