APPEAL – 714

DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**ROBERT HARVEY JNR**
APPLICATION NO:	**A30/08/714**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING:	**25 FEBRUARY 2010**
DATE OF DETERMINATION:	**2 JUNE 2010**

IN THE MATTER OF an appeal by ROBERT HARVEY JNR against the determination made by the Racing and Wagering Western Australian Stewards of Thoroughbred Racing on 20 November 2009 imposing a 9 month disqualification for breach of Australian Racing Rule 175(h)(ii).

Mr Daniel Morris instructed by Havilah Legal appeared for Mr Harvey.

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

This is a unanimous decision of the Tribunal.

The appeal against penalty is dismissed.

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

D Mossenson

DAN MOSSENSON, CHAIRPERSON

APPEAL – 714

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**ROBERT HARVEY JNR**
APPLICATION NO:	**A30/08/714**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR W CHESNUTT (MEMBER)**
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Mr Daniel Morris instructed by Havilah Legal appeared for Mr Harvey.

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

Mr Robert Harvey Jnr was the licensed trainer of MOONEMIA. On 13 November 2009 the Racing and Wagering Western Australian ("RWWA") Stewards of Thoroughbred Racing inquired into a report received from the ChemCentre that a urine sample taken from MOONEMIA after winning Race 3 at Belmont on 2 September 2009 contained the substance aminocaproic acid. The Australian Racing Forensic Laboratory analysed the control sample and also found the presence of the substance.

The Stewards proceeded to conduct an inquiry into the matter. Mr Harvey's lawyer Mr B Havilah was given permission by the Stewards to be present during the inquiry. Dr Peter Symons, the RWWA Industry Veterinarian, gave evidence that aminocaproic acid is a prohibited substance under the Rules of Racing. He described it as:

> *'.. an antifibrilitic agent and it's got an action on the cardio vascular system where it stabilises clots and helps to minimise their breakdown. So the aim of the medication is to reduce further bleeding.'* (T 14)

The appellant's veterinarian Dr J Vines was present at the inquiry. Dr Vines questioned whether the substance actually affected the cardiovascular system and denied the substance fell into the category of a prohibited substance. Dr Symons responded to these propositions as follows:

> *'... bleeding is a rupture of the cardio vascular systems, the veins or the capillaries or the arteries and the clotting mechanism actually works on the cardio vascular system to stop the bleeding, this substance acts on a clotting mechanism and helps sustain it so that it actually blocks bleeding through the cardio vascular system so I can't see how it doesn't involve the cardio vascular system which is where the blood is. The rule does say direct or indirect effect, I mean, if some people want to say it's an indirect effect then that's, that's reasonable.'* (T 15)

Later in the inquiry Dr Symons asserted the substance was capable of a range of side affects that '*... do affect quite a few systems in the body ...*'.

Dr Vines told the Stewards she imported the product in question from the USA and that it was a fully registered product for human use. Evidence was given that there were concerns MOONEMIA was potentially bleeding because it did not finish its races off. The horse was scoped and found to be a bleeder. As a consequence Mr Harvey sought advice from Dr Vines. It was Mr Harvey who actually suggested the use of Amicar based on what he had heard about it through other trainers. Mr Harvey had asked Dr Vines whether there were any problems with the treatment and was told:

> *'No, there's no problems with it, not that we are aware of.'*
>
> ...
>
> *'... she said there is one problem with it, is raceday administration are you aware of that Robbie and I said yes I am Julia ...'* (T 24)

Discussion ensued regarding testing for the problem and notification to inform the industry of changes. Mr Harvey then arranged to purchase the substance. There was a direction on the bottle which was procured which stated '*6 hours before fast work*'. Before the horse raced on 2 September last year Mr Harvey administered 10 ml of the substance around 8am. MOONEMIA was due to race around 2.40pm that day. Six weeks after the race Dr Medd, a RWWA investigator and a Steward arrived at Mr Harvey's stables and asked questions. Mr Harvey claimed he honestly but mistakenly believed the substance was legal to administer but did not know it should not have been administered within 24 hours of the race. Mr Harvey was most cooperative with the Stewards at the inquiry. Mr Harvey admitted that the substance was present in the sample which he accepted had been taken from the horse after the race. He required no evidence to be presented and accepted the

laboratory documents were proof of the presence of the substance. Further, Mr Harvey admitted he was aware the medication should not have been administered to a horse 24 hours before a race.

