APPEAL NO. 832

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT:	**ROBERT ALAN WESTWORTH**
APPLICATION NO:	**A30/08/832**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR A E MONISSE (MEMBER)** **MS B ROBBINS (MEMBER)**
DATE OF HEARING:	**12 MARCH 2020**
DATE OF DETERMINATION:	**15 MAY 2020**

IN THE MATTER OF an appeal by Robert Alan Westworth against the determination made by the Racing and Wagering Western Australia Stewards of Greyhound Racing on 24 January 2020 imposing a disqualification of 2 years for breach of Rule 83(2)(c) of the Rules of Greyhound Racing.

Mr N van Hattem appeared for the Appellant

Mr RJ Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Greyhound Racing.

1. By a unanimous decision of the members of the Tribunal, the appeal against conviction under Rule 83(2)(c) is dismissed.

2. By a majority decision of the Presiding Member and Member Robbins, the appeal against penalty is dismissed.

PATRICK HOGAN, PRESIDING MEMBER

APPEAL NO. 832

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

APPELLANT:	**ROBERT ALAN WESTWORTH**
APPLICATION NO:	**A30/08/832**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR A E MONISSE (MEMBER)** **MS B ROBBINS (MEMBER)**
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Mr N van Hattem appeared for the Appellant

Mr RJ Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Greyhound Racing.

Introduction

1. These are appeals against conviction and penalty.

2. The Appellant is a registered greyhound trainer. On 23 April 2019, he presented MISS BONDI to compete in Race 10 at Mandurah Greyhounds on 23 April 2019. A post-race urine sample was taken. On 8 August 2019, the Racing Chemistry Laboratory (WA) reported that amphetamine was detected in the sample. The detection was reported to the Racing and Wagering WA ("RWWA") Stewards of Greyhound Racing ("the Stewards"). An inquiry then commenced. On 27 August 2019, the Racing Analytical Services Laboratory (Vic) confirmed the presence of amphetamine in the control sample.

3. On 28 October 2019, the Stewards convened a hearing as part of the ongoing inquiry. Oral evidence was taken from a number of witnesses. The Stewards heard from RWWA Industry Veterinarian Dr Medd, and from Ms Cook, a chemist at the Racing Chemistry Laboratory. At the request of the Appellant, the Stewards also heard from Veterinary Consultant Dr Major.

4. The hearing was then adjourned to a date to be fixed. By letter dated 7 November 2019, the Appellant was charged with an offence against Rule 83(2)(c) of the Rules of Greyhound Racing ("the rules").

5. Rule 83(2) is in the following terms:

> *"(2) The owner, trainer or person in charge of a greyhound-*
>
> *(a) nominated to compete in an Event;*
>
> *(b) presented for a satisfactory, weight or whelping trial or such other trial as provided for pursuant to these Rules; or*
>
> *(c)) presented for any test or examination for the purpose of a period of incapacitation or prohibition being varied or revoked*
>
> *shall present the greyhound free of any prohibited substance."*

6. The particulars of the charge were:

> *"…that you, Mr R. Westworth as the trainer and a registered person with RWWA, presented MISS BONDI to compete in Race 10 at Mandurah Greyhounds on 23 April 2019 not free of the prohibited substance amphetamine."*

7. On 25 November 2019, the hearing resumed. The Appellant pleaded not guilty to the charge. He gave evidence in his own defence. The hearing was adjourned again, to a date to be fixed.

8. On 17 December 2019, the Stewards notified the Appellant that they had found him guilty. Written reasons were delivered.

9. On 22 January 2020, the hearing resumed on the matter of penalty. On 24 January 2020, the Appellant was disqualified for 2 years. Again, the Stewards delivered written reasons.

The grounds of appeal

10. The grounds of appeal are:

> *"I am innocent of this charge and will continue to retain (sic) that I am not guilty and have no knowledge of how this sample has returned positive to the substance found.*
>
> *I have not been provided with video footage from night of 23rd April 2019 to prove potential contamination and my innocents (sic) due to it being deleted as it took 11 weeks for the sample to be returned.*

I believe RWWA has a duty of care, for that to be provided for me to protect myself should a situation like this arise.

Both A and B urine samples leaked whilst in the care of their custodian.

There was no testing for metabolites which would prove environmental contamination.

And the extremely low level of substance found in urine sample of approximately 20 nanograms or lower which indicates potential environmental contamination."

11. It is immediately apparent that the grounds do not allege any error in the conduct of the hearing, or the reasoning of the Stewards in finding the Appellant guilty. Effectively, the Appellant asks the Tribunal to arrive at a different decision than the Stewards.

12. The Stewards panel which heard this matter were well experienced in carrying out inquiries, applying the law, and providing reasons for decision. In this case comprehensive reasons were delivered. It is not the role of this Tribunal to independently scrutinise the Stewards' proceedings and decision in order to identify appellable error where none is alleged by the Appellant.

