APPEAL - 694

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**JONATHAN PETER GAVIN**
APPLICATION NO:	**A30/08/694**
PANEL:	**MR D MOSSENSON (CHAIRMAN)** **MR A MONISSE (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**07 OCTOBER 2008**
DATE OF DETERMINATION:	**19 DECEMBER 2008**

IN THE MATTER OF an appeal by Mr Jonathon Peter Gavin against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 20 August 2008, imposing a six month disqualification for breach of Rule 190 of the RWWA Rules of Harness Racing.

Mr JP Gavin appeared in person.

Mr J Zucal appeared for the Racing and Wagering Stewards of Harness Racing.

By a decision of the majority of the members of the Tribunal, the Chairperson dissenting, the appeal against penalty is upheld.

The penalty imposed by the Stewards is varied from six months disqualification to four months disqualification.

DAN MOSSENSON, CHAIRMAN

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A MONISSE (MEMBER)

APPELLANT:	**JONATHAN PETER GAVIN**
APPLICATION NO.:	**A30/08/694**
PANEL:	**MR D MOSSENSON (CHAIRMAN)** **MR A MONISSE (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**07 OCTOBER 2008**
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IN THE MATTER OF an appeal by Mr Jonathan Peter GAVIN, against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 20 August 2008 imposing a six month disqualification for breach of Rule 190 of the Rules of Harness Racing.

Mr J P Gavin appeared in person.

Mr J Zucal represented the Racing and Wagering Western Australia Stewards of Harness Racing.

This is an appeal by Mr Jonathan Peter Gavin ("the Appellant"), a licensed harness trainer with Racing and Wagering Western Australia ("RWWA"), against a penalty of 6 months disqualification imposed by the RWWA Stewards of Harness Racing ((the Stewards") on 20 August 2008.

The Stewards' Inquiry

In 2008 the Stewards commenced an inquiry into a blood sample from the horse CLASS

The manager of the Racing Chemistry Laboratory WA in Perth, Mr Charles Russo, gave evidence at the Stewards' inquiry ("the Inquiry"). Mr Russo holds a Bachelor of Science with Honours from the University of Western Australia and has been doing work in the racing industry since 1988. He also told the Inquiry that the actual reading of the pre-race blood sample went beyond his laboratory's calibration range of 39 millimoles per litre in plasma, with a result that "came out about 40.5."

The Rules of Harness Racing

After receiving evidence the Stewards at the completion of their inquiry charged the Appellant with breaching Rule 190 of the *Rules of Harness Racing* (the *Rules*"). This rule relevantly provides -

> (1) A horse shall be presented for a race free of prohibited substances.
> (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.

Rule 188A(1)(b) of the *Rules* declares various substances as prohibited substances, including alkalising agents. However Rule 188A(2) provides that alkalising agents are only a prohibited substance under Rule 190 when evidenced by TCO_2 present at a concentration greater than 36 millimoles per litre in plasma.

The Appellant immediately entered a plea of *Guilty* to the charge when the Stewards put it to him. The Stewards then invited the Appellant to comment as to penalty, which he proceeded to do. Rule 256(1) of the *Rules* provides that "[o]ne or more of the penalties set out in sub rule (2) may be imposed on a person, club or body guilty of an offence under these rules. These penalties include disqualification and a fine. In this case the Stewards decided to impose disqualification and to set the period for it at 6 months.

Grounds of Appeal

The Appellant grounds of appeal is that his penalty was too severe. He stated it as follows:

> "Against severity of penalty
> Investigation within 24 hour (sic) of a major operations (sic)
> The Chairman refused to answer a question
> Both RWWA vets gave conflicting evidence
> Dr Symons gave miss leading (sic) evidence"

An Explanation for the High TCO_2 Reading

Much of the Inquiry was concerned with what caused or may have caused the horse's TCO_2 reading on the race day in question. While such explanations are unlikely to suggest a defence to a charge of *presenting* a horse to race with a prohibited substance, they may provide assistance in determining the penalty to be imposed.

The Appellant informed the inquiry that he did not at least directly cause the high reading. For example, by "tubing" the horse with an alkalinising agent on the day of the race. He certainly had the capability to do this, because when the Stewards searched his Forrestdale stables on 29 July 2008 they found tubing apparatus and a 5 kg barrel of sodium bicarbonate. The Appellant also denied giving the horse any of the *Berroccas* from the packet that was also found at his stables in a medicine cabinet. The Appellant did state that on a daily basis he was feeding the horse some 300 grams of the alkalinising agent product, *Neutradex* (being a sodium bicarbonate substance), however consistent with his recent practice he at least did not give any of this product to the horse on race day.

