APPEAL 736

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**ROSS ALBERT OLIVIERI**
APPLICATION NO:	**A30/08/736**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING:	**22 DECEMBER 2011**
DATE OF DETERMINATION:	**22 DECEMBER 2011**
DATE OF REASONS:	**15 MARCH 2012**

IN THE MATTER OF an appeal by ROSS ALBERT OLIVIERI against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 11 October 2011 imposing a disqualification of 12 months for breach of Rule 190 of the RWWA Rules of Harness Racing.

Mr TF Percy QC, assisted by Mr Gerald Yin, instructed by D G Price and Co, represented Mr Olivieri.

Mr RJ Davies QC, represented the Racing and Wagering Western Australia Stewards of Harness Racing.

By a unanimous decision of this tribunal, the appeal against conviction is dismissed.

By a decision of the majority of the members of the Tribunal, Member A Monisse dissenting, the appeal against penalty is dismissed.

The 12 month disqualification penalty imposed by the Stewards on the appellant is confirmed, commencing on 22 December 2011.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

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

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**ROSS ALBERT OLIVIERI**
APPLICATION NO:	**A30/O8/736**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING:	**22 DECEMBER 2011**
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IN THE MATTER OF an appeal by ROSS ALBERT OLIVIERI against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 11 October 2011 imposing a disqualification of 12 months for breach of Rule 190 of the RWWA Rules of Harness Racing.

Mr TF Percy QC assisted by Mr Gerald Yin, instructed by DG Price & Co, represented Mr Olivieri.

Mr RJ Davies, QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

BACKGROUND

Mr Olivieri is a highly experienced licensed trainer/driver with an enviable reputation as one of the State's most successful operators. Mr Olivieri trained SANDLER which raced at Gloucester Park in Race 1 on 12 August 2011. Before the race, a blood sample was taken. The Racing Chemistry Laboratory (WA) (ChemCentre WA) analysed the sample and reported that it contained a level of total carbon dioxide (TCO_2) in plasma below the prohibited threshold specified in the RWWA Rules of Harness Racing. TCO_2 when present at a concentration of or below 36 millimoles per litre (mml/L) in plasma is excepted from being treated as a prohibited substance under the Rules (Rule 188A(1) and (2)(a)). A second blood sample was taken after the race. It too was analysed at the ChemCentre WA. As the second sample was reported to contain an elevated level of TCO_2 another analysis of a portion of it was undertaken by Racing Analytical Services in Victoria (RASL). RASL reported the level to be greater than 39.0 mml/L, with a measurement of uncertainty of 1.0 mml/L. This was a very high reading.

There was no dispute that the ChemCentre WA results in respect of the pre-race and post-race samples were obtained using a machine which had not been approved under the Rules. This situation came about due to an administrative oversight. The machine in question had simply not been gazetted as required. On the other hand, the machine RASL employed and which registered the high reading was a properly approved machine.

As a consequence of the laboratory reports the Stewards opened an inquiry into the matter. This led them to charging Mr Olivieri with the offence of failing to present a horse for a race free of a prohibited substance in breach of Rule 190. After a long process Mr Olivieri was held to have breached the Rule resulting in him being disqualified for 12 months.

Mr Olivieri appealed against both the conviction and penalty. The appeal was heard on 22 December 2011. At the conclusion of the appeal hearing the Tribunal reached the unanimous conclusion that the appeal against conviction be dismissed. Member P Hogan and I agreed the appeal against the penalty should also be dismissed. Member A Monisse reserved on the question of penalty.

I now set out my reasons for dismissing the appeal both as to conviction and penalty.

THE RELEVANT RULES

The Rule which Mr Olivieri was convicted of having offended makes it an offence for a person in authority to present a horse for a race which is not free of a prohibited substance. The Rule is worth quoting in full.

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.*

(5) *A horse is presented for a race during the period commencing at 8.00 a.m. on the day of the race for which the horse is nominated and ending at the time it is removed from the racecourse after the running of that race.*

(6) *Where a trainer intends to leave another person in charge of a horse in the trainer's absence, then prior to doing so, the trainer must notify the Chairman of Stewards and the notification must be in the manner, within the time, and containing the information determined by the Controlling Body or the Chairman of Stewards.*

(7) *A person can only be left in charge of a horse by a trainer with the approval of the chairman of stewards.*

(8) *A trainer who fails to comply with sub rule (6) or sub rule (7) is guilty of an offence.*

What is the effect and application of this rule? Sub-rule 5 makes it clear that a horse is treated as having been '*presented for a race*' as and from the specified time stated in the sub-rule in the morning of the day when the horse is nominated to race. In other words from 8am on the relevant day the nominated horse is regarded as already having been 'presented for a race' irrespective of whether it has actually left its usual stables or is only in transit on the way to the race course to race and has not actually arrived. Clearly '*presenting a horse for a race*' is defined by reference to time rather than simply location. The phrase refers to the whole period of time between 8am and the moment when that horse departs from the course on the day when the horse was nominated to race. This means the Rules require all horses on nominated race days, to be free of prohibited substances during the specified period of time. This obligation applies whether or not the horse actually races that day or not. It also matters not whether the substance does in fact alter or even have the ability to alter the horse's capacity to perform on the day of the race. Further, the reason why an elevated TCO_2 reading comes about is irrelevant. A presentation offence is one of absolute liability.

Despite all of the evidence which was produced in this matter both before the Stewards and the Tribunal by experts who were called on behalf of the appellant regarding the reliability and significance of pre-race versus post-race sampling, none of that evidence was of any consequence in this appeal. The purpose behind the Rule clearly is to ensure all horses which are listed to race on a particular day, remain free of any prohibited substances during the prescribed period. There are many good reasons for such a rule. They include the need to protect the integrity of the sport and maintain public confidence in racing. This requirement is aimed to help ensure there is a level playing field in races which should only be won on merit. Obviously the absolute liability provision is also aimed at advancing animal welfare and enhancing driver safety.

Rule 189 deals with testing. The authority given to the Stewards to carry out tests is not limited or inhibited. The relevant parts of this Rule state:

> ***189 Testing***
>
> *(1) The Stewards may carry out tests and examinations to determine whether a prohibited substance was or is in or on a horse.*
>
> *(2) A test or examination may be made at any time and place.*

This rule does not mean there may only be one test. Nor does it prevent both pre-and post-race testing of any horse. The discretion as to when to conduct the testing, where to conduct it prior to a horse reaching the race course and the number of tests is left entirely to the discretion of the Stewards.