13. These reasons are therefore confined to pointing out why the Appellant's approach to the matter at the Stewards inquiry and on appeal was misconceived in any event.

Presentation

14. "Presentation" and "presented" are defined by Rule 1 in the following way:

" "presentation" or "presented" a greyhound is presented for an Event from the time commencing at the appointed scratching time of the Event for which the greyhound is nominated, and continues to be presented until the time it is removed from the racecourse after the completion of that Event with the permission of the Stewards pursuant to Rule 42(2) or is scratched with the permission of the Stewards."

15. In this case, the taking of the post-race urine sample occurred before the greyhound was removed from the racecourse. That is the normal practice. It therefore occurred during presentation, which is not a point in time, but rather an ongoing thing.

An offence of strict liability

16. There is no defence to a presenting charge. The rationale for that position was explained in Harper v Racing Appeal Tribunal (1995) 12 WAR 33. The Court was there considering the precursor to a similar Rule of strict liability in trotting. Anderson and Owen JJ (Malcom CJ, Kennedy and Franklyn JJ agreeing) 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."

Urine in the greyhound and urine in the sample

17. The Appellant's position was to concede that amphetamine had been found in the urine sample. He conceded as well that the urine sample came from the greyhound. However, he argued that did not mean that amphetamine had been in the greyhound's urine before it excreted the urine. On the Appellant's case, the only time the amphetamine could have got into the sample was the time after the urine was excreted into the collection pan, and before it was put in to the sample bottle. It is in this context that the Appellant's reference to "environmental contamination" is to be understood.

18. If the amphetamine got into the sample after the urine was excreted by the greyhound, then the appellant would be not guilty. The Appellant argued that because there was no testing for metabolites, then there was no ability for him to prove that none were found and therefore there was no opportunity for him to demonstrate that the amphetamine had not passed through the greyhound and therefore no opportunity for him to prove that he was not guilty.

The stewards dealt with each of the principal contentions

19. As to the possibility of environmental contamination, The Stewards referred to Dr Medd's evidence. They said at paragraphs 16 and 17 of their reasons:

> *"16. Dr Medd described in detail these operating procedures. They are clearly designed to minimise and detect any contaminations. The control solution which passes through all vessels is designed to ensure no contaminations are within these items. We note the control sample was not reported to have amphetamine which provides great confidence that the sampling equipment did not cause any contamination. In her evidence Dr Medd indicated that in her opinion environmental contamination of the kind being indicated was "the least likely explanation."*
>
> *MEDD I think from what I've heard today because the wash control solution as I understand it in this sample is negative so there's been no report of amphetamine in the wash control so that would eliminate the possibility or the prospect that the amphetamine was either in the pan or in the two urine collection bottles prior to the urine being added. So the only scenario that's been raised today is could amphetamine somehow, somehow enter the urine sample I guess after it leaves the greyhounds body and up until a point where it's poured into the bottles and then the bottles are sealed. That's a relatively short period of time. Once the dog's provided the sample people don't in my experience they're not walking around the course with this open urine sample. Again it's got a very long handle on the pan so the sample collector has no reason to you know place their hands or any other part of their body into the urine itself. They just walk straight back into this fairly secure room and then they pour it straight into the two bottles. So I think with that time frame involved and the people there are pretty much the trainer, those two swab officials, it's a limited*

number of people that are anywhere near that sample which is a long handle. There's a short time frame. I note that other dogs were collected that night by the same handler. We didn't have any reports of amphetamines returning in those other samples. I'd certainly say from my experience and I have been doing this role for 16 years I would have to say that amphetamine entering that urine sample prior to it being sealed in the bottles would be the least likely explanation in my opinion. And that's also based on the fact that in addition to what I've already said, that we collect in WA alone approximately 1200 samples from greyhounds each year and I've been here 16 years so that approximates nearly 20,000 samples that I've, that's been collected in my tenure here. This is the first report of amphetamine in greyhound urine that I've experienced in 16 years. So I would think that if this drug was highly likely to you know fall into the urine sample prior to it going into the bottles that we would, we would be, if that is an uncontrolled situation then we would see it more frequently which we, which we don't. So it's a bit hard to think that it's a likely scenario.

17. Through the inquiry you confirmed that you had witnessed the entire swab collection procedure and were satisfied with it and had not seen anything in the process on the night that led you to think something had gone awry. Given the manner in which samples are taken as described by Dr Medd, the possibility of any unusual event occurring that is not at least potentially noticed by the two officials involved and the witness for the trainer, which in this instance was you, is in our view unlikely. The greyhound is observed to urinate in the pan which is then immediately conveyed to the vet's room in full sight of all involved. From all accounts this was a routine process of sampling. There was no suggestion raised at the time that the urine."

20. In my opinion, the Stewards were entirely justified in coming to the conclusion that the Appellant's suggestion of environmental contamination was unlikely.