The Appellant endeavoured to provide several explanations that may have been the cause of the horse's TCO_2 reading, but given the other evidence the Stewards justifiably did not accept them. One explanation he put forward was that the TCO_2 level may have been attributable to the horse being dehydrated, but the veterinarian expert evidence given at the inquiry did not support this. For example, Dr Peter Symons informed the inquiry that if that were the case then the horse would have died with the TCO_2 reading that it had.

The Appellant also believed that his 14 year old TAFE work experience student may been given the horse a "couple of shots" of *Neutradex* on the race day in question without his knowledge, and without her knowing that the horse was racing that day. Even if this was the case a trainer of his experience would know that more adequate supervision of such persons assisting him on race day is demanded by the racing industry and the betting public that supports it.

The Expert Evidence

Two veterinarian experts employed by RWWA, being Dr Timothy Mather and Dr Symons, were called by the Stewards to give evidence at the Inquiry. From my reading of the transcript of it I do not agree with the particulars in the Appellant's ground that these experts

gave conflicting evidence, at least of any significance. I also do not agree with his proposition that Dr Symons gave misleading evidence.

Dr Mather graduated in Veterinary Science from Queensland University in 1969. His evidence at the Inquiry also included advising it that:

- high levels of alkalising agent enables a horse to "be able to work harder for longer, so therefore maybe seen to elevate its ability";
- different studies on more than 500 horses in controlled experiments have demonstrated that a normal horse in a controlled situation has reading of 30.7 millimoles per litre;
- experiments show that feeding 300 grams of sodium bicarbonate will take a level from 30 to 39; and
- a reading in excess of 39 must have been achieved through artificial means, such as giving the horse 300 grams of sodium bicarbonate on the day of the race; and
- 300 grams of sodium bicarbonate is a huge amount to feed to a horse.

Dr Symons holds a Bachelor of Veterinary Science and has been a regulatory vet for 20 years. His evidence to the Inquiry also included:

- that he didn't think a horse would eat 300 grams of sodium bicarbonate a day;
- 39 is a completely abnormally reading; and
- sick horses don't get to 39.

The Type of Penalty

The combined effect of the expert veterinary evidence is that the horse's TCO_2 level can only be attributed to artificial means that was administered to the horse on the day of the race. However the Appellant was unable to provide the Stewards with any plausible explanation for this occurrence. In my view this is unsatisfactory particularly given:

a) the Appellant has the ultimate responsibility on ensuring that the horses he trains are presented to race free of prohibited substances;
b) the extremely high TCO_2 reading that was detected in the horse;
c) the prohibited substance was of the performance enhancing type;

d) that on 28 May 2007 Dr Symons in relation to a TCO_2 level of 36 detected at that time in another horse that the Appellant was training, advised him to not medicate his horses using *Neutradex* on the morning of a race, and that no further warning would be given;
e) the Appellant's admission in the Inquiry that he doesn't keep any records of "who administers what" to his horses;
f) the Appellant's admission in the Inquiry that on the morning of the race he intravenously administered the medication *Bleeder Shot* knowing he was contravening Rule 193(3) of the *Rules*;
g) that on 30 June 2008 the horse returned a TCO_2 reading of 36.3 – prior to the Appellant taking over the training of the horse, the highest of the 13 TCO_2 readings taken from it was 33.9, with an average of 32.1; and
h) that of the 9 pacers that the Appellant had trained and which had been tested for TCO_2, 5 of them had recorded levels of 36.3, 36, 36.3, 36.5 and 36.8.

The Appellant's inability to provide the Stewards with at least a plausible explanation as to what may have caused the *greater than 39* level that was detected, in the circumstances described above justifies a penalty of disqualification in this case as the type of penalty to be imposed.

Confirmation that this type of penalty is justified when prohibited substances of a performance enhancing nature are detected can be found in the following leading judgment of Rowland J in *McPherson v Racing Penalties Appeal Tribunal of Western Australia and Others* (1995) 79 A Crim R 256. In a review in that case of a penalty of a penalty of 2½ years disqualification imposed by the Stewards of Thoroughbred Racing, Rowland J at 261 stated:

> "The penalty imposed in this case, where it seems to be accepted that the substance did not in fact affect the performance qualities of the horse and where the substance apparently got into the horse because of some slack supervision or feeding practice, would seem to be heavy."

Past decisions of this Tribunal which have endorsed the penalty of disqualification in TCO_2 cases include *Brown* – Appeal 319 (delivered 19 September 1996), and *Slater* - Appeal 359 (delivered 13 October 1997).

The Length of the Penalty

As to the length of the disqualification, for the reasons that follow I am of the view that a period of 6 months disqualification was manifestly excessive in all the circumstances. The recent *RPAT* decision of *W L Radford* (Appeal 685 - delivered 6 June 2008) and the other cases referred to in it supports this conclusion.