The other relevant Rule is as follows:

> ***191 Evidentiary certificates***
>
> *(1) A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in or on a horse at, or approximately at, a particular time, or in blood, urine, saliva or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse is a prima facie evidence to the matters certified.*
>
> *(2) If another person or drug testing laboratory approved by the Controlling Body analyses a portion of the sample or specimen referred to in sub rule (1) and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub rule (1) is conclusive evidence of the presence of a prohibited substance. (G.G. 27th Oct 2000)*

(3) *A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse at a meeting shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the horse was presented for a race not free of prohibited substances.*

(4) *A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the prohibited substances was present in or on the horse at the time the blood, urine, saliva, or other matter or sample or specimen was taken from the horse.*

(5) *Sub rules (1) and (2) do not preclude the presence of a prohibited substance in or on a horse, or in blood, urine, saliva or other matter or sample or specimen, or the fact that a prohibited substance had at some time been administered to a horse, being established in other ways.*

(6) *Sub rule (3) does not preclude the fact that a horse was presented for a race not free of prohibited substances being established in other ways.*

(7) *Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish and offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.*

The certificate rule provides a flexible range of possibilities in terms of going about the process of proving whether or not a prohibited substance is present in a horse. The usual approach is to rely on the application of the provisions of the first two sub-rules. This appeal is somewhat out of the ordinary to the extent it involves a departure from the normal approach. This case is an example of the valid employment or application of other provisions in this particular rule.

GROUNDS OF APPEAL

The following grounds of appeal were raised:

A. CONVICTION

1 *The Stewards erred in their interpretation of HRR 191(2) relating to the evidentiary effect of the second sample.*

PARTICULARS

(a) *Under the rules the second sample could only have effect once there was a*

valid first sample.

(b) *The first sample being invalid, the result of the second sample had no effect.*

(c) *In holding that the second sample could, notwithstanding the invalidity of the first sample, be prima facie evidence of the TCO_2 level of the horse the Stewards were in error.*

2 *The Stewards erred by affording any evidentiary effect to the first reading.*

PARTICULARS

(a) *The first reading was of no evidentiary effect having been made otherwise than in accordance with the Rules.*

(b) *The Stewards erred in attributing to the result of that test any degree of evidentiary value.*

3 *The Stewards erred in their interpretation of HRR 191(5).*

PARTICULARS

(a) *The Stewards erred in their interpretation of this Rule by construing it to validate the results of the first and second tests, notwithstanding the invalidity of the first test and the dependency of the second test on the validity of the first.*

(b) *The correct interpretation of the Rule facilitates the admission of evidence of administration other than those for which an evidentiary regime is provided for elsewhere in the Rules.*

(c) *The subsection, correctly construed, allows for non-scientific evidence such as visual evidence of administration or oral admissions by an accused person.*

(d) *The interpretation of the Stewards to the effect that the Rule validated the results of otherwise invalid testing procedures was erroneous.*

4 *The Stewards erred in their determination of the defences raised by the Appellant by reversing the onus of proof.*

PARTICULARS

(a) *The Appellant in his defence of the charges raised two primary defences; namely:*

(i) *the potential inaccuracy of the three readings given that they were each different; and*

(ii) *the fact that the horse's TCO_2 levels had become elevated despite*

the fact that there had been no administration to it.

(b) *In dealing with these offences the Stewards adopted the erroneous approach that it was for the Appellant to affirmatively make out each of the defences.*

(c) *It was for the Stewards to negate each of the defences raised by the Appellant and in adopting the reverse approach the Stewards were in error.*

5 *The Stewards erred by denying the Appellant procedural fairness in the conduct of the hearing by:*

(a) *refusing to particularise the charge as to which reading or readings were relied upon by the Stewards; and*

(b) *refusing to provide details of other post race tests conducted by the Stewards in relation to TCO_2 levels returned using the same instrument as those in the present case.*

6 *The Stewards erred in their interpretation of HRR 190(5).*

PARTICULARS

(a) *The Stewards erred in construing the Rule as applying beyond the time when a horse was tested.*

(b) *The correct interpretation of the Rule to avoid any question of double jeopardy is that the obligation to present a horse drug free ends once a horse is tested.*

7 *The Stewards' decision to convict the Appellant of the offence was unsafe, unsatisfactory and not reasonably open on the evidence.*

PARTICULARS

(a) *There was no admissible evidence of the horse's TCO_2 level under the Rules in respect of which the Appellant could properly have been convicted.*

(b) *The decision was contrary to a significance body of veterinary and other evidence which indicated that the horse's TCO_2 levels had occurred naturally.*

(c) *On any reasonable overview of the evidence the charge as laid was not established to the requisite standard nor were either of the defences negated.*

8 *The decision of the Stewards was additionally unsafe having regard to Dr Evans' evidence, which was not available at the time of inquiry.*

9 *In the event that the Court is not satisfied that the errors identified in any of the individual grounds of appeal constitutes or has led to a substantial miscarriage of justice the*

combination of errors has led to such a miscarriage.

B PENALTY

10 The Stewards erred by treating the offence as a second offence.

11 The penalty imposed was manifestly excessive in all the circumstances of the case.

REASONS

I have had the opportunity to read the draft reasons of Member Hogan with whom I agree and whose reasons I adopt. As those reasons are fully detailed I am content to confine myself to making a number of relatively brief comments which are directed to some of the conviction grounds of appeal only.

Ground one could not result in the appeal being upheld as it ignores or overlooks the full scope and extent of the Rules as they are presently framed. As Member Hogan points out in his reasons the evidentiary certificates' rule used to be worded differently. The wording of this ground raises issues which may well have had some relevance or substance under the Rules as formerly framed. The charge was that of presenting SANDLER to race with an elevated TCO_2 level. There was relevant and credible evidence addressing this allegation from two sources. One was the RASL certificate (Ex 4). That certificate qualified as being admissible under Rule 191(5) and (6). The other was the evidence given by Mr D Batty of RASL (at page 78 of the transcript). This latter evidence, brief as it was, also qualified to be taken into account and be acted upon under the same sub-rules. I was satisfied the Stewards were entitled to convict the appellant on the basis of either source. Indeed, arguably the Stewards would have failed in their duty had they not done so.