21. As to metabolites, the Stewards said at paragraphs 22 and 23:

"22. As Dr Medd indicated:

> *MEDD The presence of metabolites can be a useful indicator that a drug has been metabolised within a mammalian body system. So yes metabolites can be an indicator of that however their absence in a sample does not necessarily indicate that that substance hasn't been through the body system and that's for the following reasons:*

23. The evidence of Ms Cook should be noted. Ms Cook confirmed that the Chem Centre did not do testing for metabolites in this case. This was because as she explained

> *COOK We did not do any testing for metabolites in this case. This is quite usual for forensic laboratories to not test for metabolites as it's not required of us under the RWWA rules but also mainly because the levels of the metabolites can be so low that they can be very difficult to detect.*

Therefore it has not been established that they were not present as they were not analysed for. The Rules do not require metabolites to be found in order to establish an

offence. Even if they were specifically tested for but not detected, for the reasons which follow that does not prove that the offending substance must have entered the urine after it had been excreted. As Ms Cook explained, there are difficulties associated with detecting metabolites at levels such as that involving this case."

And at paragraph 25:

"25*. Dr Medd also indicated in those passages that And we know that amphetamine can also be a metabolite of methamphetamine so amphetamine can be there as a parent drug or it can actually be considered a metabolite of methamphetamine itself."*

22. I am of the opinion that the lack of testing for metabolites did not produce any injustice to the Appellant.

Conclusion on appeal against conviction

23. For all of the above reasons, I would dismiss the appeal against conviction.

Appeal against penalty

24. The Stewards reasons on penalty were delivered under cover of a letter dated 24 January 2020. The notice of appeal lodged by the Appellant on 29 January 2020 under section 16 of the *Racing Penalties (Appeals) Act 1990* ("the Act") clearly sets out that the Appeal is against the determination of two (2) years disqualification made against him by Racing and Wagering Western Australia: see Notice of Appeal signed by Robert Alan Westworth and dated 28 January 2020.

25. Grounds of Appeal were attached to the Notice of Appeal. These grounds dated 27 January 2020 comprised six (6) paragraphs which tended to focus upon why the Appellant ought not to have been convicted, rather than directed to any alleged severity of penalty. However, at the hearing of the Appeal, counsel for the Appellant, Mr van Hattem, informed the Tribunal that the Appellant wished to advance the argument that the penalty imposed by the Stewards of two (2) years disqualification was in all the circumstances manifestly excessive.

26. In R -v- Grein (1989) WAR 178 at page 180, Malcolm CJ (with whom Wallace and Nicholson JJ agreed) referred to the following passage from R -v- Tait (1979) 46 FLR 386 at 388-389. Their Honours there stated:

"An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error."

27. A sentencing judge will fail to properly exercise his discretion where he has *"acted on a wrong principle or overlooked or undervalued or over-estimated or misunderstood some salient feature of the material before him."* Wong Keong Chan (1989) 38 A Crim R 337 at 342 per Malcolm CJ.

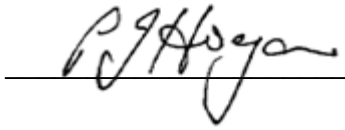
28. At paragraphs 17 to 20 of their reasons, the Stewards referred to a number of cases:

> *"17. To use cobalt as an example, it has been a relatively recent substance of concern in racing. Being a ubiquitous substance in nature it is regulated by way of a threshold which when exceeded attracts penalty under the rules. By its actions at high levels it is described as having hypoxia inducible factor potential which would attract the provisions of Rule 190A(2)(1). Unlike amphetamine, cobalt is present in various animal supplements and vitamin preparations which if used in excessive quantity or too close to racing has potential to elevate levels above the prescribed threshold. Therefore although a serious matter when found in levels above the threshold, cobalt is not an illegal substance in its own right or one that is of the nature of cocaine. Nevertheless penalties of at a range of 9 to 12 months disqualification have been imposed with higher penalties of up to two years applying in extreme matters. Several decided cases have been reviewed on appeal where penalties of in the range of 9-12 months disqualification have been confirmed relating to persons with "best-case" scenarios of pleas of guilt, good records and levels that were not extreme. Similar exists in relation to penalties for caffeine, a far more domestically available substance. If those cases can attract such periods of disqualification it is difficult to envisage on what basis a substance such as amphetamine would be treated more leniently.*
>
> *18. We are also aware of several decided greyhound matters from Victoria involving the substance cocaine. In this respect we refer to the following:*
>
> > *2012 — Trainer Mr C. Meo. Presented with Benzoylecgonine (BZE) only. Pleaded guilty with no explanation as to how this occurred and was disqualified for 18-months.*
> >
> > *2016 — Trainer Mr B. Finn. Presented with "miniscule amount" of BZE only. Found guilty and disqualified for 12 months with 6 months suspended of that penalty.*
> >
> > *2017 — Trainer Ms C Dundon. Presented with BZE and Ecogninemethylester (EZE). Found guilty and disqualified for 18 months.*
>
> *19. We are also aware of the case involving greyhound trainer Mark Azzopardi dealt with by NSW in 2013. Following inquiry he was disqualified for a period of 2 years when his greyhound TRANSCEND TIME returned a positive result to benzolecgonine. The evidence put forward was that there had been a possibility of inadvertent contamination of the greyhound in the morning prior to the race.*
>
> *20. We are also aware of the cases of trainer Richard Baverstock and stablehand Adam Baverstock dealt with in NSW in 2019 which involved a detection of the parent drug cocaine in a urine sample taken from a horse called MY WHISKEY LULLABY following it winning a race in October 2018 at Penrith. Mr R Baverstock was found guilty of the related charge being considered here and was disqualified for two years and six months. He had an unblemished record at the time."*