Radford was a *TCO_2 presentation* appeal against a penalty imposed by the RWWA Stewards of Thoroughbred Racing. While a different code was under consideration in that case, the "parity principle" applies to ensure that penalties imposed should as far as possible be consistent between persons who are convicted of similar offences [per the High Court of Australia in *Lowe v R* (1984) 154 CLR 606].

Mr Radford was only marginally over the TCO_2 "offence" level of greater than 36 millimoles per litre in plasma, with readings of 36.2 and 36.3 (in his case, two tests were taken of the sample which produced these levels after allowing for a 1 millimole margin or error). On appeal to this Tribunal Mr Radford had his period of disqualification reduced from 5 to 3 months owing to his mitigating factors.

The mitigating factors that apply to the Appellant are at least on par with those that existed in *Radford*. The Appellant is 42 years of age. The Stewards treated him as a first offender, which is a significant achievement given that he has been a trainer for "20 odd years", with the last 14 in a full time capacity. Training horses is the only means available to the Appellant in which he can independently derive an income, pay his mortgage and provide for his 5 young children. He should also receive substantial credit for entering a *Guilty* plea at the first available opportunity.

A breach of "presentation" rule like Rule 190 is to be regarded seriously. The Stewards when considering the question of penalty justifiably stated:

> "The level of TCO_2 detected was greater than 39. This is a significantly high reading and is one of the highest to come before a Stewards' inquiry. Excessive levels of TCO_2 has the effect of inhibiting fatigue in a racehorse by delaying the onset of lactic acid and is potentially performance enhancing."

Fortunately for the Appellant the harm that he caused the racing industry was minimal given that his breach concerned a weekday country meeting, with either little or no money bet on the horse (consistent with its poor odds of winning the race), and the horse was unplaced. In this context and given the Appellant's inability to at least provide a plausible explanation for what was an extremely high TCO_2 reading in the circumstances (a) through to (h) that I have stated above, I would impose a period of 6 months disqualification but then reduce it by 2 months to take into account the mitigating factors.

In arriving at this decision I also make the following comments:

a) while Stewards' past *TCO_2* decisions on penalty can potentially provide initial guidance of an appropriate range of penalties, it is their appealed decisions and the related decisions of this Tribunal which ultimately determines that range;

b) in arriving at my determination I have given little weight to the very early decisions of this Tribunal given the evolving nature of *TCO_2* appeals;

c) I have not given any weight to the past decisions of this Tribunal where effectively a mandatory minimum *TCO_2* penalty was under review [for example, 12 months for a first offence imposed by the Stewards of Harness Racing in *G S Puglia* (Appeal 472)], and 2 years for a second offence imposed by the same stewards in *F Charles* (Appeal 344 – delivered 3 February 1998) Those penalty regimes have for some time now no longer applied. Owing to their lack of sentencing discretion, past determinations concerning them provide no guidance as to a current range; and

d) past *TCO_2* appeal decisions and the circumstances relating to them need to be carefully analysed. This case for example is very similar to *R G Brown* (Appeal 319 – delivered 12 December 1996) and *W L Radford* (referred to above). Substantial mitigation operated in those determinations such that this Tribunal determined that the Stewards erred in those cases when deciding the period of disqualification. However, a case such as *G P Slater* (Appeal 359 – delivered 13 October 1997) concerned an "administration" offence, which tend to be regarded more seriously by this Tribunal in comparison to a "presentation" offence such as the one under review in this case (*nb* in *Slater* the period of disqualification was reduced on appeal from 12 months to 8 months).

For these reasons I would allow the appeal and impose a penalty of 4 months disqualification on the Appellant.

Seal of the Racing Penalties Appeal Tribunal of WA

A Monisse

ANDREW MONISSE, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT:	**JONATHAN PETER GAVIN**
APPLICATION NO:	**A30/08/694**
PANEL:	**MR D MOSSENSON (CHAIRMAN)** **MR A MONISSE (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**07 OCTOBER 2008**
DATE OF DETERMINATION:	**19 DECEMBER 2008**

IN THE MATTER OF an appeal by Mr J P Gavin, against the determination of the Racing and Wagering Western Australia Stewards of Harness Racing on 20 August 2008 imposing a disqualification for 6 months for a breach of Rule 190 of the RWWA Rules of Harness Racing.

Mr J P Gavin appeared in person.

Mr J Zucal appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read a draft of the Reasons of Member Mr Monisse in this matter with which I am in general agreement. Specifically, I agree with the learned member's determination that the 6 month disqualification of the Appellant should be reduced to 4 months.

After some agonising and difficult reflection on the matter, I have reached the view that the extent of the hardship that a six month disqualification was likely to have on the Appellant was of such severity that, in all of the circumstances, it was manifestly excessive.

