

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR BRIAN FERGUSON

APPLICATION NO: 21/829

PANEL: MS K FARLEY  
(CHAIRPERSON)  
MR P HOGAN (MEMBER)  
MS J OVERMARS (MEMBER)

DATE OF HEARING: 12 APRIL 2021

DATE OF DETERMINATION: 30 JUNE 2021

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IN THE MATTER OF an appeal by BRIAN COLIN FERGUSON against the determination made by Racing and Wagering Western Australia ("RWVA") Stewards of Harness Racing ("the Stewards") on 12 March 2021 imposing a of \$6000 for breach of Harness Rule of Racing 190(1).

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The appellant appeared in person assisted by managing owner Ms Denise Trobe.

Mr Denis Borovica represented the RWVA Stewards.

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This is a unanimous decision of the Tribunal.

For the reasons published, the appeal against Penalty is allowed. The penalty of a fine of \$6000 is set aside and a fine of \$1000 is substituted.

## Introduction

1. This is an appeal against penalty.
2. AUSSIE EDITION competed in and won Race 4 at Gloucester Park on 21 December 2020. A post-race urine sample was later found to contain the prohibited substance dexamethasone.
3. On 12 March 2021, the Stewards conducted an inquiry. The trainer of AUSSIE EDITION, Mr Brian Ferguson was charged with presenting the horse not free of the prohibited substance, in contravention of Rule 190(1). Mr Ferguson pleaded guilty and was therefore found guilty. A fine of \$6000 was imposed.
4. He now appeals against the penalty.

## Rule 190

5. Rule 190 is 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.*

*(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) .....*

## **Grounds of Appeal**

6. The grounds of appeal are as set out in the Appellant's notice dated 26 March 2021:
  1. *RWWA including the Veterinary Department's failure to ensure due diligence over their published veterinary notices, has led me (and other trainers) being placed at risk of exceeding screening limits and subsequently being charged and penalised, in spite of our abiding by the rules and policies. Penalty to be quashed.*
  2. *The penalty levied is manifestly excessive in the circumstances of this case.*
  3. *The Stewards have erred in not taking into account my personal and all other circumstances to assist to determine penalty.*
7. At the hearing of this appeal, the Appellant confirmed that his appeal was against penalty, not conviction. His request that the penalty be "quashed", as stated in his notice of appeal, should be taken to mean that no penalty, or a nominal penalty, should be substituted on the appeal.

## **An absolute offence**

8. The Appellant accepted that Rule 190 creates an absolute offence. There is no room for a defence of mistake of fact, or lack of "mens rea". That is so because of the wording of Rule 190(4). The Appellant is correct in his understanding of the Rule.

## **The basic facts**

9. The appellant administered 10 mils of dexamethasone. The sample was taken 81 hours after the administration.
10. The sampling and the results were not in dispute. The fact that the Appellant was doing his best to not present the horse in contravention of the rule was not in dispute. The fact that the Appellant made a mistake in his administration calculation was not in dispute.
11. The Appellant says that he was led into error by following the Stewards own published information. He says that the penalty should be reduced to nothing ("quashed"), or at least nominal, because of the Stewards' published error.
12. The Stewards say that the published information was correct and not misleading. There is therefore no reason to reduce the penalty.

### **The scheme of the rules**

13. The following is a convenient summary, taken from the evidence of veterinary steward Dr McMullen as given at the Stewards' inquiry:

*Dexamethasone is classified as a prohibited substance under R188A, It has an action or an effect on several body systems including the musculoskeletal system and respiratory system. It is used commonly in racing horses as a therapeutic drug to treat musculoskeletal inflammatory conditions and also to treat inflammatory or allergic conditions of other areas such as the skin or the lungs. In Australia it is predominantly available as an injectable. It is commonly used as a therapeutic and is not performance enhancing.*

14. It can be seen from the above summary that Dexamethasone is a substance which has a legitimate use. It only attracts a penalty if a horse is presented and the substance is detected at that time. For that reason, a trainer can legitimately administer the drug and then stop using it a certain time before the presenting for race so that the substance is not detected. There is nothing wrong with a trainer doing that.

### **Withdrawal periods and detection periods**

15. Withdrawal periods and detection periods are not the same thing.
16. If a person, or an animal, stops using a substance a certain time before testing then it is hoped that that the substance will not be detected. In the context of the rules of harness (and thoroughbred and greyhound) racing, there is nothing wrong with that. In common usage, that process is often spoken of as a withdrawal period.
17. However, Chemists and veterinary persons may also use the phrase detection period. Dr McMullen said at the Stewards' inquiry in an exchange with the Chairman: (T 21)

*CHAIRMAN Right. So if, how, what is the withdrawal time? How long would you say to..?*

*McMULLEN Okay so we don't publish withdrawal times.*

*CHAIRMAN Times.*

*MCMULLEN But what we do publish is available data from administration studies and they will give us detection times.*

18. The Chairman was asking the only question which is important to trainers, which I characterise as: *"how long before testing do I have to stop administering the drug"*. In asking the question of Dr McMullen, the Chairman himself appeared to be equating the terms withdrawal and detection. He was quickly corrected by Dr McMullen.

### **The published information**

19. Dr McMullen in her evidence was referring to a notice published on the RWWA website in 2015, and still available there. The notice is exhibit 9 at the Stewards' inquiry. The title of the notice is:

*"Important Notice for Harness Trainers and Veterinarians regarding the detection of the corticosteroid drug Dexamethasone"*

20. The notice informed readers that a new International Screening Limit for dexamethasone had been adopted across Australia in both thoroughbred and harness racing. The screening limit adopted was (and still is) 0.2ng/mL. This new screening limit led to a prolongation of detection times. The detection times went from 48 hours to 72 hours.