29. An examination of the above penalties demonstrates that the period of disqualification imposed in this case, namely 2 years, was within the proper exercise of discretion of the Stewards for all the reasons they gave in their determination.

Conclusion on appeal against penalty

30. I would dismiss the appeal against penalty.



PATRICK HOGAN, PRESIDING MEMBER

APPEAL NO. 832

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MS B ROBBINS (MEMBER)

APPELLANT:	**ROBERT ALAN WESTWORTH**
APPLICATION NO:	**A30/08/832**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR A E MONISSE (MEMBER)** **MS B ROBBINS (MEMBER)**
DATE OF HEARING:	**12 MARCH 2020**
DATE OF DETERMINATION:	**15 MAY 2020**

IN THE MATTER OF an appeal by Robert Alan Westworth against the determination made by the Racing and Wagering Western Australia Stewards of Greyhound Racing on 24 January 2020 imposing a disqualification of 2 years for breach of Rule 83(2)(c) of the Rules of Greyhound Racing.

Mr N van Hattem appeared for the Appellant

Mr RJ Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Greyhound Racing.

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1. I have had the advantage of reading the draft reasons as to conviction and penalty of Mr Patrick Hogan, Presiding Member. I agree with the decisions he made and reasons that he gives but wish to add the following observations and comments in relation to penalty.

The Role of this Tribunal

2. The role of the Tribunal is conveniently set out by Murray J in *Danagher v Racing Penalties Appeal Tribunal* (1995) 13 WAR 531, noting in particular that the Tribunal is to make a full and thorough investigation in open court: *see* section 11(3)(e)(i) of the *Racing Penalties Appeal Act* 1990 ("the Act") and upon the determination of the appeal may confirm, vary or set aside the determination or finding appealed against or any order or penalty imposed to which it relates: section 17(9)(c) of the Act.

Appeal against penalty

3. The Appellant at the Appeal Hearing, through his counsel raised the ground that the penalty imposed of two (2) years disqualification was in all the circumstances manifestly excessive.

4. Murray J in *Danagher v Racing Penalties Appeal Tribunal* (1995) 13 WAR 531 at 554 analysed the approach to be taken by the Tribunal in reviewing discretionary judgments of the Stewards and said that: "…*as to the exercise of discretion, it would have been correct for the Tribunal to approach that as an appellate court would ordinarily approach the exercise of a discretionary power by a tribunal at first instance"*.

5. His Honour Murray J referred to the tests for setting aside the exercise of such a discretionary judgment in his decision citing Kitto J with approval in *Australian Coal and Shale Employees Federation v Commonwealth* (1953) 94 CLR 621 at 627.

Principles of appellate review of sentencing

6. Appeals against penalty are constrained by the principles of appellate review of discretionary decisions as stated in *House v R* [1936] HCA 40; (1936) 55 CLR 499 at [2] per Dixon, Evatt and McTiernan JJ:

> *"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."*

7. It may not be clear how an error occurred, but if the result is unreasonable or plainly unjust, the appellate court may conclude that there was an error: *Lowndes v R* (1999) 195 CLR 665; *Dinsdale v R* (2000) 202 CLR 321.

Exercise of discretion and manifest excess

8. This part of the Appeal against penalty involved an alleged error in the exercise of discretion by the Stewards. The error in question was said to be that the penalty imposed of 2 years disqualification was in all the circumstances manifestly excessive. It was argued before us that the penalty imposed of two (2) years disqualification was outside the available range of penalty customarily imposed for a presentation offence of this type.

9. It is fundamental that an appeal court (and also this Tribunal), may not substitute its opinion as to sentencing merely because the court would have exercised the discretion differently: *Lowndes v The Queen* (1999) HCA 29; (1999) 195 CLR 665.

