

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: RONALD EDWARD ELVY

APPLICATION NO: A30/08/654

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR A E MONISSE (MEMBER)

DATE OF HEARING: 11 JULY 2006

DATE OF DETERMINATION: 3 OCTOBER 2006

IN THE MATTER OF an appeal by Ronald Edward Elvy against the determination made by Racing & Wagering Western Australian Stewards of Thoroughbred Racing on 12 May 2006 imposing a penalty of \$5,000 for breach of Rule 178 of the Australian Rules of Racing.

Mr R E Elvy appeared in person.

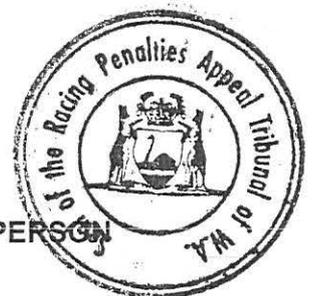
Mr C W Waller, Stipendiary Steward, appeared for the Racing & Wagering Stewards of Thoroughbred Racing.

This is a unanimous decision of the Tribunal.

The appeal as to penalty is upheld. A fine of \$3,000 is substituted for the fine of \$5,000 which was imposed by the Stewards.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR D MOSSENSON (CHAIRPERSON)

APPELLANT: RONALD EDWARD ELVY

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Mr R E Elvy appeared in person.

Mr C W Waller, Stipendiary Steward, appeared for the Racing & Wagering Stewards of Thoroughbred Racing.

THE STEWARDS' INQUIRY

This is an appeal against the penalty of \$5,000 imposed on Mr R E Elvy, trainer of GUN BARREL BLUE, following an inquiry by Racing & Wagering Western Australian Stewards into a report received from the Chemistry Centre of Western Australia that the post race blood sample taken from the horse contained Phenylbutazone and Oxyphenbutazone. At the commencement of the inquiry the report was presented in evidence as well as the report in respect of the reserve

sample which was tested at the Queensland Government Racing Science Centre. The test of the reserve sample confirmed the presence of both the drug and its metabolite.

Veterinarian evidence was given that Phenylbutazone is a non-steroidal anti-inflammatory drug and a prohibited substance. Its metabolite, Oxyphenbutazone, is also a prohibited substance. Phenylbutazone is used primarily for the inflammation of the muscular skeletal system and can also be used as an analgesic. Phenylbutazone is a wholly synthesised substance which does not occur in nature or naturally in the equine body.

Mr Elvy gave evidence that GUN BARREL BLUE was not under any treatment, it was a sound horse and he had no other horses stabled at the relevant time. Mr Elvy had no idea how the substance entered the horse's system.

The Stewards charged Mr Elvy under Australian Racing Rule 178 which reads:

'When any horse has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer or any other person who was in charge of such horse at any relevant time may be punished'.

The specifics of the charge were:

'...that you Mr Ronald Elvy, a licensed trainer with Racing and Wagering Western Australian, did present GUN BARREL BLUE for the purpose of engaging in race 2 the JB KEY MEMORIAL HANDICAP at Pingrup race course on the 18th March 2006 with the prohibited substance Phenylbutazone and Oxyphenbutazone being detected in the post race blood sample of the aforementioned gelding'.

Mr Elvy declined entering a plea to the charge on the basis that he *'didn't know how the horse had stuff in him'*. Mr Elvy went on to assert:

'he has won six races that horse, he has been swabbed every time and he has never ever been anything and I can't understand why this time he has. So obviously someone has given him something but it was definitely not me. I have never been done for a dirty swab yet in twenty five years. I don't know how that works'.

The Stewards found Mr Elvy guilty of the charge and handed down their determination in these terms:

'Australian Rule of Racing 178... contains strict liability to the trainer of any horse when presenting them to the race course they must be presented drug free. You have put forward to the Stewards you have reserved your plea and you have put forward that there is obviously some third party that has administered the substance to GUN BARREL BLUE but against that you have offered no alternative to the Stewards as to who or what may have administered the substance to the gelding. Therefore in the absence of any reason the Stewards do formally find you guilty'.

On the issue of penalty Mr Elvy stated to the Stewards' that he had '*...never had a dirty swab before...*'; he had held a trainer's licence for 25 years and enjoyed a good record. In fact the Stewards acknowledged during the hearing that his record was '*...almost exemplary...*'.

The Stewards informed Mr Elvy that, pursuant to Australian Rule of Racing 196, they had the power to fine, suspend or disqualify. At the time of determining the penalty Mr Elvy had no horses in work. The Stewards arrived at the penalty in the following manner:

'We have given careful consideration to the matter of penalty, taken into account all your submissions and evidence. Firstly the Stewards again reiterate that a conviction in relation to this rule and to the prohibited substance rule is a serious matter and affects the image and integrity of racing. In deciding on the appropriate penalty, Stewards have given thought to consider the following as mitigating factors for you. You have your good disciplinary record, you have a good standing within the industry, the substance, an anti inflammatory was less severe than an enhancing drug. Against that, probably during the twenty five years you haven't had the amount of volume of starters as other trainers. Obviously you've only had a small team, so we have had to consider all those factors, one we had to consider was your submission that more than likely a suspension would be better for you but we have had to look at it in another light, in the fact that you have no horses in work currently, and have no ambition to have any horses as you are working in the mines at the current time. So we, the Stewards feel the action of a suspension or disqualification wouldn't serve as a deterrent for you in this case, so we do feel that in order for this that a fine should be issued. In looking at previous penalties for this substance it has been anywhere between \$3,000 for lower cases and upwards of two years disqualification. In putting all of the evidence we have before us, we do feel a fine should be issued, and that will be a fine of \$5,000.'

