APPEAL NO.– 758

DETERMINATION OF THE

RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**KEVIN NOLAN**
APPLICATION NO:	**30/08/758**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR J PRIOR (MEMBER)**
DATE OF HEARING:	**29 JANUARY 2014**
DATE OF DETERMINATION:	**18 FEBRUARY 2014**

IN THE MATTER OF an appeal by Kevin Nolan against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 15 May 2013 imposing a disqualification of 3 years for a breach of Rule 190(1) of the Rules of Harness Racing.

Mr G Yin appeared for the appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

By a unanimous decision of this Tribunal, the appeal against penalty is dismissed.

DAN MOSSENSON, CHAIRPERSON

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

APPEAL NO.– 758

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

APPELLANT:	**KEVIN NOLAN**
APPLICATION NO:	**30/08/758**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR J PRIOR (MEMBER)**
DATE OF HEARING:	**29 JANUARY 2014**
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IN THE MATTER OF an appeal by Kevin Nolan against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 15 May 2013 imposing a disqualification of 3 years for a breach of Rule 190(1) of the Rules of Harness Racing.

Mr G Yin appeared for the appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr P Hogan, Member.

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

D Mossenson.

DAN MOSSENSON, CHAIRPERSON

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

APPEAL NO.– 758

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:	**KEVIN NOLAN**
APPLICATION NO:	**30/08/758**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR J PRIOR (MEMBER)**
DATE OF HEARING:	**29 JANUARY 2014**
DATE OF DETERMINATION:	**18 FEBRUARY 2014**

IN THE MATTER OF an appeal by Kevin Nolan against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 15 May 2013 imposing a disqualification of 3 years for a breach of Rule 190(1) of the Rules of Harness Racing.

Mr G Yin appeared for the appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr P Hogan, Member.

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

John Prior

JOHN PRIOR, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA

APPEAL NO.– 758

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT:	**KEVIN NOLAN**
APPLICATION NO:	**30/08/758**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR J PRIOR (MEMBER)**
DATE OF HEARING:	**29 JANUARY 2014**
DATE OF DETERMINATION:	**18 FEBRUARY 2014**

IN THE MATTER OF an appeal by Kevin Nolan against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 15 May 2013 imposing A disqualification of 3 years for a breach of Rule 190(1) of the Rules of Harness Racing.

Mr G Yin appeared for the appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

This is an appeal against penalty.

On 15 May 2013, the Racing and Wagering Western Australia Stewards of Harness Racing disqualified the appellant for three years for a breach of Rule 190(1) of the Rules of Harness Racing.

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.
>
> .....

BACKGROUND

The appellant was the trainer of OUR UNIVERSAL RULER NZ, which was presented to race at Gloucester Park in Race 1 the Milwaukee New Fuel MS Pace on Friday 22 March 2013. A pre-race blood sample was taken. The sample was analysed at the Racing Chemistry Laboratory (WA), and was reported to contain TCO2 at a level greater than 36mmoles/l. The actual level was 38.1, with a measurement uncertainty of 1.0. Confirmatory analysis was then undertaken by Racing Analytical Services in Victoria, and the level above 36 was confirmed. The actual level detected there was 37.4, again with a measurement uncertainty of 1.0. Because of the results, the Stewards opened an inquiry. There was a hearing on 4 April 2013. The certificates of analysis were presented as evidence. Pursuant to Rule 191(2), these two certificates amounted to conclusive evidence of the presence of a prohibited substance. It was on this evidence that the Appellant was charged. The particulars of the charge were put to the Appellant at T 62, where the Chairman said:

> *"And the particulars of the charge, Mr Nolan, are that you being the trainer of OUR UNIVERSAL RULER presented it to race in Race 1 at Gloucester Park on Friday the 22nd March 2013 with a prohibited substance alkalinizing agents evidenced by concentration of TCO2 in excess of 36 millimoles per litre in plasma."*

The hearing was adjourned so that the Appellant could obtain legal advice.

The hearing resumed on 6 May 2013, and the Appellant pleaded guilty through his counsel and the matter then proceeded on penalty only. A large part of the evidence was concerned with the appellant putting to the Stewards that he did not know how the elevated level came about. Ultimately the Stewards made a finding that there was no explanation for the elevated level. They did not find that the Appellant administered a substance and they did not find that the appellant knew of the horse's elevated level. On those facts and all the other relevant facts the Stewards imposed a penalty of disqualification of three years.

THE STEWARDS' REASONS FOR PENALTY

The Stewards delivered written reasons for penalty under cover of a letter dated 15 May 2013. The Steward's reasons can be briefly summarised as follows:

- The appellant has a long history within the sport which, whilst described as at the 'hobby' level was not insignificant.
- The plea of guilty.
- The fact that there was no explanation for the elevated level did not amount to mitigation.
- The levels were in the upper range, being 38.1 & 37.4.
- TCO2 at the excess level has a performance enhancing quality.
- The appellant had three previous convictions for the same offence:

    1. 10 December 1999, disqualified for 12 months for presenting a horse with an elevated level of TCO2 (later varied to 3 month disqualification and $5000 fine by WATA Committee);
    2. 10 January 2005, disqualified for 12 months for presenting a horse with an elevated level of TCO2;
    3. 3 October 2008, disqualified for 6 months for presenting a horse with an elevated level of TCO2.