There was no dispute the two tests carried out at ChemCentre WA were irrelevant. Neither of those tests had any probative value in relation to the charge. Ground two makes a valid point in that regard. But in view of the other evidence, the proposition does not exonerate the appellant. The mere fact that the ChemCentre WA carried out testing and provided Stewards with the results which had no probative value under the Rules did not invalidate the RASL testing and the consequences which flowed from it.

As to the next ground this was not a case where the Rules required two corroborating samples as the condition precedent to being satisfied that the presenting rule had been breached. The propositions contained in the particulars of ground three do not stand up to scrutiny. The argument that a conviction cannot result from one sample alone or on the basis of any other evidence than two successive results from the same sample simply ignores the full force and effect Rule 191. In this appeal, it mattered not that one sub-rule states one valid certificate can be *prima facie* evidence of the matters certified and another that a second certificate in relation to the same sample can be treated as conclusive evidence of the presence of a prohibited

substance. Mr Olivieri was able to be validly charged and properly convicted as he was by virtue of the application of other provisions of Rule 190 than the first two sub-rules. Whilst the Stewards should not have taken into account any results from ChemCentre WA, in view of the fact that the machine had not been gazetted at the time, that error did not invalidate the finding and the outcome in respect of the ultimate issue. This wrongful admission of evidence did not exonerate and did not in some way neutralise or sterilise the other evidence. The fact that RASL tested portion of the same sample which had previously been tested by ChemCentre WA did not detract from the validity and admissibility of the RASL testing result. No valid defence was raised in response to the admissible evidence in relation to the offence. There was no good reason advanced why the Stewards should not have accepted the RASL result and the evidence in respect of it.

As already explained, the proposition in ground six ignores the meaning of the phrase '*presented for a race*' contained in Rule 190(5).

Dr Evans gave evidence in the course of the appeal by means of a telephone link up. That evidence was not helpful in relation to any relevant issue. Whilst it was typical of the argument presented on the appellant's behalf before the Stewards of the difference between pre-race and post-race testing results, it could not influence the outcome in view of the application of Rule 190(5) read with Rule 189(2). The Rules make it perfectly clear that in proving an offence of this nature has been committed valid further testing may take place at any time after the initial test and up until such time as the horse leaves the track on race day.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

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

APPEAL – 736

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT:	**ROSS ALBERT OLIVIERI**
APPLICATION NO:	**A30/08/736**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING:	**22 DECEMBER 2011**
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IN THE MATTER OF an appeal by ROSS ALBERT OLIVIERI against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 11 October 2011 imposing a disqualification of 12 months for breach of Rule 190 of the RWWA Rules of Harness Racing.

Mr TF Percy QC, assisted by Mr Gerald Yin, instructed by D G Price and Co, represented Mr Olivieri.

Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

INTRODUCTION

This is an appeal against conviction and penalty.

On 11 October 2011, the Racing and Wagering Western Australia ("RWWA") Stewards of Harness Racing ("the Stewards") convicted the appellant and disqualified him for 12 months for a breach of Rule 190 of the RWWA Rules of Harness Racing ("the Rules"). On 22 December 2011, the appeal was heard and determined. These are my reasons for determination.

BACKGROUND FACTS

The appellant was the trainer of SANDLER, which raced at Gloucester Park in Race 1, the Gate Bar and Bistro Pace (2100m) on Friday 12 August 2011.

Before the race, a blood sample was taken. The sample was analysed at the Racing Chemistry Laboratory (WA) ("ChemCentre WA"), and was reported to contain TCO_2 ("total carbon dioxide in plasma") at a level of 34.2 mmoles/Litre ("mml/L"). The expanded measurement for uncertainty is 1.0 mml/L. No other analysis was carried out on this first sample.

After the race, a second blood sample was taken. This sample was also analysed at the ChemCentre WA, and was reported to contain TCO_2 at a level of 38.5 mml/L. Another analysis of this second sample was undertaken by Racing Analytical Services in Victoria ("RSL Victoria"), and that laboratory reported the level to be greater than 39.0 mml/L, again with a measurement of uncertainty of 1.0 mml/L. Because of these results in relation to the second sample, the Stewards opened an inquiry. The hearing commenced on 7 September 2011, and was adjourned to 13 September 2011. On that date, the appellant was charged. The hearing was further adjourned to 28 September, and then to 11 October 2011. On 11 October 2011, the Appellant was found guilty.

It was common ground that the ChemCentre WA results, on both the first and the second samples, were obtained using a machine not approved under the Rules. Due to administrative oversight, the machine had not been gazetted as required. The RSL Victoria did use a properly approved machine.

PHYSIOLOGY

Whenever a substance is administered to an animal, it may have an effect. The substance may also be detectable. Eventually, the substance is excreted. It then cannot be detected any more. The excretion process takes place over time. At different times over the period of excretion, the substance may be detected at different levels, eventually to the point where

nothing is left to be detected. No expert evidence is needed for these propositions. They are within ordinary human experience.

One of the substances in mammals, therefore horses, is carbon dioxide. It is an endogenous substance, present without being administered. It is present in the plasma of the blood. The level of carbon dioxide can be measured. Alkalinising agents can be administered in order to increase the carbon dioxide level. Over a period of time after administration, the level of carbon dioxide will rise, and then fall. The horse will then be back at its own naturally occurring level. Within this same period of time, other events apart from the administration itself can occur which themselves cause the carbon dioxide level to rise and fall. One significant factor which causes a rise and fall is exertion, such as a horse running in a race. This process was referred to by Dr Medd, the Racing Industry Veterinarian for RWWA. Dr Medd said at T 26 to T 27:-

> *"...This was based on the knowledge that racing, or exercise, would produce a rise in lactic acid production or a rise in lactate levels, which is effectively an acid substance, which will neutralize and which will cause TCO_2 levels to drop."*

and further:

> *".....However, these levels after racing will gradually return to normal physiological levels during a recovery phase...."*

THE RULES

The Committee of the Western Australian Trotting Association determined that there should be Rules to prevent trainers administering alkalinising agents on race day, and also presenting a horse to race with increased levels of carbon dioxide. The Committee proclaimed the Rules of Trotting, providing for both an administration offence and a presenting offence. The Rules set a level of anything over 35.0 mml/L. (later increased to 36.0 mml/L). Anything over that level was deemed to be evidence of administration, and also the level itself at which a horse could not be presented.