THE APPEAL

In support of his appeal against the penalty Mr Elvy referred the Tribunal to a schedule of "Phenyl and Oxyphenbutazone" cases of conviction. The schedule had been provided to the Appellant by the Stewards. It summarises the penalties imposed in this state and elsewhere in the first instance and on appeal going back to the start of 2000. In the course of his argument Mr Elvy submitted that the penalty imposed on him by comparison to others was excessive, in circumstances where he asserted:

- 1 he did not administer anything illicit to the horse;
- 2 a minimal amount was detected;
- 3 it was out of character; and
- 4 the substance was not an enhancing substance.

In response, Mr Waller submitted that the matter was serious and detrimental to the image of racing. The safety of riders was compromised. The Stewards had taken into account the financial circumstances of Mr Elvy. The Tribunal was told the purpose of the penalty which had been imposed was twofold. Firstly, it was to punish the perpetrator. Secondly, it was intended to make the industry aware that prohibited substances were not tolerated.

In regard to the aspect of the deterrent effect of the penalty on Mr Elvy personally both Member Hogan and I asked Mr Waller a number of questions to clarify matters. In response to the question that if one assumes Mr Elvy was oblivious to the presence of the substance in the horse and he could not have reasonably known it was present how would he be deterred by the penalty, the Tribunal was told:

"He becomes deterred in a number of ways his security at the stables must be bolstered he must take greater supervision of the horses under his care and take a much greater responsibility to his horses arriving at race day drug free."

In response to a question from me as to whether there was any suggestion of "... *inadequate supervision or unsatisfactory security*" Mr Waller advised that a complete stabling record had not been presented to the Stewards in the course of the inquiry. Further, the Tribunal was told Mr Elvy's stables had not in fact been inspected by the Stewards. Mr Elvy agreed that there had been no reference during the enquiry to any aspect of inadequate security and, secondly, in choosing to impose a fine and in deciding on its amount the Stewards "... *clearly ... were mindful of the need to have Mr Elvy deterredin this case.*"

Mr Waller concluded his submission by reference to the schedule for Phenylbutazone and Oxyphenbutazone offences which Mr Elvy had relied on.

DETERMINATION

In arriving at the penalty the Stewards quite properly took into account the fact that any breach of the prohibited substance rule by a trainer must be treated seriously by the Stewards. The Stewards appropriately acknowledged the mitigating factors of Mr Elvy's good record, his standing in the industry and the type of substance in question.

It is clear from the wording of the Stewards' reasons for determining the penalty, confirmed by Mr Waller's submission at the appeal hearing, that an element taken into account in arriving at the penalty was the intended deterrent effect it was to have on Mr Elvy. How or why the substance found its way into GUN BARREL BLUE could not be explained. Usually in the case of presenting offences no evidence of the actual administration is forthcoming. There clearly was no suggestion that Mr Elvy had himself actually wittingly or unwittingly administered Phenylbutazone. Nor was it suggested through any action or inaction on Mr Elvy's part could he be held directly

responsible for the actual act of administration. The Stewards were not dealing with a breach of the administration rule (ARR 175 (h)). Rather Mr Elvy was charged with, and properly convicted of, a breach of the prohibited substance rule dealing with a presenting offence, that is of presenting the horse to race with a drug in its system. Rule 178 not surprisingly creates an offence of absolute liability as the circumstances of an administration often remain a mystery. In those circumstances for the Stewards to have referred to and so obviously relied on the element of deterrence as a contributing factor in setting the penalty was inappropriate. It would have been a different case had there been evidence of any neglect or omission on Mr Elvy's part, of poor stabling security, a feeding mix up or inappropriate supervision of the horse. I consider this reflects an error on the part of the Stewards where none of these considerations were put to Mr Elvy at the inquiry and he therefore was not afforded an opportunity to respond.

Specific deterrence as a factor in the context of security at Mr Elvy's stables was therefore meaningless in the absence of this issue having been explored during the course of the hearing by the Stewards. Had the matter been raised by the Stewards and it had been demonstrated, for example, that the security measures at the stables either did not exist at all or had been lax in some way, the physical condition of the improvements were in some way deficient or the level of supervision inadequate then it may well have been justified and entirely appropriate to take it into account in setting the type of penalty. Any one or more of these type of factors, had they been raised, clearly could justify determining the quantum of the fine towards the upper end of the range in the absence of any adequate explanation or defence.

The list of relevant presentation penalties referred to by the parties are summarised in the table below. Only a few of the cases have any information as to the details or circumstances of the offences.