THE APPEAL

The ground of appeal reads as follows:

> *"The Stewards erred by imposing a sentence that was manifestly excessive in all the circumstances of the case".*

The imposition of a sentence involves the exercise of discretion. This Tribunal can only intervene if the appellant demonstrates that the Stewards erred in exercising the discretion because the end result is so unreasonable or unjust that the Tribunal must conclude that a substantial wrong has occurred. In his submissions, Counsel did not seek to persuade the Tribunal that the Stewards had made any express error. Rather, counsel pointed to the range of penalties imposed in other cases of this type, and sought to persuade us that the appellant here was deserving of something less than the three years imposed on him.

The Stewards themselves had referred to penalties in previous cases in coming to their conclusion. The Stewards set out a list of previous penalties imposed on repeat offenders. The list differentiates between presentation and administration offences and is set out here, with some modification for ease of reference:

Trainer F Maynard

- Thoroughbreds - 16/3/90 2 years presentation (therapeutic)
- Thoroughbreds - 23/8/96 18 months presentation (therapeutic)
- Thoroughbreds - 26/9/00 18 months and 9 months (served concurrently) presentation (therapeutic)
- Thoroughbreds - 26/3/02 2 years presentation (therapeutic)

Trainer P Graham

- Thoroughbreds - 1976 5 years presentation (stimulant)
- Thoroughbreds -1986 4 years presentation (stimulant/narcotic)
- Thoroughbreds - 1998 18 months presentation (tonic)
- Thoroughbreds - 7/10/03 12 months presentation (therapeutic)
- Thoroughbreds - 9/6/05 10-years (anabolic/performance enhancing) for administering to a horse that he owned when he was a stablehand.

Trainer B McIntosh

- Harness - 13/9/93 8 months in relation to TCO2 in HOMESTEADER at which time he also received a 6-month disqualification for stomach tubing a horse on race day
- Harness - 20/08/2008 8 months presentation (elevated level of TCO2)
- Harness - 20/2/12 2 years presentation (elevated level of TCO2)

Trainer G D Harper

- Thoroughbreds - 26/11/93 6 months for administration and 6 months concurrent for presentation (elevated level of TCO2)

- Thoroughbreds - 16/11/1999 12 months presentation (elevated level of TCO2)
- Thoroughbreds - 17/02/2000 18 months presentation (stimulant)
- Thoroughbreds - 13/02/2009 5 years for presentation (elevated level of TCO2)

Trainer M Reed

- Harness - 8/9/00 $500 presentation and $500 fine possession (elevated level of TCO2
- Harness - 28/9/01 $5000 fine presentation (elevated level of TCO2)
- Thoroughbreds - 25/10/10 6 months presentation (elevated level of TCO2)
- Harness - 27/10/11 2 years for presentation (elevated level of TCO2)

An examination of these penalties (imposed on repeat offenders) demonstrates clearly that the penalty involved in this case was within the range commonly imposed. However, that is not an end of the matter, because sentencing ranges can provide only general guidance.

As noted by Murphy JA in *JKL -v- The State of Western Australia [2012] WASCA 215:*

> *"The limits of the guidance afforded by comparable cases are flexible rather than rigid. A sentencing range is merely one of the factors to be taken into account in deciding whether a sentence is manifestly excessive. The mere fact that a sentence is within the range of other sentences imposed for similar offences does not necessarily establish that there was an appropriate exercise of the sentencing discretion in the particular case. Similarly, the mere fact that a sentence is outside that range does not necessarily establish that the exercise of the sentencing discretion in the particular case miscarried."*

The difficulty for the Appellant in this case is that he can point to nothing which would justify this Tribunal finding that the result (three years disqualification) is so unreasonable or unjust that the Tribunal must conclude that a substantial wrong has occurred. The Stewards stated the position correctly in their reasons when they said at page 3:

> *"A trainer, charged under this rule, in a situation where there is a complete lack of explanation for the finding, cannot seek benefit with respect to penalty for the fact of there being no cogent explanation. To do so would be contrary to the principles of a rule that does not require actual proof (sic) administration, or knowledge thereof, on the part of the trainer in order to attract the sanctions that potentially apply. A benefit, in*

certain cases, can be afforded to a trainer on the question of penalty where there is an accepted reasonable explanation for the presence of the prohibited substance, usually therapeutic, in the horse presented by him and this rule is preferred by the Stewards. A rational and cogent explanation in such circumstances can be a factor in mitigation, when it is accompanied with other circumstances including, but not limited to, pleas of guilt, absence of betting activity, specific veterinary advice and other associated matters. There may be other unique and special circumstances where the explanation serves in mitigation. A trainer cannot be afforded the same mitigation, when there is no explanation, as if there was one. The same level of mitigation simply cannot not apply when there is no explanation, or no accepted explanation."

General and specific deterrence both demand that firm penalties be imposed for presentation offences. This is particularly so when the offender has three previous convictions for the same offence.

CONCLUSION

For all of these reasons, I would dismiss the appeal.

PATRICK HOGAN, MEMBER