On the coming into existence of the new controlling body, RWWA, in August 2003, similar Rules continued in force. There remains an offence of administration, Rule 196A, and an offence of presenting, Rule 190(2). These offences are found in the Rules of Harness Racing 2004.

Dr Medd gave a brief explanation of how RWWA determined that the prohibited level should be 36.0 mml/L. At T 17, she said:

"CHAIRMAN .....Well, while you're just doing that, Dr Medd if I could ask you the threshold of 36. Do you have any scientific documentation on how that level came about? For a start, that's an international level, am I correct in saying that? MEDD That's correct. It is a level specified by the International Federation of Horse Racing Authorities in one of their articles. CHAIRMAN And how did they determine to set it at 36? MEDD Sure. Obviously when the threshold was set and as Mr Yin's pointed out, it has changed over the years and different codes have adopted different threshold levels over the years. Some considered to be inappropriate at the time, so therefore the level has been revised by many of these codes and states in Australia who have now agreed to be 36. And it has been quite static at 36 for over a period of time. The way these levels were set was based on statistical analysis of population studies and the probabilities of a normal or natural horse that hasn't been administered alkalizing agents exceeding this level, the threshold level. "

The level is to be found in Rule 188A. That Rule provides as follows:

(1) For the purpose of these Rules, the following are prohibited substances:
.....alkalinising agents anabolic agents

(2) The following substances when present at or below the levels set out are excepted from the provisions of subRule (1)

.....Alkalinising Agents, when evidenced by total carbon dioxide (TCO2) present at a concentration of 36 millimoles per litre in plasma

By Rule 188A(1)(b), alkalinising agents are prohibited substances. By Rule 188A(2)(a), alkalinising agents are not prohibited substances when evidenced by TCO2 at less than 36.0 mml/L. The presumption, written into Rule 188A (2)(a) is that anything over 36.0 mml/L is evidence that a prohibited substance is present and therefore may have been has been administered (Rule 196A), or is in the horse at a particular time (Rule 190).

PRESENTATION

The relevant parts of Rule 190 are in the following terms:

"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.

.....

(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.

(5) A horse is presented for a race is presented for a race during the period commencing at 8.00 a.m. on the day of the race for which the horse is nominated and ending at the time it is removed from the racecourse after the running of that race.

ADMINISTRATION

Rule 196A is in the following terms:-

196A. Administering substances

(1) A person shall not administer or cause to be administered to a horse any prohibited substance

(i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race; or

(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

(2) A person who fails to comply with sub-Rule (1) is guilty of an offence.

SUMMARY

From all of the above, a number of propositions can be stated at this early stage:

- There is no specific offence of a horse running in a race at the prohibited level. There is no specific offence of a horse running in a race with any prohibited substance in its system. What the level was during the running of the race is irrelevant. This is so despite the fact that running in a race inevitably occurs during the presentation period.
- Presenting a horse to race is an event which takes place over the period of time from 8 a.m. to the time when the horse leaves the track. Presenting is not limited to the event of taking the horse to the barrier so that it can run.
- The race for which the horse was presented in this case was finished before the presenting period finished.
- By Rule 190(4), it is irrelevant how the horse came to be in excess of 36.0 mml/L. No exceptions are made for a horse which has a naturally occurring high level.

- There was no power for the Stewards to alter the Rules at the inquiry. There is no power for this Tribunal here on appeal to alter the Rules.

THE SCOPE OF THE STEWARDS' INQUIRY

When a TCO_2 level is reported above 36.0 mml/L, at least two potential offences arise for investigation by the Stewards. There is the possibility of an offence against Rule 190, which is what was charged in this case. That is what is commonly called a "presentation offence". There is also the possibility of an "administration offence" under Rule196A.

In this case, the Stewards chose to charge the Appellant with a presentation offence. The charge came at the end of the second day of the hearings. By that stage evidence had been given which might have been relevant to both an administration and a presenting offence. After the charge was laid, the only relevant evidence was that relating to presentation, because the appellant was not charged with administering.

The Chairman of Stewards announced the charge and its particulars at page 86 of the transcript (T 86). The Chairman said:-

- *" Mr Olivieri at this stage of the inquiry the Stewards do believe you have a charge to answer and that is under Harness Rule of Racing 190; and I'll read that Rule to you; 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. Now you're charged under section (1), the particulars of the charge being that you, Mr Ross Olivieri a licensed Harness Trainer presented SANDLER to race at Gloucester Park on Friday, 12 August 2011, with a level of total carbon dioxide* (TCO2) in excess of 36.0 millimoles per litre in plasma....."

OVERVIEW OF THE EVIDENCE

The first witness called by the Stewards was Dr Medd. Dr Medd was asked by the Chairman to *"talk through"* Rule 188A. Dr Medd said at T7 that:

> *".....elevated levels of total carbon dioxide exceeding the threshold of 36 millimoles per litre in plasma are considered evidence that excessive quantities of alkalizing agents have been administered to a horse close to racing."*

The reason why RWWA set the level at 36.0 mml/L was not relevant to the Stewards' determination of the presentation offence which was ultimately alleged. Dr Medd's reference to *"excessive quantities"* was irrelevant because Rule 190(4) makes it clear that circumstances in which the prohibited substance came to be present in or on the horse are

irrelevant in a presentation offence. As pointed out above, no exceptions are made for horses with a naturally high level. Counsel for the appellant then asked questions of Dr Medd at T9 to T10 regarding factors which can affect a TCO_2 level. At T11 to T12, Dr Medd answered at T11, and produced a scientific paper as an exhibit. All of this was irrelevant to the presentation offence later alleged for the same reasons.

At T15, by way of submission, counsel for the appellant made it clear that he was trying to establish that many horses have a naturally occurring elevated TCO_2 level. That led Dr Medd to go on to an explanation at T16 to T21 as to why the controlling body, RWWA, set the level at 36.0mml/L. That was irrelevant to the issues before the Stewards, being a matter for RWWA itself and not the inquiry. Counsel pressed on, at T21, asking whether Sandler could have been a horse with a naturally occurring high level, and at T22 he asked questions based on the feeding regime. All of this became irrelevant once the Stewards charged the appellant with the presentation offence.