Date	State	Penalty	Name	Appeal - Result (where applicable)
01/01/2000	QLD	\$4,000	D PARADISE	-
26/02/2000	SA	12 MTHS DISQ	R DANIEL	4 MTHS DISQ
03/06/2000	QLD	\$5,000	B HOWLETT	-
24/08/2000	NSW	\$4,000	J HAWKES	-
07/10/2000	VIC	NO PENALTY	B MAYFIELD-SMITH	-
17/03/2001	QLD	6 MTHS DISQ	P O'TOOLE	-
06/11/2001	QLD	6 MTHS SUSP	W MASSINGHAM	-

Date	State	Penalty	Name	Appeal - Result (where applicable)
28/10/2002 (broke down resulting in Jason Oliver's death) (Trial)	WA	2 YEARS DISQ	S J WOLFE	12 MTHS DISQ
05/01/2003	NSW	2 MTHS DISQ (CUMM)	G LUNN	\$4,000
04/02/2003 (Trial)	QLD	\$3,500	D SUTTON	-
27/09/2003 (horse injected by third party)	NSW	\$1,500	M PETROVIC	-
27/09/2003	QLD	\$4,000	A WEBB	-
22/11/2003	QLD	3 MTHS DISQ	G POPP	-
14/09/2004	NT	3 MTHS SUSP	L HOULDSWORTH	\$2,000
17/09/2004	QLD	\$2,500	J MANZELMANN	-
16/12/2004	QLD	\$4,000	D BAUER	-
05/03/2005	NSW	\$6,000	T MULHOLLAND	-
12/05/2005	QLD	2 YEARS DISQ	K SMYTH	-
02/07/2005	WA	\$6,000	A T JOLLY	-
23/09/2005	WA	\$3,000	H PARNHAM	-
12/11/2005	QLD	4 MTHS DISQ	L HICKMOTT	-

This list of the penalties reveals that the range of fines imposed Australia wide over the last five and a half years has been \$1,500 to \$6,000. In one case no penalty was imposed. At the other extreme two years disqualification was the outcome. This information needs then to be evaluated in the light of Mr Elvy's situation. In their reasons in relation to Mr Elvy the Stewards asserted that "... the range of penalties for this substance was anywhere between \$3,000 for lower cases to upwards of two years disqualification". As I have often indicated in the context of the type of information contained in the schedule and summarised in the table, that as helpful and important as it is to know what has been imposed over a period of time both here and in other jurisdictions, one cannot easily draw meaningful comparisons and properly assess relativities as little, or in most cases no details of the circumstances of each offence is revealed.

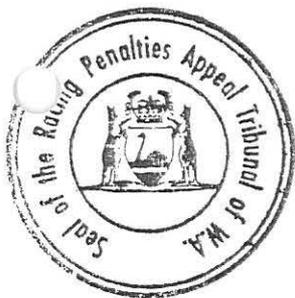
What other key elements need to be evaluated in arriving at an appropriate fine? I am conscious that Mr Elvy did not plead guilty. However, he did not actively protest his innocence. Mr Elvy did not seek to defend the matter before the Stewards. He did not dispute the finding but basically took that stance regarding his plea on the basis that he had not in fact personally been responsible for the administration and was in no position to explain how it came about.

Mr Elvy is a part time trainer. GUN BARRELL BLUE was the only horse he had in work at the time of the offence. The horse had run third in a country race where there was only a win dividend paid by the on course totalisator. No place dividends were paid due to insufficient starters. No argument was presented to the Tribunal to support the proposition asserted by the Stewards as to the adverse affect of the offence or the damage to "... *the image and integrity of racing*". Nothing more was said to clarify precisely what the adverse impact on the betting public was in the particular circumstances of this low key race meeting. It is reasonable to assume that the adverse consequences of the positive swab of GUN BARRELL BLUE on this occasion would be likely to be far less damaging to the image of the industry than an administration offence which, for example, involved a full time trainer at a metropolitan meeting.

For these reasons I am satisfied that the penalty of \$5,000 imposed by the Stewards on Mr Elvy is manifestly excessive. Accordingly, I would uphold the appeal and substitute a fine of \$3,000. This revised penalty will convey to the industry the seriousness of Mr Elvey's offence while taking into account his personal circumstances.



DAN MOSSENSON, CHAIRPERSON



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT: RONALD EDWARD ELVY
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PANEL: MR D MOSSENSON (CHAIRPERSON)
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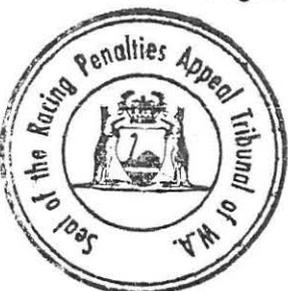
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Mr C W Waller, Stipendiary Steward, appeared for the Racing & Wagering Stewards of Thoroughbred Racing.

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

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



P. J. Hogan

PATRICK HOGAN, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A MONISSE (MEMBER)

APPELLANT: RONALD EDWARD ELVY
APPLICATION NO: A30/08/654
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A E Monisse

ANDREW MONISSE, MEMBER