10. In *Barbaro v The Queen* [2014] HCA 2, the Court comprising French CJ, Hayne, Kiefel and Bell JJ said the following about available range:

> *"[26] Reference to an "available range" of sentences derives from the well-known principles in House v The King. The residuary category of error in discretionary judgment identified in House is where the result embodied in the court's order "is unreasonable or plainly unjust" and the appellant court infers "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance." In the field of sentencing appeals, this kind of error is usually referred to as "manifest excess" or "manifest inadequacy". But this kind of error can also be (and often is) described as the sentence imposed falling outside the range of sentences which could have been imposed if proper principles had been applied. It is, then, common to speak of a sentence as falling outside the available range of sentences.*
>
> *[27] The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some "substantial wrong in fact has occurred" in fixing that sentence. For the reasons which follow, the essentially negative proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any positive statements of the upper and lower limits within which a sentence could properly be imposed.*
>
> *[28] Despite the frequency with which reference is made in reasons for judgment disposing of sentencing appeals to an "available range" of sentences, stating the bounds of an "available range" of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that different sentence neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall".*

Consistency in sentencing

11. While consistency in sentencing is important, the consistency must relate to consistency in relevant legal principles, not numerical equivalence: *Hili v The Queen* ("Hili") (2010) 242 CLR 520 at [48]–[54]. A range of penalties customarily imposed is a yardstick for the purpose of ensuring broad consistency in the sentencing of offenders in broadly comparable cases. Consistency in sentencing means that like cases must be treated alike, and different cases must be treated differently: see *R v Pham* [2015] HCA 39; (2015) 256 CLR 550 [28].

12. A sentencing range for comparable cases is merely one of the factors to be taken into account in deciding whether a sentence is manifestly excessive or manifestly inadequate. In *DPP v Dalgliesh (a pseudonym)* [2017] HCA 41 at [51] Kiefel CJ, Bell & Keane JJ said "*In DPP (Vic) v OJA [54] Nettle JA, with whom Ashley and Redlich JJA agreed, said: "[T]he*

need to have regard to current sentencing practices does not mean that the measures of manifest excessiveness and manifest inadequacy are capped and collared by the highest and lowest sentences for similar offences hitherto imposed …"

13. These are important principles for a tribunal to adopt when reviewing penalties in previous case authorities from either the same or another relevant jurisdiction, and such comparisons were considered in this Appeal before the RPAT.

14. The High Court in *Hili* at [54] cited with approval Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa* [45] as follows:

> *"… a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits". As her Honour said [46]: "Sentencing patterns are, of course, of considerable significance in that they result from the application of accumulated experience and wisdom of first instance judges and of appellate courts." But the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought to sentence" [47]. Past sentences, are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence." [48] (emphasis added). When considering past sentences, "it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned*" [50]."

Comparisons cases cited by the Stewards in their Reasons

15. The offence in this case, namely, a breach of Rule 83(2)(c) of the Rules of Greyhound Racing ("the Rules") where a greyhound is found to have been presented to compete in a race when not free of the prohibited substance, amphetamine, is the first amphetamine case in Western Australia; hence, the penalty handed down by the Stewards is also the first of its type. The Stewards did not have a direct comparison of decided matters as to penalty from other amphetamine (or cocaine) cases from the Western Australian jurisdiction. They approached their task of determining the appropriate penalty *inter alia* by considering cases in other jurisdictions for cocaine and as well as comparing them with penalties issued in Western Australia for substances of a less serious nature.

16. The Stewards referred to three (3) decided cases from Victoria involving the substance cocaine (which is of a similar level of seriousness as amphetamine). Brief summaries were set out in paragraph [18] of their Reasons showing penalties ranging from 12 months disqualification (with 6 months suspended) to 18 months disqualification for these offences.

17. At paragraphs [19]-[20] of their Reasons, the Stewards referred to three (3) cocaine/benzolecgonine ("BZE") presentation cases from New South Wales where the penalties ranged from 2 years disqualification to 3 years 6 months (*sic*) 9 months disqualification: *see* Baverstock in *National Trotguide Harness Racing Weekly,* 6 February 2019.

18. The authorities from other jurisdictions cited by the Stewards demonstrate that there has been some variation in penalties imposed for offences involving substances on the permanently banned list and that the facts and circumstances in each case differ.

19. At paragraphs [12]-[14] of their Reasons, the RWWA Stewards comment on the principles adopted in past determinations of this Tribunal when considering the determinations on penalty from other jurisdictions, and note the remarks made by Mr W Chesnutt in the Tribunal Appeal of Gavin Slater: Appeal 750, as follows:

> "*Racing in Australia is administered on a state-by-state basis. In Western Australia, those responsible for the administration of the rules and for imposing penalties for breach pf the rules are the stewards of RWWA. While the penalties which are imposed for breaches of the same rule by other authorities throughout the rest of Australia can provide some guidance to the stewards of RWWA in any particular case, they provide no more than guidance and the stewards in this state are in no way bound by those decisions or obliged to impose any penalty other than that which they think appropriate simply because an authority in another state has taken a different view. In this tribunal, we would be most unlikely to overrule a decision by the stewards on a penalty for no other reason than that it was different to penalties imposed in other parts of Australia for a breach of the same rule. Uniformity may be desirable, but it cannot take precedence over a proper decision-making process by those who carry the responsibility in this state for making decisions as to the appropriate penalty for a breach of the rules…"*

20. At paragraph [16] of their Reasons, the Stewards considered the penalties imposed in Western Australian cases relating to other potentially performance enhancing prohibited substances such as cobalt, TCO2 and caffeine, which are less serious than a substance like amphetamine. They commented that these less serious substances attracted lengthy periods of disqualification for mere presentation offences alone in Western Australia in situations where there was no evidence of where or why the substance came to appear in the sample.

