

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: ROBERT HARVEY

APPLICATION NO: A30/08/652

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR A MONISSE (MEMBER)
MR W CHESNUTT (MEMBER)

DATE OF HEARING 22 AUGUST 2006

DATE OF DETERMINATION 31 OCTOBER 2006

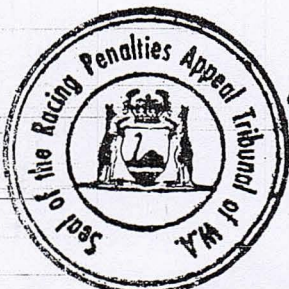
IN THE MATTER OF an appeal by Robert Harvey (Jnr) against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 1 May 2006 imposing 12 months disqualification for breach of rule 178 of The Australian Rules of Racing.

Mr R Mancini appeared for Mr R Harvey.

Mr R J Davies QC appeared for the Racing and Wagering Stewards of Thoroughbred Racing.

This is a unanimous decision of the Tribunal.

The appeal as to penalty is upheld. The period of twelve months disqualification imposed by the Stewards be reduced to six months disqualification expiring 31 October, 2006.



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MR D MOSSENSON, CHAIRPERSON

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR W CHESNUTT

APPELLANT: ROBERT HARVEY

APPLICATION NO: A30/08/652

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IN THE MATTER OF an appeal by Robert Harvey (Jnr) against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 1 May 2006 imposing 12 months disqualification for breach of rule 178 of The Australian Rules of Racing.

Mr R Mancini appeared for Mr R Harvey.

Mr R Davies QC appeared for the Racing and Wagering Stewards of Thoroughbred Racing.

This is an appeal by Mr. Robert Neil Harvey (Jnr), a licensed Thoroughbred Trainer with Racing and Wagering Western Australia ("RWVA"), against a 12 month disqualification imposed by the RWVA Stewards on 1 May 2006. Following an Inquiry by the Stewards on that date Mr. Harvey was charged with a breach of ARR 178; that is, shortly stated, for presenting a horse to race with a prohibited substance in it. He pleaded guilty to that charge and there has been no appeal against conviction, only against the 12 months disqualification that the Stewards handed down as a penalty. Mr. R. Mancini appeared before us for the appellant, and Mr. R. Davies QC for the Stewards.

The horse was IMPACT RATING, a thoroughbred gelding. The prohibited substance was an alkalisising agent, evidenced by an excess of total carbon dioxide in the horse's blood. Mr. Harvey was the trainer of IMPACT RATING and he presented the horse to race in Race 6, The Mount Franklin Lightly Sparkling WATC Derby at Ascot on Saturday, 8 April 2006. IMPACT RATING ran tenth. A pre-race blood sample was taken, and a subsequent analysis of that blood sample by the Chemistry Centre indicated a total carbon dioxide reading of 37.4 millimoles per litre, with an uncertainty of measurement of plus or minus 1.2 millimoles per litre. A further analysis was undertaken by the Australian Racing Forensic Laboratory and this indicated a level of 37.5 millimoles per litre, also with an uncertainty measurement of plus or minus 1.2 millimoles per litre.

Carbon dioxide occurs naturally in a horse's blood; however the concentration of it is capable of being increased by the ingestion by the horse of various alkalisising substances, most notably bicarbonate. This can be administered either by being added to the horse's feed, or by drenching the horse. The effect of the administration of alkalisising agents on the horse is to delay the onset of fatigue; in other words, it has the effect of being a performance enhancer. For this reason, the Australian Rules of Racing prescribe alkalisising agents as a prohibited substance when evidenced by total carbon dioxide in a horse's blood in excess of 36 millimoles per litre. Accordingly, in any view, the levels of uncertainty of measurement, IMPACT RATING had an excess level of total carbon dioxide in its blood, albeit by possibly only a small margin.

Mr. Harvey had apparently been in the habit of adding bicarbonate to the feed of at least some of the horses that he trained. This is indicated by the fact that on 11 March 2006, BEAUZILLA, another of the horses that he trained, was tested and found to have a total carbon dioxide level of 36.1 millimoles per litre. Dr. Peter Symons, a veterinarian with RWWA, spoke with Mr. Harvey on 18 March 2006 and enquired about any alkalisising agents that Mr. Harvey might be using on his horses. Mr. Harvey explained that he fed both bicarbonate and Neutrolene to his horses, and that he did this in particular by adding a "handful" of bicarbonate to their feed. Dr. Symons then apparently advised Mr. Harvey not to feed bicarbonate the day before races. I say apparently because Dr. Symons was not called before the Stewards' Inquiry, nor before us. The Stewards had before them a typed and signed report from Dr. Symons and a signed handwritten note, both of which briefly set out what Dr. Symons said happened on 18 March 2006. These became Exhibit 8 in the Stewards' Inquiry, and found their way to us as part of the bundle of papers that were provided to the Tribunal for the appeal. As is usual, we also had the benefit of having the transcript of the Stewards' Inquiry. At the hearing before us, Mr. Harvey attempted to dispute from the bar table the details of the advice which he had received from Dr. Symons. I do not think it is necessary to resolve that particular matter in order to dispose of this appeal. For the purpose of these reasons I am happy to assume that Dr. Symons' version of events was correct.