Dr Stewart, a veterinarian assisting the appellant and his counsel at the inquiry, then asked questions and engaged in discussion with Dr Medd at T23 to T31. Dr Stewart raised the issue that the sample in this case was post race and not pre race, and said at T25 that *"we don't know what happens to horses post race"*. Dr Stewart's questions and submissions on behalf of the appellant appear to have proceeded on the mistaken assumption that the only issue in question for both possible offences was the horse's level during the race.

At T39 to T50, evidence was given of the horse's feeding regime, a bleeding attack, and its habits. Later, on the third day of the inquiry, at T97 to T114, the appellant gave evidence including the horse's habits, and of the recent bleeding attack. All of this was irrelevant to the presentation offence.

Towards the end of the first day of the inquiry, Dr Stewart on behalf of the appellant pressed again the issue of the Stewards providing him with data of their post race testing of other horses, including other horses from the appellant's stables. Again this seems to proceed on the mistaken assumption that the horse's level during the race was the only issue to be determined by the Stewards.

The above are only some examples of the evidence and arguments presented by the appellant on the issues he saw as relevant. Little point would be served in traversing all of the evidence which the appellant presented, because it became largely irrelevant once the Stewards alleged the presentation offence. The appellant sought to prove that the horse's level might not have been 36.0 mml/L during the running of the race. He also sought to prove that the horse might have a naturally occurring high level.

In their reasons at T190 to T 197, the Stewards discounted the appellant's evidence on the various ways in which the horse could have reached the level that was reported. At T196, the Chairman said:

"...We are not satisfied from all that is before us, that the culmination of all of the factors put forth accounts for a horse to achieve the levels as reported in the case of Sandler."

At T196-197, the Chairman said:

"Dr Medd's evidence and the scientific papers produce (sic) leave the Stewards in no doubt that under all the circumstances that (sic) Sandler did not race free of prohibited substances"

In my opinion, this finding of fact was equally as irrelevant as the evidence and arguments presented by the appellant.

THE GROUNDS OF APPEAL

1. *The Stewards erred in their interpretation of HRR 191(2) relating to the evidentiary effect of the second sample*

PARTICULARS

(a) Under the Rules the second sample could only have effect once there was a valid first sample.

(b) The first sample being invalid, the result of the second sample had no effect.

(c) In holding that the second sample could, notwithstanding the invalidity of the first sample, be prime facie evidence of the TCO_2 level of the horse the Stewards were in error.

This ground of appeal is incorrectly worded. There were two samples taken, one before the race and one after the race. The one before the race was the first sample. The one after the race was the second sample. The second sample was split into two. The second sample was therefore able to be tested twice. A result from the second sample was obtained from the ChemCentre WA. Another result from the second sample was obtained from RSL Victoria. The appellant is concerned about both results from the second sample, because both results returned readings in excess of 36.0mml/L. He is not concerned with the single result from the first sample, because it returned a reading lower than 36.0mml/L.

As noted above, it was common ground that the ChemCentre WA results, on both the first and the second samples, were obtained using a machine not approved under the Rules. In my opinion, the ChemCentre WA result was inadmissible.

Rules 191(1) and (2) are in the following terms:

191. Evidentiary certificates

1. *A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in*

or on a horse at, or approximately at, a particular time, or in blood, urine, saliva, or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse is prima facie evidence of the matters certified.

2. *If another person or drug testing laboratory approved by the Controlling Body analyses a portion of the sample or specimen referred to in sub Rule (1) and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub Rule (1) is conclusive evidence of the presence of a prohibited substance.*

By ground 1, the appellant seeks to import a time sequence into the Rule. It is easy to see how such a mistake could be made. The predecessor to this Rule, under the Rules of Trotting, required that upon the reporting of a level in excess of 35.0mml/L, the laboratory should then send the sample to another approved laboratory for testing. The equivalent to this Rule in the Rules of Thoroughbred Racing, Rule 178D, requires that upon a finding by one laboratory the sample be sent to another laboratory and tested there. As a matter of scientific practice, or indeed proof in a fact finding tribunal, it is easy to imagine that a fact might be more safely relied on if the first report is backed up by some person or other body saying the same thing.

However, there is no sequence of time in Rule 191. Two results can be obtained at the same time. It is not necessary that one of the two results referred to in Rules 191(1) and 191(2) be first in time. The Stewards relied on the RSL Victoria result (T196). The certificate from RSL Victoria was admissible under Rule 191(1). They did not rely on the ChemCentre WA certificate. In doing so they were not in error. I do not uphold this ground of appeal.

2. The Stewards erred by affording any evidentiary effect to the first reading.

PARTICULARS

(a) The first reading was of no evidentiary effect having been made otherwise than in accordance with the Rules.

(b) The Stewards erred in attributing to the result of that test any degree of evidentiary value.

At T183, the Stewards took into consideration the result obtained from the ChemCentre WA. The Chairman said:

"....both results being well in excess of the threshold, gives potential to a finding that Sandler was presented over the threshold level of 36.0"

However, the Chairman went on to recognise the fact that the ChemCentre WA machine was not approved under the Rules. In the end, what was relied upon was the RSL Victoria result, together with the other evidence such as the oral evidence of the analyst himself, Dr Batty. This is made clear by the Chairman's comment at T196:

> *"The evidentiary (sic) evidence in this case has on a prima facie basis indicated that an offence has occurred. But more than that the Stewards have other convincing evidence from expert witnesses which also supports such a finding."*

I uphold this ground, but with a finding that no "miscarriage of justice" has occurred by the Stewards' consideration of the inadmissible evidence.

> *3. The Stewards erred in their interpretation of HRR 191(5).*
>
> *PARTICULARS*
>
> *(a) The Stewards erred in their interpretation of this Rule by construing it to validate the results of the first and second tests, notwithstanding the invalidity of the first test and the dependency of the second test on the validity of the first.*
> *(b) The correct interpretation of the Rule facilitates the admission of evidence of administration other than those for which an evidentiary regime is provided for elsewhere in the Rules.*
> *(c) The subsection, correctly construed, allows for non scientific evidence such as visual evidence of administration or oral admissions by an accused person.*
> *(d) The interpretation of the Stewards to the effect that the Rule validated the results of otherwise invalid testing procedures was erroneous.*

Rule 191(5) is in the following terms:

> *(5) Sub rules (1) and (2) do not preclude the presence of a prohibited substance in or on a horse, or in blood, urine, saliva, or other matter or sample or specimen, or the fact that a prohibited substance had at some time been administered to a horse, being established in other ways.*

As I have found in relation to ground 1, the certificate showing the result of the RSL Victoria test was admissible. Its admissibility did not depend on the admissibility of the ChemCentre WA test. The appellant's argument on this ground proceeds on the basis that the certificate of the result of one test can never be enough to convict a person. It is said that where there is a "statutory scheme", namely that provided for by Rules 191(1) and (2), there must always be two certificates of results over 36.0 mml/L, or one certificate of a result over 36.0 mml/L together with non-scientific evidence pursuant to Rule 191(5).

