APPEAL – 701

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT: **JAMES ANDREW MILLSTEED**

APPLICATION NO: **A30/08/701**

PANEL: **MR D MOSSENSON (CHAIRPERSON)**

DATE OF HEARING: **14 JANUARY 2009**

DATE OF DETERMINATION: **14 JANUARY 2009**

IN THE MATTER OF an appeal by Mr J A MILLSTEED against the determination made by the Racing and Wagering Western Australia Stewards of Greyhound Racing on 11 November 2008 imposing a fine of $1,000 for breach of Rule 83(2)(a) of the Rules of Greyhound Racing.

Mr A Kinnish was granted leave to appear for Mr J A Millsteed.

Mr C Martins represented Racing and Wagering Western Australia Stewards of Greyhound Racing.

BACKGROUND

Mr J A Millsteed is a registered public trainer with Racing and Wagering Western Australia (RWWA). Mr Millsteed presented SEEKA DREAM to compete at a trial at Greyhounds WA Mandurah on 11 September 2008. The greyhound won the trial. A report received from Racing Chemistry Centre in Perth subsequently revealed that a urine sample taken from the greyhound contained the drug Flunixin. A confirmatory analysis was received from the Queensland Racing Science Centre.

The Stewards conducted an inquiry into the matter on 27 October 2008. Dr Symons, the RWWA Industry Veterinarian Surgeon gave evidence to the inquiry that Flunixin is an anti-

inflammatory agent. It therefore was a drug for the purposes of the Rules of Greyhound Racing.

Mr Millsteed was the person responsible for feeding his greyhounds. He told the Stewards that he used beef and probiotic powder which contained herbal extracts. Mr Millsteed was adamant that although he did not administer anything untoward to the dog and could come up with no other explanation for the presence of the prohibited substance. Mr Millsteed acknowledged he purchased his meat from a farmer in Harvey named Ken Davis who had access to cows that had gone down with calving paralysis or were unfit for human consumption. He also acknowledged he was aware that some farmers tried to assist the recovery of the health of their cows by *'… administer(ing) things to try and get them up'*. Mr Davis sold some pet meat on the side. Mr Millsteed purchased up to 100 to 150kgs at a time. Basically Mr Millsteed took the full cow, froze the meat in one or two kilo packs and then stored it. Upon learning of the positive swab he changed his meat supplier to abattoirs.

The trainer admitted he was aware of the possibility of positive swabs being obtained through meat, or horses through hay and other feed. When queried regarding his awareness of industry concerns in terms of contaminated meat and whether he took any precautions Mr Millsteed said he did not. No measures were taken to test or to ensure that the meat he obtained from Mr Davis was free from contamination, for reasons of cost.

Dr Symons told the inquiry he understood that abattoirs or knackeries waited for two or three days before animals were dealt with to enable any drugs to clear. Drugs disappear reasonably quickly within animals being treated and going to be slaughtered. Accordingly there was a safety margin. The vet acknowledged sometimes meat that has been treated does go through the abattoirs.

Mr Millsteed gave evidence of having been a trainer of horses and greyhounds of 25 years standing. The Stewards received a glowing reference from Dr P C Thomas, veterinary surgeon, regarding Mr Millsteed's integrity and how he was totally trusted in handling Dr Thomas' family's greyhounds.

SEEKA DREAM was in excellent physical condition and free from any major injury at the time. The greyhound did not require any medical treatment for some three months before the qualifying trial in question. Mr Millsteed claimed he was always extremely careful with what he fed and treated his dogs to avoid the possibility of positive swabs. As the inquiry progressed he reiterated the only conclusion he came to for the presence of Flunixin was that it was the feed or probiotic powder that he had used that caused the problem.

Although in the earlier part of the inquiry evidence was given that it was highly unlikely that the contamination came from the meat, the Stewards adjourned the inquiry to have a sample of it tested. This was despite the fact that the sample wasn't necessarily going to be the exact packet that had been given to the greyhound prior to its engagement in September.

When the inquiry resumed on 11 November 2008 it was reported Flunixin was detected in the frozen meat sample as well as the liquid from the meat. The evidence from the analyst of the concentrations in the meat and the liquid suggested that the Flunixin was not introduced after the meat was processed. The presence of the drug was detected from a number of places within the packet. This suggested that the cow was given Flunixin before dying and the substance was not administered to the processed mince. The meat supplier

Mr Davis was interviewed by the Racing Investigator and a video of that interview was presented as an exhibit to the Stewards. The Chairman of the Stewards' inquiry described the Davis operation as *'…a back-yard operation' w*ith meat sourced from suppliers rejected by the abattoirs as being injured and diseased animals.