Also before the Stewards at their Inquiry as Exhibit 7, and consequently before us, was a report from Mr. P. O'Reilly, the RWWA Principal Investigator. In this report Mr. O'Reilly stated that on 9

April 2006 he, in company with Dr. Symons, Mr. R. Mance and a RWWA Steward attended Mr. Harvey's stable. A search was conducted of the stable area, and in separate locations of the feed storage area were found a half empty 250 gram box of bicarbonate and a half empty 25 litre container of Neutrolene. Following the search Mr. O'Reilly interviewed Mr. Harvey, and in the course of this interview Mr. Harvey stated that IMPACT RATING had won two races this campaign and had not previously recorded a high total carbon dioxide reading.

A video was taken of this interview, and this was played to the Stewards' Inquiry, and so found its way into the transcript. In the transcript of this interview Mr. Harvey was at pains to insist that he had not changed the feeding routine of IMPACT RATING in any way. This apparently included feeding bicarbonate to it. In the Inquiry he told the Stewards the same thing, at pages 12 & 13 & 14 of the transcript.

Dr. Judith Medd, another veterinarian with RWWA, was called as a witness at the Inquiry and she gave evidence that IMPACT RATING had been tested on 25 March 2006 and found to have a total carbon dioxide reading of 34.5 millimoles per litre on that occasion. That was a week after Dr. Symons had spoken to Mr. Harvey and just under 2 weeks before the sample was taken that led to Mr. Harvey being charged.

Against this background it appears to me that Mr. Harvey held an honest belief that the feeding regime which he had with IMPACT RATING was one that could safely lead to the horse racing with a total carbon dioxide level in its blood that was below the 36 millimoles per litre threshold. He continued this regime notwithstanding the warning he had received from Dr. Symons. A more cautious man might have taken closer note of that advice and changed the feeding pattern. It could hardly be said, though, that Mr. Harvey was wilfully reckless in continuing with it up to 8 April 2006 in view of the test result that IMPACT RATING returned on 25 March 2006. There is no evidence and nothing at all to suggest that the horse was drenched or that the reading that was recorded from the blood sample on 8 April 2006 was anything other than the result of a miscalculation by Mr. Harvey. A "handful" of bicarbonate, after all, is hardly an exact measurement. The horse was over the limit, but only by a relatively small margin after making the adjustment for minus uncertainty.

None of this would affect the question of a conviction. The charge was one of presenting a horse to race with a prohibited substance in it, and Mr. Harvey unquestionably did that. Mr. Davies QC made much at the hearing before us that Mr. Harvey had been charged only with a presenting offence rather than one involving the administration of a prohibited substance. That is undoubtedly correct. However the penalty to be imposed must still take into account the known circumstances of the offence.

The Rule presenting a horse to race with a prohibited substance in it exists in large measure because all too often prohibited substances are covertly administered to horses that are about to race in circumstances that can never be properly determined and the Stewards cannot subsequently be expected to try to unravel the mysteries of who was responsible for the administration or how it was done. To overcome this, trainers are obliged to closely supervise their horses prior to racing and to guard against prohibited substances being administered to the horses, under pain of facing a charge of "presenting" if they are not sufficiently diligent.

However, this particular case does not seem to have involved any real mystery at all. Mr. Harvey had a feeding regime that included feeding bicarbonate to his horses. This was inherently risky, and he was warned of the risks. If there was nothing more to it than that he would have little reason to complain. But he did have reason to believe that his conduct was not unsafe, at least with IMPACT RATING, as the horse had not previously tested above the threshold. Two weeks prior to 8 April 2006 it had tested below the threshold, with a reading of 34.5 and he says that he continued its regime unchanged, apparently, believing the horse would continue below the threshold. That was an error of judgment - but there appears to me to be nothing deliberately sinister about it. It seems to me that even to describe Mr. Harvey's conduct as running a calculated risk, is somewhat harsh. He was incautious, but not recklessly so. Of course, trainers have an obligation to ensure that the horses that they present to race are drug free, and when the horses are not drug free the trainers must expect to be penalised. But there are degrees of culpability, and the penalties that are imposed must reflect that at least on those occasions when the level of culpability can actually be determined.

Mr. Harvey has a poor record. It covers a number of pages and has been accrued between 1973 and the present time. There are two previous convictions involving prohibited substances, one in 1995 and the other in 1998. Both of these involved administering therapeutic substances to his horses rather than performance enhancing substances. He was disqualified for 4 months in 1995 and for 7 months in 1998. Now, 8 years later he has been disqualified for what may be best described as an inadvertent presentation of his horse to race with a performance enhancing substance in its system.