The Appellant fully cooperated with the Stewards in their investigation. The Appellant's record indicated that he had been convicted 14 years earlier of a drug offence by presenting a horse to race trials which had been administered caffeine and bute. There appeared to be a degree of uncertainty surrounding that conviction as was evident from the transcript of the exchange between the Appellant and the Stewards [at 88 to 91]. The

Stewards indicated in the reasons [at 93] that they had not taken that matter into account. In effect the Stewards thereby accepted the Appellant as a trainer who, having been in the harness racing industry for "20 odd years" years, had a good record.

The horse, Class Mate, was entered in a low stakes country race and was unplaced in that race. The outcome of the race was not, it seems, affected in any way.

For my part, the most striking feature of the case, in terms of assessing penalty, was the personal circumstances of the appellant. It was clear a term of disqualification was always going to be productive of serious personal hardship for the Appellant and his family dependants. The unchallenged evidence in this regard was that the Appellant:

(a) derived all of his income from the harness racing industry and had done so for many years;
(b) had little other vocational experience and was likely to be confined to looking for manual work as a consequence of any disqualification;
(c) had shortly prior to his disqualification had knee surgery which further reduced his capacity to find alternative work of a manual kind;
(d) is married with five children to support;
(e) rents his training premises; and
(f) has a mortgage over his house.

During the course of the Appeal, by way of comparison, the Tribunal had referred to it the decision of the Stewards in relation to the trainer Mr L Coulson. Mr Coulson was a first offender and received a 6 month disqualification for a TCO2 presentation offence for presenting a horse with a TCO2 reading of 37 mmpl. Mr Coulson had pleaded not guilty, was a part time trainer and did not derive his livelihood from the Harness Racing Industry. The Appellant stated in the course of the Appeal, and it was not contested by the Stewards, that Mr Coulson was a person of substantial financial means.

There is a significant difference in the TCO2 readings between Mr Coulson's presentation and that of the Appellant. The Appellant's presentation offence was more serious because the reading was more than 39 mmpl. However, in my view that factor is offset by the fact that in this case the Appellant pleaded guilty whereas Mr Coulson did not. There remained as a further material point of difference the significantly more severe personal hardship that the Appellant in this case was likely to suffer from any disqualification than Mr Coulson was likely to experience.

There are many other decisions dealing with penalties imposed in TCO2 presentation cases, many of which have been referred to and discussed in both the learned Member Mr Monisse's reasons and the learned Chairperson's reasons. I have referred to the matter of Coulson because it was specifically referred to and addressed at the hearing of the Appeal by the parties. Although it is important that there be consistency in penalties imposed, the personal circumstances in each case remain a significant factor to the outcome.

In my view, the Stewards were right in imposing a penalty of disqualification in this case since the reading was too high to permit of any other disposition and it was necessitated for reasons of general deterrence. The Stewards also referred to taking into account the

personal circumstances of the Appellant. However, there was no reference by the Stewards to the fact that the Appellant's capacity to find alternative employment during his period of disqualification was seriously affected by the fact he had little training or experience in any other vocation, nor did they refer to the fact that his capacity to undertake manual work was seriously reduced because he had had recent knee surgery. The explanation for this, it seems, is that some of these matters were not presented by the Appellant until the Appeal Hearing. There was no objection by the Stewards to the Appellant providing the further detail of his personal circumstances from the Bar Table at the hearing of the Appeal. I hasten to add, that is not a criticism of the Stewards who conducted the Appeal (as usual) in an even handed manner making due allowance for the fact that the Appellant was unrepresented.

In my view the extent of the personal hardship that a disqualification would place on the Appellant and his family was not fully taken into account by the Stewards. The reason for this may be partly due to the fact that the Appellant, representing himself before the Stewards, did not fully articulate the extent of that hardship to them.

It is not the function of this Tribunal to simply tinker with the decisions of the Stewards and make fine adjustments based on personal differences of approach. However after considerable reflection, in my view modifying the penalty by reducing the disqualification by one third in duration, is not merely tinkering.

Accordingly, I agree with the determination of Member Mr Monisse that it is appropriate having regard to the extent of that hardship in this case, to moderate the length of the disqualification by reducing it to 4 months.

ROBERT NASH, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT: JONATHAN PETER GAVIN

APPLICATION NO: A30/08/694

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR A MONISSE (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 7 October 2008

DATE OF DETERMINATION: 19 December 2008

IN THE MATTER OF an appeal by Mr Jonathan Peter GAVIN against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 20 August 2008 imposing a six month disqualification for breach of Rule 190 of the Rules of Harness Racing.

Mr J P Gavin appeared in person.

Mr J Zucal represented the Racing and Wagering Western Australia Stewards of Harness Racing.