21. At paragraph [17] the Stewards used cobalt as an example, noting that:

> "*several decided cases have been reviewed on appeal where penalties of in the range of 9-12 months disqualification have been confirmed relating to persons in "best case" scenarios with of pleas of guilt, good records and levels that were not extreme".*

22. The Stewards, mindful of what was said by Sir Thomas Bingham MR in *R v Disciplinary Committee of Jockey Club; ex parte Aga Khan* 1993 1 WLR 909 at 914, carefully explained why it was necessary to impose strict controls in respect to the drug amphetamine. See generally paragraphs [5]-[11] of the Stewards Reasons. I cite from paragraphs [5], [9] and [10] as follows:

> "*[5] The principles upon which these rules are couched are important when considering penalty. If stringent control is to have appropriate meaning and effect, then the determination of penalties has an important role to play. Inadequate penalties would severely dilute the effectiveness of this stringent control. It is why the penalty must take into account all factors. As has been said in many past matters of this kind,*

the occurrence of prohibited substances in racing animals that have competed in races tarnishes the image of racing being a fair and level playing field. It threatens the confidence of those vital to the industry's future where there is unprecedented competition for the wagering dollar and a myriad of other avenues of wagering."
[9]" ...The nature of the substance in question is therefore an important consideration. Doctor Medd provided clear evidence in this regard as she stated:

> *MEDD …Amphetamines are prohibited substances and permanently banned substances in racing codes as they are considered to be potentially performance enhancing in the racing animal. The reason this is is because amphetamines affect the sympathetic nervous system and the primary effect on the central and sympathetic nervous system which can lead to mood elevation, euphoria, decreased sense of fatigue and an increase in the metabolic rate including cardiovascular stimulation and respiratory stimulation and human athletes have used amphetamines in sport as they are capable of reducing fatigue and enhancing athletic performance. "*

[10] It is a substance well-known through the community and associated with wide levels of concern. This case, unlike so many others dealt with under this Rule, involves a substance of particular concern. It is a substance of notoriety in the general community being an illegal substance which elevates the seriousness of an offence under this rule as compared to other routine veterinary medications or common substances that may be used in the course of training. When it appears in performance athletes on the day of contest it is particularly offensive to the concept of fair play given its stimulatory nature. Whilst it is a substance of addiction in the community its context in a racing animal is different. It is a substance that has only rarely been detected in racing animals despite its prevalence in society. That may partly be attributable to its short acting nature but mainly is a reflection that provided reasonable practices and controls are adopted, it is highly unlikely that a racing animal will return a finding of this substance from a race day sample."

23. The Stewards said at [11] of their Reasons: "*For a substance of this nature to appear in a greyhound without explanation represents a most serious level of offence under this rule*".

24. I agree with these Reasons as to why strict control is necessary by the Stewards through the mechanism of penalty.

The Appellant's submissions made to this Tribunal

25. Submissions on penalty were made orally by the Appellant's counsel at the Tribunal Hearing. Mr van Hattem submitted that penalty was a matter for discretion. It was further submitted that "*So the ground is manifest excess and the submissions are developed on what are the relevant considerations and what are some of the decisions"*: see the transcript of these proceedings (T13): RPAT Hearing no.832, 12 March 2020.

26. It was then submitted (T14) that in assessing the penalty, "*the concentration of the prohibitive substance is of course a relevant consideration*", citing *Queensland Racing Integrity Commission v Gilroy* [2016] QCATA ("Gilroy"). I make two observations on this aspect of this submission. Firstly, the case of *Gilroy* was a presentation offence for the substance cobalt in a high concentration, not for amphetamines or another more serious

substance. Secondly, the RWWA Stewards specifically addressed the issue of level of the amphetamine in paragraph [22] of their Reasons stating that "…*nevertheless the levels in this case place (sic) do serve to afford some level of mitigation which we have applied accordingly".*

27. There was no failure to take into account a relevant consideration.

28. Mr van Hattem (T15) cited the Queensland case of *Gareth Miggins v Racing Queensland Limited* [2013] QCAT 230 in support of his submission that the Stewards in their Reasons did not give due consideration to the application of mitigation for the economic effect of a suspension on Mr Westworth's livelihood and his previously unblemished record.