Mr. Mancini complained before us that the Stewards had not taken account or sufficient account of the mitigating factors that were involved in this particular case. The Stewards twice said in giving their reasons that they were taking into account mitigating factors and I have not been persuaded that they did not. The error that I think they made in imposing the penalty was not a failure to take into account of mitigating circumstances, it was a failure to give proper attention to the circumstances of the offence.

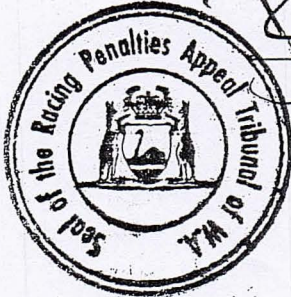
Mr. Mancini also complained before us about the way in which the Stewards conducted their Inquiry. He referred particularly to the manner in which the Chairman of the Stewards cut off Mr.

Harvey in his cross-examination of Dr. Medd (at page 6 of the transcript), giving as his reason for doing so the need to get through the remainder of the evidence that was to go before the Inquiry. I think there is some substance in this complaint by Mr. Mancini. On occasions, it will be necessary for the Stewards to control the cross examination of a witness if this has become repetitive, or prolix, or insulting or unnecessarily aggressive, or perhaps for some other similar such reason. But none of that had happened at this point in this Inquiry. The transcript of the cross-examination fills less than two sides of one A4 page. It could hardly have taken more than a few minutes, if that. Mr. Harvey was appearing on his own behalf and attempting to make a point. He was doing so clumsily, it is true, but he ought to have been given a fair opportunity of making out his case with this particular witness, and he wasn't. Where he might have gone with this line of questioning is something that we can only wonder. Had he been allowed to pursue it, his claims that he had done nothing different with this particular horse might have been confirmed, or perhaps brought undone by his own questions. We will never know. The Chairman was not, of course, being deliberately high-handed in his treatment of Mr. Harvey, but his understandable desire to expedite proceedings had the effect of making the proceeding an unfair one all the same. In my view, the Chairman ought to have been much slower to cut Mr. Harvey off in his cross-examination in an Inquiry which had the potential to take away Mr. Harvey's livelihood.

To take away a man's livelihood is a serious matter as is presenting a horse to race with a prohibited substance in it. The Stewards, in the brief reasons that they gave for the penalty that they were about to impose, stressed the damage that is done to the industry by administering drugs to horses, and the need for deterrence. No one would disagree with any of that. However, the case that they were dealing with, was a charge of presenting where the circumstances of the administration of the prohibited substance were known with a reasonable degree of certainty. The administration arose out of a miscalculation by Mr. Harvey which, although it was not entirely blameless, was nevertheless at the bottom end of the scale of culpability. The Stewards thought that the considerations they referred to, particularly that of deterrence, required that Mr. Harvey be disqualified. I am not prepared to say that they were wrong in that, but when a penalty as onerous as disqualification is about to be imposed great care is required to see that the period of disqualification fairly meets the nature and circumstances of the offence. Mr. Davies QC helpfully provided us with a chart showing the penalties handed down in a range of recent total carbon dioxide cases. For a charge of this nature the range of penalties usually involves disqualification for a period of between six months and two years, although there have been lesser periods of disqualification. Certainly, I would not think anything less than six months would be appropriate here

There are likely to be very few "presenting" cases indeed where one can say that the offence is at the bottom end of the scale. However, I think that this was one of those rare cases where it was. As such, I think that it was a case where it would have been appropriate to have imposed a

penalty at the bottom end of the range, notwithstanding the poor record that Mr. Harvey carries. The penalty that I think he ought to have been given was a disqualification for a period of six months. Accordingly, I would allow this appeal, and substitute a period of disqualification of six months as the penalty to be suffered by Mr. Harvey.



William Chesnutt

WILLIAM CHESNUTT, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON

APPELLANT: ROBERT HARVEY

APPLICATION NO: A30/08/652

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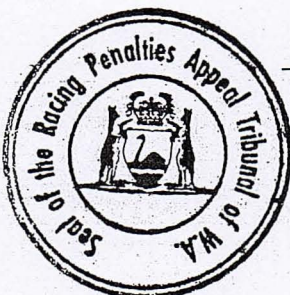
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Mr R Mancini appeared for Mr R Harvey.

Mr R Davies QC appeared for the Racing and Wagering Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr W Chesnutt, Member.

I agree with those reasons and conclusions and have nothing to add.



D. Mossenson

DAN MOSSENSON, CHAIRMAN

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR A MONISSE

APPELLANT: ROBERT HARVEY
APPLICATION NO: A30/08/652
PANEL: MR D MOSSENSON (CHAIRPERSON)
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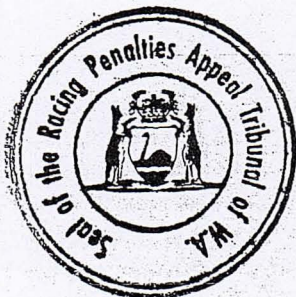
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MR A MONISSE, MEMBER