The Stewards charged Mr Harvey with a breach of Australian Racing Rule 175(h)(ii). That Rule states:

> *'The Committee of any Club or the Stewards may penalise;*
>
> *(h) Any person who administers, or causes to be administered, to a horse any prohibited substance –*
>
> *(ii) which is detected in any sample taken from such horse prior to or following the running of any race.'*

The particulars of the charge are:

> *'... by your own admission you administered Amicar to MOONIMEA which resulted in the prohibited substance aminocaproic acid being detected in the urine sample taken from MOONIMEA after the gelding won Race 3 the playeronline Handicap at Belmont Park on the 2nd of September 2009.'* .

After the charge was laid Mr Harvey acknowledged to the Stewards that he understood the charge. Mr Harvey was then afforded an adjournment to talk with his solicitor. Once the inquiry resumed Mr Harvey entered a plea of guilty. The Stewards then examined Mr Harvey's personal circumstances including his financial situation. Mr Harvey had been training for approximately 26 years. He had three convictions over that period namely two anti-inflammatory readings and an elevated TC02 level. In addition Mr Harvey had been convicted of administering vitamins on race day.

The Stewards adjourned. One week later they reconvened to deliver their extensive reasons as to how they arrived at their penalty decision. This is what they concluded:

> *'... your actions of administering the prohibited substance, Aminocaproic Acid to MOONEMIA a short time prior to the race are a significantly aggravating factor in this case, and this fact alone would cause the Stewards to give consideration to a considerable penalty. However, the Stewards are required to consider a wide range of factors relevant to the case and your own individual and personal circumstances in order to determine an appropriate penalty...'*
>
> *'An offence under AR.175(h)(ii) is in itself, a very serious transgression of the rules; however such a breach is taken to an even higher level and degree of culpability when it occurs on race day in direct contravention of AR.178E(1).*
>
> *AR.178E(1) was introduced in February 2003 for the very purpose of preventing horses from racing with a prohibited substance in its system. It prohibits all treatment of horses with drugs and other substances whether they are prohibited or not. You have entirely flouted and disregarded this rule, which if obeyed, would have protected you from the very consequences now confronting you.*
>
> *You acted in the belief that your actions would go undiscovered and put your faith in the advice of your Veterinary Surgeon, Dr Vines who erroneously advised you that the substance was not detectable after 6 hours. Significantly, this advice*

was qualified by her stating to you that it was contrary to the rules of racing to administer medication on race day. Inexplicably, you chose to ignore the qualification given by Dr Vines knowing that your actions were wrong, but justified them by believing the information was entirely reliable in that the administration would go undetected. This belief is further evidenced by similar treatments to MOONEMIA at two subsequent race starts.

There is an Australia wide policy of drug free racing and all drug related offences are serious matters as made clear in the judgement of Owen and Anderson JJ in the case of Harper v The Racing Penalties Appeal Tribunal of WA (1995) where it was said that such matters clearly do endanger the integrity of the racing industry.

Mr Harvey, you have an extensive career within the Western Australian Racing Industry having ridden in races as an Apprentice Jockey and Jockey since December 1973 and then gained your trainer's licence from August 1986. In the 1992/1993 season you rose to the status of an Open Class Trainer.

Your record as a Trainer shows three prior offences in relation to prohibited substances. Firstly, in February 1995 you were disqualified for a period of four months under ARR.175(h)(ii) for administering the banned substance Flunixen to NOBLE BARONESS before it raced. The features of this case were that you took no veterinary advice, were imprecise as to the time of the administration and failed to keep any records. You stated in that inquiry that you administered the drug 6 days before the race and assumed it would be out of its system based on your own experiences as a Trainer. A subsequent appeal was dismissed. In 1998 you were disqualified for 7 months under ARR.175(h)(ii) for administering Celestone to VANITY ROSE which resulted in the prohibited substance Betamethasone being detected in the post race urine sample taken after it won at Belmont on Saturday, 18 July 1998. A subsequent appeal was dismissed. This administration took place 24 hours prior to the race and this was deemed to be an exacerbating circumstance in that matter.

In May 2006 you were disqualified by the Stewards for a period of 12 months under ARR.178 for bringing IMPACT RATING to race at Ascot on 8 April 2006 with a TCO2 level in excess of 36 millimoles per litre. This penalty was subsequently reduced to 6 months on appeal. The determination by the Racing Penalties Appeal Tribunal stated that you fed both bicarbonate and neutrolene which was an inherently risky feeding regime and that you were warned of the risks but continued the regime unchanged. This was said to be an error of judgement but that there was nothing inherently sinister about it. Your actions were described by the Tribunal as incautious, but not recklessly so and that the offence arose out of miscalculation for which you were not entirely blameless. Your actions were deemed to be at the bottom end of the scale of culpability.