The Chairman said at T185:

> *"....the Stewards do not, as an absolute require two certificates certifying the presence of a prohibited substance in order to reach a conclusion that the rules have been offended against. The existence of a single certificate, as foreshadowed by the rule in question, can be considered to be prima facie evidence which can, when sufficient other evidence is available and together with all the other evidence, establish sufficient evidentiary weight to determine an offence under the relevant rules."*

In this case, apart from the certificate from RSL Victoria, the Stewards also had the evidence of Dr Batty from Victoria, who gave oral evidence at T78 that the reading was in excess of 39.0 mml/L.

The Stewards correctly used Rule 191(5). I do not uphold ground 3

> *4. The Stewards erred in their determination of the defences raised by the appellant by reversing the onus of proof.*
>
> *PARTICULARS*
>
> *(a) The appellant in his defence of the charges raised two primary defences, namely:*
> *(i) the potential inaccuracy of the three readings given that they were each different; and*
> *(ii) the fact that the horse's TCO_2 levels had become elevated despite the fact that there had been no administration to it.*
> *(b) In dealing with these defences the Stewards adopted the erroneous approach that it was for the appellant to affirmatively make out each of the defences.*
> *(c) It was for the Stewards to negate each of the defences raised by the appellant and in adopting the reverse approach the Stewards were in error.*

I do not uphold this ground of appeal. The reading relied on by the Stewards was that from RSL Victoria. It was evidenced by the certificate, and by the oral evidence of Dr Batty. Its accuracy was never challenged. Further, for the reasons given above, any reason for the horse having the level in excess of 36.0mml/L was irrelevant. There was no defence to be negated.

> *5. The Stewards erred by denying the appellant procedural fairness in the conduct of the hearing by:*
>
> *(a) Refusing to particularise the charge as to which reading or readings were relied upon by the Stewards; and*

(b) Refusing to provide details of other post race tests conducted by the Stewards in relation to TCO_2 levels returned using the same instrumentation as those in the present case.

This ground was not pursued at the hearing of the appeal. I would not have upheld it in any event.

6. The Stewards erred in their interpretation of HRR 190(5).

PARTICULARS

(a) The Stewards erred in construing the Rule as applying beyond the time when a horse was tested.

(b) The correct interpretation of the Rule to avoid any question of double jeopardy is that the obligation to present a horse drug free ends once a horse is tested.

As can be seen from Rule 190(5), presenting is an ongoing thing. It commences at 8.00 am on the day of the race for which the horse is nominated, and ends when the horse is removed from the racecourse after that race. Presenting is not a single action, nor is it a moment in time. On a normal race day, presenting can go on for a period in excess of 12 hours.

Rule 190 creates a continuing obligation. During the period of time over which the offence could have been committed, the horse ran in the race. The appellant could have been convicted even if the horse did not run. The ground and its particulars assert that the obligation for the horse to be presented drug free ends once it is tested. The appellant says that the time period of presenting the horse stops once a sample is taken. It is said that to construct the Rule otherwise would be to expose a trainer to a continuing obligation after having complied with the requirement of the Rule once. The answer to that submission is that the very purpose of the Rule is to expose the trainer to a continuing obligation. Compliance is required over the whole period. The mistake in the appellant's argument is to treat compliance as a single event, namely the act of taking of a sample.

There is no reason to limit the Rule in this way. It is perfectly possible that at one point in time over which the offence could be committed, the appellant could be not guilty, and at another point in time he could be guilty. That is the very nature of a continuing obligation.

I do not uphold this ground.

7. The Stewards decision to convict the appellant of the offence was unsafe, unsatisfactory and not reasonably open on the evidence.

PARTICULARS

(a) There was no admissible evidence of the horses TCO_2 level under the Rules in respect of which the appellant could properly have been convicted.
(b) the decision was contrary to a significance body of veterinary and other evidence which indicated that the horse's TCO_2 levels had occurred naturally.
(c) On any reasonable overview of the evidence the charge as laid was not established to the requisite standard nor were either of the defences negated.

There was admissible evidence of the TCO_2 level, namely the certificate from RSL Victoria and the evidence of Dr Batty. How the horse reached the level in excess of 36.0 mml/l was not material. For the reasons given in relation to ground 4, there was no defence. I do not uphold this ground of appeal.

8. *The decision of the Stewards was additionally unsafe having regard to Dr Evans' evidence which was not available at the time of inquiry.*

At the hearing of the appeal, leave was given to call Dr Evans. Dr Evans gave evidence concerning post race testing, and report was tendered in evidence. Dr Evans' evidence was irrelevant to any issue in this appeal. The evidence was to the effect that post race testing was not a sufficiently accurate method at this stage to determine what a horse's level would be during the race. As noted above, the horse's level during the race was irrelevant.

I do not uphold this ground of appeal.

9. *In the event that the Court is not satisfied that the errors identified in any of the individual grounds of appeal constitutes or has led to a substantial miscarriage of justice the combination of errors has led to such a miscarriage.*

This ground of appeal adds nothing to the other grounds. However, it invites consideration of a wider issue.

In my view, there is no defence to a presentation offence. Rule 190 creates an absolute offence. Rule 188A contains no exceptions for horses which have high naturally occurring levels of TCO_2. Nor does it contain any exceptions for horses which run in the race for the few minutes contained within the period of presentment There is nothing to be found anywhere else in the Rules which would provide an exception, or in legal terms a "defence". The position is quite the opposite. Rule 190(4) provides that an offence is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse. In the context of this or any other TCO_2 offence, an offence is committed regardless of the circumstances in which the TCO2 level came to be in excess of 36.0 mml/L

That the appellant could be convicted of this offence without any fault on his part may seem unfair. However, that has long been the position with respect to the Rules.