Mr Millsteed proceeded to read a statement out to the Stewards shortly before the charge was laid to the effect that he had trained for many years and always acted strictly within the Rules. He was proud of his unblemished record. The stigma attached to being called before the Stewards to explain the presence of the anti-inflammatory substance placed an enormous stress on him. It was a great relief to him that the laboratory had found the meat to be contaminated. He had no knowledge that the animal had the banned anti-inflammatory substance in its system when it trialled. Therefore, rather than inflict a punishment and record a finding of guilt, he asked the Stewards that he be discharged.

The Stewards laid a charge against Mr Millsteed under Rule 83(2) (a) which reads:

> *'Racing Greyhound to be drug free*
> *…*
> *(2) The owner, trainer or person in charge of the greyhound-*
> *(a) nominated to compete in an Event:-*
> *…*
> *shall present the greyhound free of any drug.'*

The specifics of the charge were that Mr Millsteed:

> '*…nominated and presented the greyhound SEEKA DREAM to compete in a qualifying trial at Greyhounds WA - Mandurah on Thursday 11th not free of the drug Flunixin…'*

Mr Millsteed pleaded not guilty on the basis of '*not…knowing that the dog had…a banned substance its system when I presented the dog.'* Some discussion ensued about the fact that knowledge was not an element of the offence. The Stewards treated the plea as a plea of not guilty, adjourned to deliberate on the matter and then concluded in the following terms:

> *'In consideration of the question of guilt, we would like to outline the SEEKA DREAM was presented by you, to compete in a Qualifying Trial at Mandurah on 11th September 2008 and after an analysis was found to have the anti-inflammatory drug Flunixin in its system. This is the offence and one of a strict liability to the Trainer. You are ultimately responsible for the presentation of SEEKA DREAM being drug-free on this occasion, she was not. Essentially you have agreed with all the particulars of the charge. Your defence and the basis of us proceeding with a Not Guilty plea is that you did not knowingly present SEEKA DREAM with the Flunixin in its system. The Stewards have considered this defence and we are of the view that it does not detract from the particulars of the charge and we are satisfied that all the particulars have been met. Accordingly, we find you Guilty As Charged.'*

In dealing with the penalty the Stewards examined Mr Millsteed's involvement in the industry, his reliance on income from greyhounds and previous cases of Flunixin. The reasons in relation to the penalty were announced as follows:

'*The Stewards have considered all the relevant submissions on penalty, which include you personal circumstances, your unblemished record since being registered, your good conduct throughout this inquiry , the fact that this was a Qualifying Trial and the duress that you and your family have encountered throughout. In assessing how the Flunixin appeared in this sample, the Stewards have carefully assessed the evidence of Dr Symons and Mr Russo and we are satisfied that this is the most likely explanation as to how the Flunixin appeared in the urine sample, thus supporting you theory of contaminated meat. There can be, however, no mis-understanding that the onus is on the person in charge of a greyhound to present the greyhound for the event, free of a drug. It seems that although you had heard of and were aware of the possibilities of contaminations previously, you have not taken enough precautions to protect yourself from this possibility occurring. It is especially so in your case as you were buying your meat from a person who acquires animals that are sick or injured. Certainly the possibility of these animals being treated with something is not out of the question and was a foreseeable risk to you. Whilst no money was to be gained from winning the trial, it is a medium to gain entry into races and as such this form was used by the public to wager in the subsequent races that SEEKA DREAM competed in. The consequences that flow from the detection of a drug can be serious to the trainer and to the integrity of the industry. We as Stewards do take strong measures and send strong messages to when the issues of integrity and public confidence come into question. Clearly a greyhound competing in an event with a drug in its system undermines that integrity and confidence. We have taken into account the previous penalties issued for this type of drug and that they were all in races as opposed to a Qualifying Trial. The case mentioned of Barnes is of some assistance in that it involved the ingestion of bread, which contained poppy seeds unbeknownst (sic) to the trainer and the result was a positive swab to morphine. The Stewards are aware of your intention and desire to continue on the greyhound industry…with that in mind and taking into account all of the circumstances of this case, we feel that a fine is the appropriate penalty. That being a fine of $1000.00.'*

THE APPEAL

The revised grounds of appeal read:

'*I firmly believe I should not be convicted on presenting a greyhound with a banned substance in its system. I presented the greyhound in good faith not knowing that the meat the greyhound was fed was contaminated.*

After proving through the Chemistry Centre, that the meat was contaminated I am therefore appealing the conviction.

Penalty

As there was no way of knowing that the meat was contaminated, as it was proven to be, and that the race was a qualifying trial and of no monetary value, I am therefore appealing the severity of the fine.'

Mr Kinnish argued that the matter should be treated the same as occurred in the case of trainer L Smith where post race urine samples revealed Ractopamine in five horses which raced at Northam race course at three meetings held in October in 2004. Mr Kinnish submitted that as the Stewards in the thoroughbred cases chose to find no culpability. This matter, which was similar, deserved the same outcome. It was said that the offence occurred unknowingly and there was nothing which Mr Millsteed could do to have prevented it. Consequently, either the inquiry should have concluded on the basis that there was no case to answer or the Stewards should have dealt with the matter pursuant to Rule 98(1) by simply recording a breach but finding no conviction. Apart from the reference to the Smith case the argument presented for Mr Millsteed at the appeal hearing raised nothing very new or any different from the propositions advanced at the Stewards' inquiry.