29. The Stewards did refer to the above-mentioned matter at paragraphs two [2] and three [3] of their Reasons and said that they took into account, amongst other things; Mr Westworth's personal history, extensive involvement in greyhound racing and that he relied upon it for his livelihood, his unblemished record (which was deserving of credit) and the fact that he successfully trained a relatively large number of greyhounds in a professional manner and maintained their health and welfare to very high standards. The Stewards also said that "*you (Mr Westworth) handled yourself and this matter in a thoroughly professional fashion throughout which we do not ignore*". Furthermore at [3] the Stewards stated: "W*e are fully aware of the implications that arise and their impact to you from the various modes of penalty available to us and have thus considered them carefully in determining the matter of penalty"*. Due consideration was given to the economic effect of suspension.

30. Mr van Hattem referred to the Victorian case of *Bradon Finn v Racing Appeals & Disciplinary Board* (19 July 2016) (a case which the Stewards also considered in their deliberations). This case can be distinguished factually from Westworth's in that Finn's disqualification of 12 months, suspended for 6 months, was additionally influenced by the loss of prize money of $89,000 which the Board took into account in determining the matter of penalty.

31. Three (3) Western Australian cases determined by the Tribunal were raised in oral submissions on penalty (T16); namely, Peter John Hepple: Appeal No. 792 (2017), Linda Joy Britton: Appeal No. 775 (2015) and Wayne Jacobson: Appeal No. 762 (2014). The Applicant's submissions identified the fact that in each of these cases the determination of the RWWA Stewards in relation to a penalty of a period of disqualification was reduced by the Tribunal. No argument was presented to this Tribunal as to how the errors that were found on appeal in these three (3) cases (none of which related to amphetamines) assist the Appellant's claim that: "*I say two years was manifestly excessive…"* Each of these cases is unique and dependent on its own facts and circumstances.

32. The Stewards stated at paragraph [21] of their Reasons that:

> *"Whilst we respect that each jurisdiction is entitled to determine matters of penalty for itself, some of the penalties issued in the cases you have referred to do not sit comfortably in comparison to the calibration of penalties issued in Western Australia for other substances of less serious nature to cocaine. Amphetamine in a racing animal has no legitimate purpose at any time. Accordingly it must attract a premium with respect to seriousness".*

33. Although Mr van Hattem concluded his submission that a disqualification of two years was manifestly excessive, in my opinion, given all the circumstances, the Appellant has not demonstrated that the resultant penalty imposed by the Stewards was unreasonable or plainly unjust; therefore it was not manifestly excessive.

Conclusion on penalty

34. It is readily apparent from what the Stewards have said in relation to penalty at [5] to [11] and elsewhere in their Reasons [2] and [4] that they had in mind the impact to the industry and the need to maintain its integrity. The Stewards put maintenance of integrity in the industry and stringent controls as imperative and of paramount importance. Stringent controls in respect to presentation of dogs free of drugs such as amphetamine are necessary as is the enforcement of those controls by preemptory means: *see Harper v Racing Penalties Appeal Tribunal of Western Australia and Styles and Others* (Unreported 1963 of 1993 at pages 11 and 12) per Anderson and Owen JJ.

35. The imposition of two (2) years disqualification was not unreasonable or plainly unjust and was therefore not manifestly excessive, but was within the range of a sound discretionary judgment.

36. I would confirm the penalty imposed by the Stewards and dismiss the appeal.

BRENDA ROBBINS, MEMBER

APPEAL NO. 832

THE RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT:	**ROBERT ALAN WESTWORTH**
APPLICATION NO:	**A30/08/832**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR A E MONISSE (MEMBER)** **MS B ROBBINS (MEMBER)**
DATE OF HEARING:	**12 MARCH 2020**
DATE OF DETERMINATION:	**15 MAY 2020**

IN THE MATTER OF an appeal by Robert Alan Westworth against the determination made by the Racing and Wagering Western Australia Stewards of Greyhound Racing on 24 January 2020 imposing a disqualification of 2 years for breach of Rule 83(2)(c) of the RWWA Rules of Greyhound Racing.

Mr N van Hattem appeared for the Appellant.

Mr RJ Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Greyhound Racing.

1. This is an appeal by a licensed greyhound trainer, Mr Robert Westworth ("the Appellant"), against a finding by the Stewards of Greyhound Racing ("the Stewards") that he had breached Rule 83(2)(c) of the RWWA Rules of Greyhound Racing ("the Rules"), and against the penalty of 2 years disqualification imposed by the Stewards for that breach.

2. I have read the draft reasons for determination of the Presiding Member, Mr P Hogan. I agree with his reasons dismissing the Appellant's appeal against the Stewards' finding that he had breached Rule 83(2)(c) and add the following comments on that appeal.

3. A presentation breach of the rules is an absolute liability offence. It can be defended if a trainer produces evidence that establishes that the sampling process and/or subsequent testing process was faulty or defective in some way such that a positive test result could not be relied on.