In Harper -v- Racing Appeal Tribunal (1995) 12 WAR 337, The Supreme Court of Western Australia had cause the consider the Rules, then known as the "Rules of Trotting." In particular, the Court had cause to consider Rule 364(a), which is not relevantly different from the Rule under consideration here. In that case, Anderson and Owen JJ (with whom Franklyn J agreed) said:-

> *"Counsel for the applicant made much of the fact that a literal construction of the Rules could conceivably result in a trainer guilty of no wrong conduct being disqualified. He tried to persuade the court that no such intention should be attributed to the committee of the Trotting Association which drew up the Rules. We do not see why. It may well be the case that those familiar with every aspect of the industry and with long experience in it have come to the conclusion that to ensure the integrity of racing and to maintain public confidence in its integrity, there is a need to impose very stringent controls and that those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so may well be taken from them if for any reason, even without actual fault on their part, they present a doped horse for racing".*

CONCLUSION ON APPEAL AGAINST CONVICTION

For all of the above reasons, I do not uphold the appeal against conviction.

APPEAL AGAINST PENALTY

10. *The Stewards erred by treating the offence as a second offence.*
11. *The penalty imposed was manifestly excessive in all the circumstances of the case.*

The appellant is a leading trainer, with 37 years in the industry. He has won the trainer's premiership 8 times. He was convicted of a presentation offence in 1999, when the level was 35.0 mml/L. The Stewards took this into account and dealt with the appellant as a second time offender for TCO_2. The Chairman said at T210:

> *".....this case should be treated as your second TCO_2 positive"*

The appellant's argument is that because the facts of the offence in 1999 would not constitute an offence now, it should not be taken into account in fixing the penalty now. I do not agree with the submission.

The Rules do not provide a graduated set of penalties for second and subsequent offences. The 1999 offence does not have to be categorised as a first offence in order to be taken into

account. It is simply part of the appellant's antecedents. On any definition, it was a first TCO_2 positive.

It is also the case that the appellant was convicted of this offence without any fault being proved on his part, other than the fact of presenting itself. The Stewards recognised this fact, when the Chairman said at T209:

> *"It must be recognised that this matter is one of presentation and not administration. We simply do not know on the question of administration who, when, how or what was administered to Sandler. The rules are designed to function in the way that they do on these matters because the answers to these questions are rarely known to the Stewards and so the trainer has a strict liability"*

On the question of what was the appropriate type and length of penalty, the Chairman said at T209:

> *".... disqualification is usually meted out such is the seriousness of the offence."*

and further:

> *"....the Stewards must.....look to previous cases to establish the range of penalties in these circumstances."*

The Stewards inserted a list of relevant TCO_2 penalties at T211 to T213 of their reasons. That shows a range of penalties including 4,6,8,9 and 12 months disqualification, and one of 5 years. The most common periods of disqualification were 6 and 12 months.

In my opinion, it cannot be demonstrated that the Stewards either failed to take into account any relevant factor, or took into account any irrelevant factor. Further, the penalty imposed was within the range of sound discretionary judgment.

For these reasons, I did not uphold the appeal against penalty.

PATRICK HOGAN, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A MONISSE (MEMBER)

APPELLANT: ROSS ALBERT OLIVIERI

APPLICATION NO: A30/O8/736

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

DATE OF HEARING: 22 DECEMBER 2011

DATE OF DETERMINATION: 22 DECEMBER 2011

DATE OF REASONS: 15 MARCH 2012

IN THE MATTER OF an appeal by ROSS ALBERT OLIVIERI against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 11 October 2011 imposing a disqualification of 12 months for breach of Rule 190 of the RWWA Rules of Harness Racing.

Mr TF Percy QC, assisted by Mr Gerald Yin, instructed by DG Price & Co. represented Mr Olivieri.

Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

APPEAL AGAINST CONVICTION

I have read the draft reasons of Mr PJ Hogan, Member as to the appellant's appeal against conviction. I agree with those reasons and add the following in dismissing that appeal.

The *presentation* offence specified in Rule 190 of the *RWWA Rules of Harness Racing* ("the Rules") is one of absolute liability, compared to an offence of strict liability where the defence of *honest and reasonable but mistaken belief* can apply. While absolute liability offences are "very rare" [per O'Connor D. and Fairall P.A., *Criminal Defences,* 3rd *edn* (1996) Butterworths: Sydney, para. 1.47], Rule 190(4) of the Rules clearly states that a *presentation* offence is committed "regardless of the circumstances in which the prohibited substance came to be present in the horse".

Counsel for the appellant stated at the outset of his submissions to the Tribunal on 22 December 2011 that the appeal was about post-race testing for TCO_2 when it exceeded 36 mmol/L in plasma, particularly the efficacy of relying on any post-race test result above this level given the circumstances that applied to the appellant's horse after it had raced.

However, at the Stewards' inquiry and in this appeal there remained one validly obtained and unchallenged analysis of a blood sample taken from the horse in question which had a TCO_2 level that exceeded 39.0 mmol/L, being that analysis conducted by RASL Victoria. The Rules that relevantly apply to this result are:

- Rule 188(1)(b): states that the Controlling Body may determine a substance to be a prohibited substance;
- Rule 188A(1)(b): declares various substances as prohibited substances, including alkalinising agents;
- Rule 188A(2) - provides that alkalinising agents are only a prohibited substance *when evidenced by* TCO_2 present at a concentration greater than 36 millimoles per litre in plasma (italics added);
- Rule 190 – provides that a horse shall be presented for a race free of prohibited substances and if it is not then its trainer is guilty of an offence. Rule 190 also provides that a horse is presented for a race during the period commencing at 8.00 a.m. on the day of the race for which the horse is nominated and ending at the time it is removed from the racecourse after the running of that race.

Given these particular provisions if there is a valid and unchallenged TCO_2 test result above 36 mmol/L, then that is evidence of a prohibited substance in the form of an alkalinising agent being present in the horse. Given that horses do not naturally produce alkalinising agents the only conclusion that the Rules necessitate is that an alkalinising substance was given *ie* administered to a horse when its TCO_2 level is above 36 mmol/L in plasma.