In response Mr Martins provided further information regarding the Smith matter. That case involved feeder cubes which had been fed to horses. The cubes were a well known food product for horses which were produced by a reputable company. Photos of the packaging of that product where produced which revealed the professional labelling. The drug contamination in question occurred as a consequence of a mix up. The source of the prohibited substance detected in the horses was established beyond any doubt. Clearly the factory which made the feed was at fault. Mr Martins explained the facts and circumstances in the Smith saga and contrasted them with those of this particular case where the meat supplier was a backyard operator and neither the meat supplier nor Mr Millsteed were in a position to name the source of the meat. Operations which supply pet meat must be registered with the Health Department. There was no evidence the supplier in this case was so registered. According to Mr Martins there were no similarities but rather only comparisons between the two cases.

Mr Martins then argued the charge that had been laid was under a rule of strict liability designed to protect and preserve the wellbeing and integrity of the racing industry. All of the elements of the charge were acknowledged and it was clearly open to the Stewards to find Mr Millsteed guilty. Mr Millsteed had been sold unlabelled product, no procedures were in place to avoid the risk of contamination and that risk was all the more likely to occur in view of the condition of the cows which Mr Davis purchased. Mr Martins was critical of a trainer who knew of the condition of the source of the meat and yet fed it to his racing animals. The meat in question was sourced randomly with no controls. This was quite different from feed sourced from an abattoir which has procedures in place to eliminate selling contaminated meat. Mr Davis took in sick, injured or diseased cows. Mr Millsteed was aware of this. Mr Millsteed also knew that some sick cows were being treated. This therefore meant that he was also aware that some may have drugs administered to them. In other words the trainer knew that the animals could be contaminated, sick and diseased and there was therefore the possibility they were being treated with drugs. In that set of circumstances it was submitted no reasonable licensed person should have used such a source of supply but rather should have taken precautions to ensure that the feed was drug free. No such precautions or any precautions were taken. No tests or other measures were taken to address this possibility. Since the matter arose Mr Millsteed has, however, addressed the errors of his ways and amended his practices. The Stewards were not

satisfied that all proper reasonable precautions were taken to address a foreseeable risk and the intent of the Rule was clear that a charge should be laid and a conviction should be recorded.

I was handed a list of nine previous greyhound presenting offences by Mr Martins, which involved penalties ranging from three months suspensions through to disqualifications which ranged from two months to 12 months, the latter reduced to nine months on appeal. Some involved trials but most related to races. Three of the examples were the subject of not guilty pleas.

It is apparent from their reasons the Stewards took into account that this was a qualifying trial and also the circumstances of the likely introduction of the drug. As a consequence I was told a significant reduction was made. This was the lowest penalty in WA for an anti-inflammatory drug. It was argued for the Stewards that in view of the significant reduction in penalty the outcome was entirely fair, appropriate and totally justified. In addition a message of deterrence was necessary to make trainers fully accountable as anything less may suggest that it was worth the temptation. In the case of Mr Smith, despite personal culpability not having been the result, the fact the horses were disqualified was some form of penalty coupled with the return of the stake money. Mr Millsteed's unblemished record was also a factor in imposing such a light penalty.

The arguments raised by Mr Martins were not responded to by the other side with any substantive argument. I was entirely persuaded by the argument advanced by Mr Martins which totally vindicated the approach adopted of the Stewards. I dismissed the appeal. I accepted without question Mr Martins' comments both as to the culpability of Mr Millsteed and the difference between the Smith case and this case. There was a need to impose a punishment. Invoking Rule 98(1) was inappropriate. The penalty which was decided on in my opinion was entirely fair and reasonable after allowing for all of the mitigating factors of this particularly unusual case.

I was not persuaded that any error on the part of the Stewards was demonstrated in any aspect of the Stewards' inquiry. I was satisfied the Stewards conducted a detailed and thorough investigation of the matter which lead them to lay a charge against Mr Millsteed. It was appropriate that they should take that action in view of the evidence that had been presented. On the evidence it was also clearly open to the Stewards to find a charge was sustained. The charge which the Stewards pursued was that of presenting rather then that of administering a prohibited substance. All of the elements of the presenting charge were clearly established. As Mr Millsteed was in breach in Rule 83(2)(a) this then required the Stewards to exercise their discretion as to penalty. Under the Rules there is a wide range of possibilities in terms of both the type and the length or severity of any punishment which may be imposed. In view of the unusual circumstance of this case it was not inappropriate that the Stewards imposed a fine rather than one of the more severe penalties of suspension or disqualification.

DAN MOSSENSON, CHAIRPERSON