4. The Appellant contended that the only reasonable inference that can be drawn from all the evidence was that the sampling process was defective, in that environmental contamination of the post-race urine sample taken from the greyhound MISS BONDI had occurred, and that is why the sample tested positive for amphetamine. Further, that this contamination occurred in the period of time when the sample was taken before it was bottled for analysis, which is usually a 5 minute process from the Appellant's experience.

5. Evidence at the Stewards' inquiry ("the inquiry") considered the Appellant's contentions. The Stewards, in accepting that the greyhound itself excreted the amphetamine, found the contamination claim to be speculative and of such a remote likelihood that they could safely dismiss it. This finding is entirely justified on the *Briginshaw* standard given all the evidence in the inquiry including that of the regular, controlled sampling process that occurred in this matter. Further, I agree with the Stewards reasons for why they preferred their experts' evidence on the contamination claim rather than the Appellant's expert evidence.

6. The Appellant's sole ground in support of his appeal against penalty was that it was manifestly excessive. For the reasons that follow, I would allow the appeal against penalty on that basis.

7. This Tribunal has not previously considered a presentation breach involving amphetamine, nor have the Stewards. However, that does not preclude a ground of manifestly excessive being examined and doing so upon a consideration of all of the factual circumstances of a matter. The circumstances of this matter are such that the Stewards' penalty of 2 years disqualification was so excessive as to manifest an error.

8. The Stewards in their reasons referred to five penalty decisions by Victorian and New South Wales stewards on presentation breaches by trainers that involved cocaine. The penalties imposed by the Victorian Stewards were disqualifications for 18 months, 12 months and 18 months. The penalties imposed by the NSW Stewards were disqualifications for 2 years and 2½ years. These decisions were not considered on appeal.

9. The Appellant relied on *Miggins v Racing Queensland Limited* [2013] QCAT 230. In that decision, the Queensland Civil and Administrative Tribunal reduced the disqualification penalty imposed on a trainer for presenting a greyhound that had tested positive for amphetamine from 12 months to 4 months.

10. I consider that a penalty of disqualification is required in this matter for the following reasons.

11. Expert evidence given at the inquiry established that amphetamine is a stimulant drug that can enhance the racing performance of a greyhound. With a presentation breach it does not need to be established that an increase in performance in fact occurred.

12. Amphetamine has no legitimate application in the treatment and racing of greyhounds. Amphetamine is also an Australia-wide illicit substance of abuse. Those factors in combination cause greater harm to the image of greyhound racing in Western Australia than, for example, that caused from presenting a greyhound with a stimulant drug like caffeine, which is lawfully available for consumption in the community. Presentation breaches involving therapeutic drugs generally cause lesser harm to the integrity of racing.

13. The Appellant gave evidence at the inquiry that he did not know how his greyhound tested positive for amphetamine. This is consistent with the Stewards' reasons not finding that the Appellant was involved in causing that result nor contributing to it, for example, by having lax security measures. The Appellant's evidence that he was not involved with the positive result is also supported by his good character in the Australian greyhound racing industry. The Appellant has been a registered greyhound checker and/or trainer in Victoria, Queensland, New South Wales and Western Australia over the past 36 years and has no record of a prior breach of any rules. His references confirm he is of good character.

14. While personal deterrence is not necessary in this matter, general deterrence is required to maintain the integrity of the greyhound racing industry in Western Australia. On that basis alone, it is appropriate to impose a penalty of disqualification on a trainer who presents a greyhound with amphetamine in its system, notwithstanding that there is no evidence suggesting any involvement on their part with that test result.

15. A further aggravating factor is that the greyhound won Race 10 at Mandurah on 23 April 2019. The integrity of the greyhound racing industry suffers greater harm than if the greyhound did not place, arising from the losses to the betting public affected by the greyhound's positive result.

16. The Stewards gave the Appellant credit for the low level of amphetamine of approximately 20 nanograms per ml. The analysis of the sample that detected that trace amount was performed by the WA ChemCentre using methodology that it had developed and which has been in place since approximately 2016.

17. The positive sample taken from the greyhound was a couple of hours after it had won Race 10. Expert evidence given at the inquiry was that amphetamine, with a biological half-life decomposition in dogs of approximately 4½ hours, is a relatively short acting substance that is rapidly excreted from their system. Further, that about 30% of the amphetamine is excreted unchanged in the urine. Given that expert evidence, the amount of amphetamine that the greyhound had in its system between when it won Race 10 and before the sample was taken would have been much greater.

18. Given the above circumstances, 2 years disqualification is an appropriate starting point for an appropriate penalty. However, I would discount it by 6 months to take into account the mitigating factors personal to the Appellant, being: his good character in the greyhound racing industry throughout Australia demonstrated over 36 years; the severe financial impact that disqualification will have on the Appellant from losing his sole source of income as a successful, full-time trainer; and his co-operation with the Stewards' inquiry.

19. For these reasons, I would allow the appeal as to penalty and impose 18 months disqualification.

A E Monisse

ANDREW MONISSE, MEMBER