BACKGROUND

Mr J P Gavin, a licensed trainer and owner with Racing and Wagering Western Australia (RWWA), appealed against his six month disqualification imposed by the RWWA Stewards of Harness Racing for breach of the Rules of Harness Racing. Following a Stewards'

inquiry on 20 August 2008 Mr Gavin pleaded guilty to presenting a horse which he had trained to race with a TCO2 level in excess of 36.0 millimoles per litre in plasma. The relevant parts of the Rule in question state:

> '190. Presentation free of prohibited substances
>
> *(1) A horse shall be presented for a race free of prohibited substances.*
>
> *(2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.*
>
> *(3) If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub rule (1), the trainer of the horse and the person left in charge is each guilty of an offence.*
>
> (4) *An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.'*

In dealing with the penalty the Stewards concluded as follows:

> *'... It was said at the outset of this inquiry that the Stewards considered this to be a serious matter. All breaches of drug rules are serious. There is a public expectation that competing racehorses do so on an equal footing, any positive swab finding impacts and has the potential to adversely affect that support of the betting public. The financial support of the wagering public is vital for the well being of this industry, without that support, the racing industry would suffer considerably. Any positive swab finding undermines the integrity of racing and consequently public confidence. The level of TC02 detected was greater than 39 millimoles per litre. This is a significantly high reading and is one of the highest to come before a Stewards inquiry. Excessive levels of TC02 have the effect of*

inhibiting fatigue in a racehorse by delaying the onset of lactic acid and is potentially performance enhancing. Consequently the Stewards place this prohibited substance in the serious category bracket. Expert veterinary evidence reveals that to get to a level of greater than 39, an administration has taken place. Your explanation of CLASS MATE being dehydrated and denied water does not explain this high reading. Your stable protocols have found to be lacking, you use Neutradex widely in your feeding. You maintain that Neutradex is not fed to any pacers on the day of the racing, however you harbour a suspicion that CLASS MATE may have received a "couple of shots" amounting to 100mils. High TC02 positives unfortunately is not an infrequent occurrence in the racing industry, yet despite the publicity of such occurrences and the fact in June 07 Dr Peter Symons advised you officially that a pacer in your care recorded a level of 36 millimoles per litre of TC02, you appear to have adopted somewhat of a cavalier attitude. You fed 300 grams of bicarb daily, you feed Neutradex and you cannot guarantee that CLASS MATE did not receive any (sic), the left over feeds of other runners. As stated your stable procedures are lax. Any penalty must encompass a deterrent factor, both general and personal. The industry needs to be reminded again that presenting horses to race with prohibited substances in their system is totally unacceptable. Your record shows you have a prior conviction breaching the drug rules. In 1994 you presented a horse at trials which went positive to caffeine and bute, we acknowledge that offence was fourteen years ago and do not take that offence into account in determining a penalty for this matter. Your personal circumstances have been taken into account. You are forty two years of age and are a full time trainer, you have eleven pacers in your (sic), in work at the moment however your maximum number is twenty. You rent your stables and have a mortgage and you have five children. All these factors have been considered. CLASS MATE finished unplaced, you have pleaded guilty to the charge, both points are acknowledged by the Stewards. The Stewards have considered the penalty options, that is, disqualification, fine and suspension. We

are of the opinion that any positive swab should result in disqualification unless there are special circumstance (sic). We do not believe that this case falls into the special circumstance category. Recent cases have been K. Nolan, twelve months for a second offence, S. Suvaljko, twelve months, second offence, L. Coulson, six months first offence. In acknowledging that this is your first offence, we're of the opinion that the extremely high level justifies a starting point higher than usual, that being of six months, however after allowing for all mitigating factors, the Stewards do believe a disqualification of six months, effective immediately is appropriate.'

THE APPEAL

Mr Gavin appealed against the six month disqualification. His notice of appeal specified the grounds of appeal as follows:

'Against severity of penalty.

Investigation within 24 hour (sic) of a major operations (sic).

The chairman refused to answer a question.

Both RWWA vets gave conflicting evidence.

Dr Symons gave miss leading (sic) evidence.'

There was no dispute as to the meaning and application of the relevant Rule 190. Mr Gavin readily acknowledged he had broken the Rule and had entered a plea of guilty to the charge before the Stewards. What was in dispute in the appeal was the manner in which the Stewards dealt with Mr Gavin in relation to the penalty which was imposed. After hearing submissions from both sides the Tribunal reserved its decision. On 19 December 2008 the Tribunal handed down its decision to uphold the appeal without reasons being published. The appeal was upheld and the penalty was reduced by a majority decision. I now set out my reasons for dissenting.

REASONS

I had the opportunity to read a draft of the Reasons of Member Mr A Monisse which contained a summary of the relevant facts and circumstances relating to the matter. Whilst I agreed with and do adopt the Member's treatment of the facts, I did not agree with the conclusion to reduce the length of the disqualification. I will deal with the severity of the penalty last after briefly addressing the other grounds referred to in the appeal notice.