Accordingly there is no point in TCO_2 cases to consider the efficacy of relying on valid post-race test results above 36 mmol/L, or to challenge or adduce any expert evidence (which is what the appellant did) to explain how such a level could have been achieved aside from the administration of an alkalinising agent.

APPEAL AGAINST PENALTY

The appellant's two grounds of appeal against penalty are that:

10. The Stewards erred by treating the offence as a second offence; and
11. The penalty imposed was manifestly excessive in all the circumstances of the case.

I consider that the Stewards did err in treating the appellant's offence as a second TCO_2 offence. Technically the appellant did have a prior TCO_2 offence committed in April 1999. However only 7 months later in December of that year the controlling body sought fit to change the *offending* TCO_2 level from above 35 mmol/L to above 36 mmol/L [refer *Nolan* – Appeal 517 (delivered 26 March 2002, pp 4 and 5)]. That revised level upwards has remained unchanged for the past 12 years such that, at least in *real terms,* should the circumstances of the appellant's 1999 TCO_2 offence be considered now, there would be no breach of the current Rules.

Even if I am incorrect on this technical aspect, some 12 years has lapsed since the appellant's 1999 TCO_2 offence. In that relatively long period of time since his 1999 TCO_2 offence the appellant has effectively demonstrated that he is a person of good character who was making a positive contribution to the harness racing industry.

This is evident not only by the character evidence adduced on his behalf at the Stewards' inquiry, but also implicit in the success that he has had in recent years as a full-time professional trainer (for example, he was the leading WA trainer in 2010 with a large stable with 33 horses in work).

Accordingly, in the context of the *manifestly excessive* ground of appeal, I consider that in real terms the appellant's 1999 TCO_2 offence should not have given rise to the Stewards

treating his 2011 TCO_2 offence as a second offence given his proven re-established good character over a 12 year period.

Confirmation that the Stewards should have given no or little weight to the appellant's 1999 TCO_2 offence when determining penalty can also be found by reference to Western Australian *spent conviction* legislation. This legislation provides that after 10 years a person can apply to have their conviction for an offence contrary to WA legislation removed from their record. With serious offences the absence of any subsequent offending behaviour will assist in an application to remove the conviction.

Having found that the Stewards' erred as described above, I would allow the appeal against penalty and proceed to re-sentence the appellant.

The starting point is that a breach of *presentation* rule like Rule 190 is to be regarded seriously. The penalty for it should ensure that the integrity of the racing industry is maintained. I note that fortunately for the appellant the harm that he caused to the racing industry was not as great as what it could have been given that his horse was unplaced (it finished 10^{th}) and that it was not favoured in the betting.

The appellant, apart from the expert evidence he adduced (which I have discounted in my reasons stated above concerning the appeal against conviction), did not provide the Stewards with any other explanation for the valid TCO_2 test result that was used to find the charge proven. In my view this is unsatisfactory particularly given matters such as:

a) the appellant is an experienced trainer with 37 years in the industry;
b) he had the ultimate responsibility of ensuring that the horses he trains are presented free of prohibited substances;
c) the extremely high reading of the prohibited substance; and
d) the prohibited substance was of the performance enhancing type.

While the Stewards did not find that the appellant directly caused the offending TCO_2 level, it did find, by finding the charge proven, that an alkalinising agent was administered to a horse trained by him resulting in its TCO_2 level above 36 mmol/L. No finding was made by the Stewards as to who was responsible for this level. However a trainer of his experience would know the high standards of supervision required by him of his horses and the persons assisting him on race day. These standards are demanded by the racing industry and the betting public that supports it to ensure that offending TCO_2 levels do not occur.

In all the circumstances a penalty of disqualification is justified in this case. Since the WA Full Court decision of *McPherson v. Racing Penalties Appeal Tribunal of Western Australia and Others* (1995) 79 A Crim R 256, past decisions of this Tribunal concerning appeals against penalty have continuously endorsed the penalty of disqualification in TCO_2 cases – see for example:

- 4 months disqualification in *Monteleone* – Appeal 467 (delivered 30 September 1999);
- 6 months disqualification in *Harvey* – Appeal 652 (delivered 22 August 2006);
- 3 months disqualification in *Radford* – Appeal 685 (delivered 6 June 2008);
- 4 months disqualification in *Gavin* – Appeal 694 (delivered 19 December 2008);
- 4 months disqualification in *Nazzari* – Appeal 697 (delivered 23 January 2009);
- 6 months disqualification in *Ferguson* – Appeal 698 (delivered 17 February 2009); and
- 8 months disqualification in *McIntosh* – Appeal 695 (delivered 6 March 2009).

The passage from *Harper v. Racing Appeal Tribunal* (1995) 12 WAR 337 at 349, quoted by Mr PJ Hogan in his reasons for determination as to the appellant's appeal against conviction, also confirms that disqualification is the appropriate penalty for TCO_2 *presentation* offences.

As to the length of the disqualification, I am of the view that a period of 4 months disqualification is appropriate in all the circumstances. The periods of disqualification affirmed or imposed in the above determinations confirms that this period of disqualification is within the range of the penalties commonly imposed for a first TCO_2 *presentation* offence.

I add that the above determinations of *Monteleone, Harvey, Radford* and *Nazarri* were TCO_2 *presentation* appeals against penalties imposed by stewards of thoroughbred racing. While a different code was under consideration in those cases, 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).

The appellant is 57 years of age. As I have decided above he is to be treated as a first offender for a TCO_2 *presentation* breach of the Rules (although I do note that he has a couple of minor breaches of other provisions in the Rules). This is a significant achievement given that the appellant has been a trainer for 37 years.

Further, training horses is the appellant's full-time occupation and something which he has invested heavily in, evident by the six full-time staff that he employs to help him run a stable of 33 horses and the substantial 600K mortgage that he has on his training premises.

Accordingly, a period of disqualification even for a short period of time will impose a very significant financial penalty on the appellant, and as a result operate as both an effective general and specific deterrent.

In all the circumstances including the appellant's inability to provide any acceptable explanation for what was an extremely high TCO_2 level in the situation outlined above at (a) through to (d) on page 4 of this determination, I would impose a period of 6 months disqualification but then reduce it by 2 months to take into account his mitigating factors (these factors do not include a *guilty* plea being entered to the charge).

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

A E Monisse

ANDREW MONISSE, MEMBER

Seal of the Racing Penalties Appeal Tribunal of N.S.W.