Also, in December 2006 you were fined $1,000 under AR.178E(1) for administering an injection by a vitamin compound to ALWAYS A DEVIL prior to it competing in the Railway Stakes. This administration was completed whilst the horse was under guard before arrival on course and subsequently reported to the Stewards who allowed the horse to remain in the race but penalised you for your actions which were a direct breach of the race day medication rule.

The effects of these penalties and the lessons learnt from them should have served as a stark reminder of your responsibilities and obligations to do everything possible to ensure all horses under your control are presented to race drug free, yet you have repeatedly, and again failed on this occasion to meet this strict obligation and have added to an already poor record. You chose to rely solely on the advice of Dr Vines and did not consult with RWWA Industry Veterinarians Dr Medd or Dr Symons who are both freely available to provide guidance and direction in the use of medications. As stated by Dr Symons in this inquiry his advice to you would have been that Aminocaproic acid is a prohibited substance and cannot be administered on race day. Consultation with either of the two regulatory Veterinarians of RWWA would have prevented you from being in this position. Extensive warnings have been published by RWWA since 2003 in the monthly Racing Calendar where it is stated that it is prohibited to administer medication on race day. Aminocaproic Acid is only likely to be detected when administered on race day due to its short half life and rapid excretion rate. Strict adherence, as is expected and required, to the overarching rule of no medication on race day would have ensured MOONEMIA raced without prohibited substance in its system.

Aminocaproic acid is a human medication and is not registered as a veterinary product in Australia. It was administered approximately 6 hours before the race based on veterinary advice that relied on broad assumptions only that it could not be detected if administered at this time.

As the trainer, you bear the ultimate responsibility of presenting all horses under your control free of prohibited substances. Such responsibilities require you to obey and fully understand the rules of racing in relation to the administration of treatments to horses and you must play an active and leading role in this regard and this includes taking responsibility for any veterinary advice that is found to contravene the rules. Your overall actions in this case fall well below what is required to ensure such vital obligations are met. Although used off-label by veterinarians, Aminocaproic Acid is not a currently registered equine veterinary product in Australia and is therefore not subject to the Armytage guarantee and therefore there is no obligation to advise the industry prior to commencing testing for such substances.

This was a deliberate administration of human medication administered close to the race in the false belief that the drug would not be present when it raced. Its detection following the race causes the Stewards to take into account that this administration was intended to ameliorate the effects of exercise induced pulmonary haemorrhage so as to enable MOONEMIA to run at least to its best ability.

The Rules of Racing prohibit bringing a horse to a racecourse to perform with any prohibited substance in it and the rules do not discriminate between performance enhancing or therapeutic substances. Stewards accept that you have been fully cooperative throughout this matter and have been forthright in your evidence since first visited by the Stewards at your stables on Monday, 12 October 2009. You have also admitted the wrongfulness of your actions. You have maintained and emphasised this attitude throughout the course of the inquiry and have demonstrated genuine remorse for your actions which is highlighted by your plea

of guilty and subsequent submissions on penalty which clearly state that you will never again compromise your professional responsibilities and in future will not accept advice without discharging your own responsibilities and obligations as required. A betting analysis on this race has been conducted and the Stewards have no concerns with the level of betting on MOONEMIA.

A review of the previous penalties in relation to drug offences reveals penalties ranging from fines to lengthy disqualifications.

Further, the Stewards are mindful of the principles of specific and general deterrence in respect of this type of breach of the rules.

We have considered your personal circumstances and the effects of the various types of penalty that can be applied by Stewards under the provision of AR.196. We do not consider that there are any special circumstances that would warrant either a suspension or fine in this case and believe that a disqualification for a period of 12 months to be justified. However, there a number of important mitigating factors that we have considered, and these include the forthright manner in which you have given your evidence, your plea of guilty, degree of cooperation, and level of remorse and the personal effect on your employees. As such Mr Harvey, Stewards believe the penalty should be discounted by three months and are subsequently imposing a period of disqualification of 9 months.'

The appeal was limited to the penalty on the ground that it was '*manifestly excessive in all of the circumstances of the case'*. The appeal notice was supported by a detailed statement of evidence by Mr Harvey. At the same time Mr Harvey applied for a stay. I refused the stay application.