I did not consider there was any merit in the second ground of appeal regarding the coincidence of timing of the investigation following Mr Gavin's hospitalisation. That aspect of things, whilst it may have been personally unfortunate and apparently proved discomforting to Mr Gavin at the time, cannot influence the setting of an appropriate penalty as the proper punishment for this significant breach of the Rules. The timing of the investigation was simply not relevant to the substantive issues for determination in the appeal and the consequences which flow from this affair so far as the racing industry is concerned. Because of the serious implications to the industry and the betting public it was desirable for this type of offence to be fully addressed and was reasonable for the Stewards to deal with the matter quickly.

As to the proposition regarding the refusal by the Steward who chaired the inquiry to respond to a question, I was satisfied the inquiry was conducted in a perfectly proper manner in all aspects.

I was also not persuaded there was anything conflicting in the evidence presented by the two veterinarians. There was no material matter in their respective evidence which influenced me to conclude the length of the disqualification, or indeed the appropriateness of a disqualification itself as distinct from any other penalty, should be successfully challenged. Equally, nothing was presented to persuade me to the viewpoint that Dr Symons' evidence was misleading or in any way a basis for interfering with the penalty imposed by the Stewards.

Having arrived at these conclusions it only leaves me to consider the remaining issue which is the much more difficult question as to the penalty. Once the offence was admitted by Mr Gavin the Stewards were required to turn their minds to both the type of penalty to be imposed, and, in the case of any non-monetary one, the length of such penalty.

I was more than satisfied based on previous cases that the Stewards were correct in asserting *'... any positive'* swab should result in disqualification unless there are special circumstances. I also fully agreed with the conclusions reached by the Stewards that there were no special circumstances in this case which would justify any penalty other than a disqualification being imposed. Further, the circumstances indicated that something substantially more than a short disqualification was justified. The level of TCO2 detected in CLASS MATE was very high. It was described by the Stewards in their findings as being *'... one of the highest to come before a Stewards' inquiry'*. This disturbing aspect was made all the worse as the Stewards also found Mr Gavin's stable protocols were lacking and that he had adopted a cavalier attitude. I was satisfied both these findings were clearly open on the evidence.

In the course of enunciating their penalty reasons the Stewards have identified a relatively large number of facts and circumstances which influenced their judgment of the matter. Each of those aspects were all clearly relevant, and in summary included:

1 The fact that a drug offence was a serious infraction of the Rules.

2 The public's expectation that there should be a level playing field in racing.

3 The fact that any positive swab potentially has an adverse affect on the betting public whose support for the industry is essential.

4 The integrity of racing depends on public confidence.

5 The level TCO2 detected in Mr Gavin's horse was very high.

6 Excessive levels of TCO2 can be potentially performance enhancing which makes the presence of this substance in a horse which has been presented to race a serious matter.

7 Mr Gavin's stable protocols were clearly lacking.

8 Both general and personal deterrence were appropriate.

9 Mr Gavin's past record.

10 Mr Gavin's personal circumstances.

11 The plea of guilty.

12 Any positive swab should result in a period of disqualification, save for special circumstances.

As to the past record, the Stewards were quite fair in treating Mr Gavin as a first offender. This was despite his prior breach of the drug rules some 14 years previously involving caffeine and bute in a horse he presented at a trial. Had any one or more of the dozen factors been ignored by the Stewards it could well have been argued the Stewards had fallen into error. The consequence of such an error would have been to expose the decision to the possibility of an appeal, which, if made and successful could result in a quashing of the decision and a lesser penalty being imposed.

It is invariably not a precise or easy process to arrive at a conclusion on penalty in these types of matters. A reason for this is the fact that a wide or open ended discretion is available under the Rules for this type of offence. Rule 256 specifies one or more penalty may be imposed including a fine, a conditional or unconditional suspension for a period, a disqualification or warning off for either a period or permanently, a bar or a reprimand. Clearly in going through the process of arriving at a penalty one has to be guided by previous decisions. Whilst it goes without saying those previous decisions are largely based on their own relevant facts and circumstances, no two cases are the same. The

ability to properly evaluate and apply past unrecorded cases in arriving at an appropriate penalty depends partly on the decision maker's recollection of the facts and circumstances of those earlier cases. Usually any relevant records of those previous decisions that may be available can be most helpful. However, if one were to simply examine the results of previous matters without having the benefit of all of the details including the mitigating circumstances this might well lead to an argument that some offenders are treated much more leniently than others and vice versa. Unfortunately, most of the Tribunal's reasons for determination over the years have not recorded whether or not the appellants were first offenders. There is the further complicating factor to simply referring to the past reasons and trying to arrive at a tariff in sentencing as over the years as there have been significant changes to the Rules. This means some of the earlier decisions are now either irrelevant or relatively unhelpful. For example, in the early days of the Tribunal, Rule 55A of the Rules of Trotting imposed minimum penalties of disqualifications for 12 months for a first offence, two years for a second offence, five years for a third and life thereafter, unless there were extenuating circumstances. Since the introduction of RWWA Act in August 2003 the two horse racing codes have come under uniform control. I have been told by the Stewards during the course of a number of appeal proceedings recently that since the introduction of RWWA the approach to TCO2 offences in both codes has been uniform. It is now therefore all the more relevant to look at the more recent decisions from both codes in setting the penalty and to give the earlier decisions little or no weight. The equivalent rule to Harness Racing Rule 190 is Australian Rule of Thoroughbred Racing 178 which specifies:

> *'when any horse that 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 and any other person who as in charge of such horse at any relevant time may be punished'.*

This Thoroughbred Rule was effective from October 2002. Prior to that time there was an exception in the case of a party who had satisfied the Committee that he had taken all proper precautions to prevent the administration of the prohibited substance.

I have reviewed most of the TCO2 presenting cases which have come before this tribunal both in harness and thoroughbred racing. I appreciate that the coming into existence of RWWA proved to be a watershed in the regulation and control of racing in this state. I repeat, this and other factors clearly mean that only decisions of Stewards and the Tribunal as to penalty subsequent to RWWA are of particular relevance and useful for direct guidance. Although I have given little weight to the pre RWWA decisions, I still list them for the sake of completeness as follows:

1 G Pengel (Appeal 110) – two offences; disqualified for each for **eight and a half months** to be served concurrently (harness) (appeal dismissed).

2 S Boyd (Appeal 111) – disqualified for **eight and a half months** (harness) (appeal dismissed).

3 K Kirke (Appeal 158) – disqualified for **two years** (harness) (appeal dismissed).

4 J Craig (Appeal 159) – disqualified for **six months** (harness) (appeal dismissed).

5 G Harper (Appeal 165) – disqualified for six months reduced on appeal to **four months** (thoroughbred).

6 B M Warwick (Appeal 210) – disqualified for **eight months** (harness) (appeal dismissed).

7 P C Garner (Appeal 238) – disqualified for **six months** (thoroughbred) (appeal dismissed).

8 C Jones (Appeal 273) – disqualified for **twelve months** (harness) (appeal dismissed).

9 P L Anderson (Appeal 275). (Note Rule 55A applied) – **disqualified for life** (harness) (appeal dismissed).

10 R G Brown (Appeal 319) – disqualified for three months reduced on appeal to **one month** (thoroughbred) (first offence).

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11 F Charles (Appeal 344) – disqualified for **two years** (harness) (appeal dismissed).

12 G P Slater (Appeal 359) – disqualified for twelve months reduced on appeal to **eight months** (thoroughbred).

13 D Lalich (Appeal 368) – disqualified for three years reduced on appeal to **two years** (thoroughbred).

14 T R Stampalia (Appeal 435) – disqualified for **twelve months** (harness) (appeal dismissed) (first offence).

15 B Monteleone (Appeal 467) – disqualified for six months reduced on appeal to **four months** (thoroughbred).

16 G S Puglia (Appeal 472) – disqualified for **twelve months** (harness) (appeal dismissed).

17 M N Beech (Appeal 474) – disqualified for two years reduced on appeal to **twelve months** (harness).

18 G D Harper (Appeal 479) – disqualified for **twelve months** (thoroughbred) (appeal dismissed) (second offence).

19 T A Bettesworth (Appeal 503) – disqualified for four years reduced on appeal **two years** (thoroughbred).

20 R A Olivieri (Appeal 510) – disqualified for **twelve months** (harness) (appeal dismissed).

21 K A Nolan (Appeal 517) – disqualified for **twelve months** (harness) (appeal dismissed).

22 J J Miller Junior (Appeal 575) – disqualified for **twelve months** (thoroughbred) (appeal dismissed).

23 K A Nolan (Appeal 632) – disqualified for **twelve months** (harness) (appeal dismissed).

The matters that were appealed to the Tribunal since the formation of RWWA are:

24 S J Suvaljko (Appeal 638) – disqualified for **twelve months** (harness) (appeal dismissed).

25 R Harvey (Appeal 652) – disqualified for twelve months on appeal reduced to **six months** (thoroughbred).

26 P M Lodding (Appeal 666) – disqualified for **nine months** (harness) (appeal dismissed).

27 W L Radford (Appeal 685) – disqualified for five months reduced on appeal to **three months** (thoroughbred).

As quoted earlier, in arriving at their conclusion to disqualify Mr Gavin for six months, the Stewards referred in passing to three recent cases. Two of these were K Nolan & S Suvaljko which, as indicated above, both went on appeal. In both cases the penalty imposed for each was a twelve month disqualification in respect of second offences. The other was L Coulson who received six months for a first offence. Mr Coulson did not appeal to the Tribunal.