21. The notice goes on to state:

*"It is important to note that a withdrawal (or withholding) period is not the same as a detection period. Any withdrawal period should be calculated based on the published detection time, with the addition of a suitable safety margin based on the circumstances of the administration, including dose, route of administration, preparation administered."*

### **The facts of the case**

22. As noted above, the facts in this case are not in dispute. The Appellant administered 10 mls (not 4 to 6 mls) intravenously. He allowed 80 hours, rather than 72. His evidence at the inquiry was (T29):

*FERGUSON Yes, so yes. And I always sort of, yeah go, I don't take the 72 hours as, you know, 72 hours. I always go further than that.*

*CHAIRMAN A little bit more than the 72?*

*FERGUSON Yes I always go further than that and in this case I think I've gone 80 hours on my records, yeah, cause I'm, of for want of a better word I'm a bit anal about when I give stuff and make sure..*

*CHAIRMAN Yes.*

*FERGUSON that I'm, you know, giving myself clearance or, you know, time outside the recommended dose so yeah. It just surprises me that now I'm finding out that yeah I should've been going more, which I was totally unaware of that.*

### **The mistake made by the appellant**

23. The appellant made a mistake in his estimation of what time the horse would present drug free. He estimated 80 hours, namely 72 plus 8. The 72 hours was the published detection period and the 8 hours was the appellant's safety margin. The time period between the administration and the taking of the sample was (on the evidence) approximately 81 hours.
24. One obvious reason why the appellant was mistaken in his calculation was that he administered 10 mils, not 4 to 6 mils. He relied upon veterinary advice based upon the published notice in order to administer that dose.
25. The published notice does not contain any information about the dosage used in the study giving rise to the detection time of 72 hours as reported in the notice. Evidence given by Dr McMullen at the inquiry (T21) was that the dosage used in the trial was 4 to 6 mil:  
  
*"And I would note that that data comes from a study that used the recommended anti-inflammatory dose, which is 0.04 to 0.06 milligrams per kilogram, which is an equivalent dose of 4 to 6 mils in a 500 kg horse."*
26. Dr McMullen went on to say at T21:  
  
*"The dose that, the single IV administration that Mr Ferguson used in AUSSIE EDITION was at the higher end of the Dexamethasone dose of 10 mils but it is an established and commonly practiced dose recommended by Veterinarians for that purpose and he obviously administered it on the morning 3 days out from racing."*
27. Despite its title as being a notice, it is clear that the document amounts to more than that. The document constitutes the giving of advice to trainers and vets. This is

clear from the following evidence given at the inquiry, in an exchange between the Chairman and Dr McMullen:

*CHAIRMAN What advice would you give a, or does RWWA give in relation to using Dexamethasone?*

*MCMULLEN Yes. So in 2015 the advice published to trainers was of a revision of the international screening limit of Dexamethasone and that was reduced to 0.2 nanograms/per mil as we currently act under and that advice is available currently and has been available since 2015 on the RWWA Website”*

28. Whilst the information contained in the advice is not incorrect, it is clear that the information contributed to the veterinary advice given to Mr Ferguson and he therefore made the mistake.

#### **Ground of appeal 2 – Penalty manifestly excessive**

29. This is a case where the Stewards were given a satisfactory reason for how the prohibited substance came to be in the horse's system at the particular level detected. It is clear that a genuine mistake has been made, despite Mr Ferguson using his best efforts to present the horse free of any prohibited substance.
30. This case is distinguishable from the cases of De Campo, Wegner and Jeffries which are three cases referred to in the table provided to the Tribunal at the hearing by Counsel for the Stewards.
31. The applicable level of mitigation which should be applied has been discussed in decisions of this Tribunal including Prentice (Appeal 816), Dagostino (Appeal 831) and Wych (Appeal 839).
32. Whilst fines in those and similar matters have been imposed in the range of \$5000 to \$6000, those cases lack the plausible and honest explanation provided by Mr Ferguson in this case.
33. The reason for this presentation of itself provides significant mitigation. It places Mr Ferguson's breach on the very low end of the spectrum of presentation offences. It was simply a miscalculation on his part. Had he appreciated that the dosage given was higher than the dosages administered to calculate the detection time, and that may affect the detection time (or the safety margin), the result may have been different. Evidence of Mr Ferguson's practices would suggest that he would have allowed further time prior to racing.

34. Other mitigating factors in this matter included that the reading was not high, and that Mr Ferguson co-operated fully with the Stewards and pleaded guilty.
35. In the circumstances, we are of the view that Ground 2 of the appeal has been made out. The penalty imposed was manifestly excessive. Whilst the table of comparative penalties proved at the hearing of the appeal appears without more to indicate that the penalty imposed on Mr Ferguson was within range, that fact alone fails to give due consideration to the unusual circumstances of Mr Ferguson's offence.
36. Having found that the penalty was manifestly excessive in the circumstances, the penalty should be reduced. In our opinion, a fine of \$1000 would adequately reflect the circumstances of this case.

**Grounds 1 and 3 of appeal**

37. Ground 2 having been upheld, it is not necessary to consider grounds 1 and 3.
38. However, as to Ground 1, it may have been of assistance for the notice to have referred to the dosage of 4 to 6 mils upon which the detection times were calculated.
39. As to Ground 3, whilst the Stewards were aware of and took into account Mr Ferguson's personal circumstances, we are of the opinion that they erred in failing to give weight to the circumstances leading to the presentation, as outlined above.



\_\_\_\_\_ KAREN FARLEY, PRESIDING MEMBER



\_\_\_\_\_ PATRICK HOGAN, MEMBER



\_\_\_\_\_ JOHANNA OVERMARS, MEMBER