At the appeal hearing counsel for Mr Harvey acknowledged the penalty was not excessive on its face. Rather, it was argued relevant considerations were not taken into account and the terms of the inquiry consequently were not clear. It was claimed it was confusing as to whether the inquiry was directed to the breach of the race day rule or the issue of knowingly administering a prohibited substance. This ambiguity, it was said, led the Stewards into error in determining the penalty in the circumstances where only the breach of the 24 hour rule was admitted.

The appellant relied on the case of *C Crook (*Appeal No. 18 of 2005/06 Tasmanian Racing Appeal Board). In that case a long serving trainer committed a first offence despite acting on the advice of the veterinary surgeon. The three month disqualification penalty which was imposed was quashed and replaced with a $2,000 fine. Unlike the present case, Mrs Crook relied entirely on the advice and actions of her veterinary surgeon and, importantly, complied with that advice. The Board had no reason to doubt the accuracy of the advice that was given by the eminent and experienced equine surgeon involved. The Board concluded the facts of the case were exceptional and in the particular circumstances a disqualification was not warranted.

The facts in the Crook case can clearly be distinguished from the facts and circumstances of Mr Harvey's case. Although Mr Harvey understood from the advice that he had received that the substance in question was not necessarily a prohibited substance, he had been informed and indeed he already knew, that it was wrong to administer the substance on the day of the race. He did so at a time when he believed the substance would not be

detected. Mr Harvey was a repeat offender in this regard. The facts of Mr Harvey's case clearly do not meet the description of being exceptional.

Unlike Mrs Crook, Mr Harvey has several previous convictions in relation to prohibited substances which clearly aggravate his situation. As already stated Mr Harvey was disqualified for periods of four months, seven months and six months in addition to receiving a fine of $1,000 for injecting a vitamin compound prior to competing in a race. With such a history of substance use and administration prior to racing I am more than satisfied the imposition of a fine or a suspension would be totally inappropriate in this case.

Mr Davies QC argued that the sentencing remarks of the Stewards could not be faulted. To test that proposition it is helpful to identify and list the key points stated in the sentencing remarks, namely:

1 *The short interval between the administration and the race being an aggravating factor.*

2 *Administration offences are all the more serious when administration occurs on race day in breach of AR178E(1), as that provision prohibits all treatments with drugs or other substances.*

3 *The conduct flouted and disregarded AR178E(1).*

4 *Mr Harvey acted in the belief that his actions would go undiscovered.*

5 *There is an Australia wide policy of drug free racing, with all drug related offences being serious matters which endanger the integrity of the racing industry;*

6 *Mr Harvey has enjoyed an extensive career, first as a jockey and later as a trainer.*

7 *Mr Harvey has been convicted three times previously in relation to prohibited substances as well as being fined for administering vitamins prior to his horse competing.*

8 *Mr Harvey's penalties should have served as a reminder to him of his responsibilities and obligations to ensure he presented his horses to race drug free, yet Mr Harvey added to an already poor record.*

9 *Mr Harvey did not consult the authority's veterinary Stewards.*

10 *The prohibition on administration of medication on race day has been widely publicised.*

11 *The substance administered is a human medication which was not registered as a veterinary product.*

12 *The substance was administered based on veterinary advice on the assumption it would not be detected.*

13 *The obligation which is placed on a trainer to present all horses free of substances requires a full obedience and understanding of the Rules.*

14 *The administration in this case was intended to ameliorate the effects of exercise induced pulmonary haemorrhage to enable the horse to run at least to its best ability.*

15 *Mr Harvey had been fully cooperative throughout the matter. He was forthright in his evidence and admitted the wrongfulness of his actions.*

16 *Genuine remorse for his actions was evident, highlighted by his plea of guilty and subsequent submissions.*

17 *A review of previous penalties in relation to drug offences reveals penalties ranging from fines to lengthy disqualifications.*

18 *The Stewards are mindful of the principles of specific and general deterrence in respect of this type of breach.*

19 *There are no special circumstances that would warrant either a suspension or fine, rather a disqualification for 12 months would be justified.*

20 *A number of important mitigating factors have been considered including the forthright manner in which he gave his evidence, the plea of guilty, the degree of cooperation and level of remorse and personal affects that follow a disqualification. Hence the penalty imposed was nine months.*

As to point 2 above the provision in question states:

> *'Notwithstanding the provisions of AR.178C(2), no person without the permission of the Stewards may administer or cause to be administered any medication to a horse on race day prior to such horse running in a race.'*

There can be no doubt as to the appropriateness of the Stewards' conclusions in regard to Rule 178(E)(1), particularly in the light of the Stewards' conclusion as stated in point 3. I agree with the sentiment in point 3. The propositions regarding the drug free policy, the publicity associated with the policy, the onus on the trainer and the adverse impact on the industry of drug administration underpin the integrity of the industry. The conduct in question is aggravated by virtue of the facts referred to in points 1, 2, 4, 9, 11 and 12.