The last appeal referred to in the above list, that of Radford, I did not sit on. It appears clear from reading the Reasons for Determination in that case of Presiding Member Mr J Prior that the personal circumstances of Mr Radford were the influencing factor that caused the Tribunal to reduce the penalty. It seems in that case the Stewards had failed to give

any weight or at least proper weight to those circumstances. This situation distinguishes that case from Mr Gavin's in my assessment, as I was not persuaded the Stewards failed to give weight or proper weight to Mr Gavin's mitigating factors.

After carefully considering the range of penalties that have previously been imposed and the circumstances of this particular offence compared with the other offences, such as they were known, I was not satisfied that it had been demonstrated that the Stewards had fallen into any error in imposing the period of disqualification of six months. As has already been quoted, the Stewards have stated in their reasons *'... we're of the opinion that the extremely high level justifies a starting point higher than usual, that being of six months, however after allowing for mitigating factors, the Stewards do believe a disqualification of six months, effective immediately is appropriate'.*

In the case of Suvaljko the tests revealed the presence of TCO2 were at levels of 37.9 and 37.2 millimoles per litre subject to a 1.2 millimole adjustment in each case. In Harvey the levels were 37.4 and 37.5 millimoles before the 1.2 millimoles adjustment. In Lodding the levels exceeded 39 millimoles per litre, subject to an uncertainty measurement of plus or minus 1.2 millimoles per litre. In Radford the elevated reading was not substantially over the threshold being 36.3 and 36.2 millimoles per litre in plasma on each sample after allowing for 1 millimole of uncertainty. The levels in Nolan were 37.9 and 38.8 subject to an adjustment of 1.2 millimoles.

Very few of the past cases have been in respect of lesser periods of disqualification than six months which were arrived at after allowing for any personal or other mitigating factors. It was not demonstrated to my satisfaction that there was any error in the line of reasoning adopted by the Stewards in dealing with Mr Gavin taking into account the range of penalties imposed in other cases. Any slight adjustment to the penalty in my opinion would simply be tinkering. Any reduction of the penalty of more then some few weeks would amount to an inappropriate and unjustified reduction. To justify a reduction of one or more months would in my opinion require something so distinctive and special to the case that would make it unusual and not likely to be readily repeated. An example of that is

D.Nazzari (Appeal 697), which was heard and determined after Mr Gavin's appeal was heard. In Nazzari's matter the penalty was reduced from six months to four months due to the fresh psychological evidence, which was not before the Stewards, and was only produced at the appeal hearing.

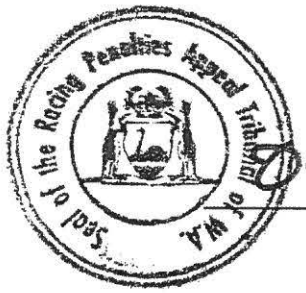
I am mindful that an appellate review of a discretionary decision must be conducted carefully with the necessity to show an error on the part of the decision maker rather than it simply being the case that the appellate body would have arrived at a different decision. As was stated in DINSDALE v R [2000] HCA 54 by Kirby J (with whom Gavidson and Gummow JJ agreed) at paragraph 58, such an error may be the adoption of an incorrect principle, giving weight to something irrelevant or failing to do so in relation to something relevant or making a mistake as to fact. I was satisfied that no such error occurred on the part of the Stewards in dealing with Mr Gavin.

In light of the facts surrounding Mr Gavin's offence I also concluded any reduction of one or more months would in my assessment send an unsatisfactory message to the racing industry. I say this after fully evaluating Mr Gavin's personal circumstances and despite taking into account the co-operation he displayed at the hearing. I was satisfied, from studying the transcript of the Steward's inquiry and the Steward's reasons, that Mr Gavin's personal factors, including age, nature of this trainer's business, his mortgage and children, had all been taken into account appropriately by the Stewards.

As is clear from the Steward's decision (quoted above), the starting point in assessing penalty for the Stewards was a disqualification exceeding six months. The Stewards clearly stated that this was one of the highest readings to come before a Stewards' inquiry. This reading influenced the conclusion which I reached. The finding that stable protocols were lacking, indeed '*lax,*' that Neutradex is used widely in Mr Gavin's stable and there was the possibility that CLASS MATE may have received a couple of shots on the day of racing were all important factors which weighed heavily on me. Added to this was the frequency of high TCO2 positives and the fact Dr Symons had advised Mr Gavin of another racer having recorded a level in excess of the threshold. As has been previously stated, the

the attitude of Mr Gavin was in fact described by the Stewards as *'cavalier.'* Although they don't state how much in excess of six months was considered appropriate, when one looks at the penalty range in the list of offences set out above it was reasonable to start the process of arriving at the length of the penalty with a period of more than seven months.

For these various reasons I was of the opinion the appeal should be dismissed and the decision of the Stewards confirmed.



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