As to points 17 and 19, it is worth acknowledging the Stewards did not in their reasons actually cite examples of penalties imposed for other such offences. However, Mr Harvey's previous penalties themselves provide some guidance. There can be little doubt the Stewards were accurate in their summation of the penalty range. Any number of past appeals can be simply referred to which would test and verify the propositions. For example, Mr G D Harper (Appeal 710). This repeat offender was disqualified successively six months, 12 months, 18 months and finally given five years. In my reasons in the Harper appeal I refer to a number of other cases where periods of disqualification considerably longer than that meted out to Mr Harvey were imposed, namely Lalich (two years), Bettesworth (two years), JJ Miller Jnr (12 months), AF Bratovich (two years), Suvaljko (12 months) and CW Hall (five years). The circumstances of all of these cases obviously varied considerably and in many respects may have differed from Mr Harvey's case. However, when looked at collectively, the Harper and other cases clearly highlight the fact that the penalty range proposition put by the Stewards and their conclusion in point 19 cannot be faulted. The only matters helpful to Mr Harvey's cause in softening that penalty conclusion are the points made at 6, 15, 16 and 20.

I am satisfied the summarised points extracted from the Stewards' reasons are all relevant matters which the Stewards were entitled to consider. I can see nothing wrong with the way all those points and more were identified and taken into account in determining the matter. Further, I can find nothing else of relevance in the evidence which was before the Stewards which can be said to have been overlooked or improperly treated by the Stewards.

The appellant admitted he was aware of the Rule which he flouted. The appellant was previously fined for this type of offence. Mr Harvey has a record of being prepared to run the gauntlet in his endeavours to assist his horses whilst at the same time attempting to avoid the consequences of administration prior to racing.

Mr Davies argued that the penalty clearly was within the range. Based on my earlier comments I am satisfied this statement cannot be doubted. Indeed, it was not challenged and the penalty needs to be considered in the light of the fact Mr Harvey was a repeat offender.

In order for the betting public to be confident that the industry is being properly regulated and controlled and that races are run according to the Rules any breach of the prohibited substance/administration rules needs in the first instance to be carefully investigated. Suspected offenders of these rules need to be identified. Proven offenders need to be adequately punished for their offences. The levels of punishment should fit the seriousness of each situation, be a salutary reminder to the offenders not to repeat their misdeeds and at the same time serve as effective warnings to other industry participants against descending to such misconduct. I am satisfied in all the circumstances of this case that the nine month disqualification which was arrived at after a suitable adjustment for mitigation is appropriate and meets these various criteria.

For these reasons I can find no basis to interfere with the Stewards' findings and find no merit in the propositions put by the appellant. I have already explained the Crook case is distinguishable. I am satisfied the terms of the Stewards' inquiry were quite clear. There was no confusion as to the actual charge involved or other ambiguity. There was no error on the part of the Stewards. I would dismiss the appeal.

DAN MOSSENSON, CHAIRPERSON

APPEAL – 714

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT:	**ROBERT HARVEY JNR**
APPLICATION NO:	**A30/08/714**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING:	**25 FEBRUARY 2010**
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Mr Daniel Morris instructed by Havilah Legal appeared for Mr Harvey.

Mr R J Davies QC appeared for Racing and Wagering Western Australian 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 further to add.

Seal of the Racing Penalties Appeal Tribunal of WA

PATRICK HOGAN, MEMBER

APPEAL – 714

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR W CHESNUTT (MEMBER)

APPELLANT:	**ROBERT HARVEY JNR**
APPLICATION NO:	**A30/08/714**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATE OF HEARING:	**25 FEBRUARY 2010**
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I have read the draft reasons of Mr D Mossenson, Chairperson.

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

Seal of the Racing Penalties Appeal Tribunal of WA

WILLIAM CHESNUTT, MEMBER