APPEAL NO. 863

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT:	**BROCK MITCHELL WILLIAM LEWTHWAITE**
APPLICATION NO:	**23/1091**
PANEL:	**MR ROBERT NASH (CHAIRPERSON)** **MS JOHANNA OVERMARS** **MS NATALIE SINTON**
DATE OF HEARING:	**17 JULY 2023**
DATE OF DETERMINATION:	**26 SEPTEMBER 2023**

IN THE MATTER OF an appeal by BROCK LEWTHWAITE against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing imposing a 10 month disqualification for breach of Rule AR 240(2) of the Rules of Thoroughbred Racing (the Rules)

Mr Tom Percy KC and Mr Jack Young appeared for the Appellant.

Mr Konrad De Kerloy and Mr Stephen Waddington appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Summary

By a unanimous decision of the members of the Tribunal, the appeal against conviction and penalty for breach of Rule AR 240(2) of the Rules of Thoroughbred Racing is dismissed.

ROBERT NASH, CHAIRPERSON

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Summary

For the reasons which follow, in my opinion the Appellant's appeal against conviction and penalty for breach of Rule AR 240(2) of the Rules of Thoroughbred Racing (**Rules**) should be dismissed.

Appeal Overview

1. The Appellant is an RWWA Licensed Trainer in the WA Thoroughbred Racing Industry.

2. The Appellant has appealed against the conviction and penalty imposed by the RWWA Stewards (**Stewards**) in which they found he breached AR 240(2) of the Rules, as the trainer of the mare, **STAR PRESENT** (**the Horse**), by presenting the Horse to race at Race 4 at Ascot on 9 April 2022, with prohibited substances, namely testosterone and boldenone, being detected in a post-race urine sample taken from the Horse.

3. AR 240(2) provides:

> *'Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.'*

4. AR 240(3) provides:

> *'If:*
>
> *(a) testosterone (including both free testosterone and testosterone liberated from its conjugates) above the mass concentration set out in paragraph 7(a) or (b) of Schedule 1, part 2, Division 3 (as applicable):*
>
> *...*
>
> *is detected in a sample taken form a horse prior to or following its running in any race, ... the Stewards retain a discretion to find that a breach of sub-rule (1) or (2) has not been committed if, on the basis of scientific and analytical evidence available to them, they are satisfied that the level in the sample was of endogenous origin and/or as a result of endogenous activity.'*

5. Testosterone and boldenone are anabolic androgenic steroids, which are listed in item 13 of Prohibited List A (Schedule 1, Part 1, Division 1 of the Rules) as prohibited substances unless they are present at or below the thresholds set out in Schedule 1, Part 1, Division 3.

6. Division 3 provides that the relevant threshold in the case of mares, for free testosterone and testosterone liberated from its conjugates is a mass concentration of 55 micrograms per litre of urine or less.

7. For mares, there is no relevant threshold for boldenone.

8. By his amended notice of appeal dated 31 March 2023, the Appellant contends:

> ***Category A – Grounds of Appeal on Conviction***
>
> *1. The Stewards erred by holding that there was an evidentiary burden on a person charged under rule AR 240 to provide reliable and acceptable evidence that he or she was not guilty of the charge.*
>
> *2. The Stewards erred by holding that the offence was a "strict liability" offence which did not require them to consider alternative explanations as to the presence of the substance in the sample.*
>
> *3. The findings of the Stewards as to the presence of the substance in the sample must have necessarily been as a result of the substance being in the horse at the relevant time was against the evidence and the weight of the evidence.*
>
> *4. The Stewards erred by concluding that on the basis of the scientific and analytical evidence, the presence of testosterone (including free testosterone and testosterone liberated from its conjugates) detected in the relevant sample was of not of endogenous origin and/or as a result of endogenous activity.*

5. The Stewards erred by concluding that a finding of guilt necessarily followed from a finding that the presence of the metabolite of testosterone in the sample had not occurred endogenously.

6. The Stewards erred by holding that it was not necessary to resolve the differences in expert opinion which were before them in evidence.

7. The Stewards erred in requiring any alternative scenario consistent with innocence to have been established by the person charged to the "comfortable satisfaction" of the Stewards.

Category B – Ground of Appeal on Penalty

8. The Stewards erred by holding that penalties for testosterone, being a permanently banned substance, should be more severe that penalties for substance that are not permanently banned.

9. The Stewards erred in imposing a penalty which was in excess of those which have been imposed in other jurisdictions in Australia.

10. The Stewards erred by imposing a penalty similar to that in Terrence Ferguson v RWWA Stewards (RPAT APP 843), notwithstanding Terrence Ferguson:

A. Was not a comparatively young offender;

B. Had previous convictions for presentation offences;

C. Had been dealt with for 2x instances of presentation which resulted in the impost of the penalties in question.

11. The penalty imposed was manifestly excessive in all the circumstances of the case having regard to:

A. The circumstances surrounding the race in question, including:

I. the fact the horse had no condition which might have been assisted by the use of testosterone;

II. there was no reversal of form involved in the horse's performance; and

III. there was no anomalous wagering on the horse compared to the horse's previous and subsequent starts.

B. The Appellant's prior good record, his exemplary character and the fact he was held in high esteem in the industry;

C. The impact that the imposition of a period of disqualification will have on him personally and on his future career (both financially and reputationally);

D. The exemplary conduct of the Appellant throughout the course of the Inquiry and while dealing with investigators; and

E. Whilst testosterone might enhance the performance of a thoroughbred racehorse, there was no evidence of performance enhancement in the present case.

Background

9. The Appellant is 31 years of age. He has been involved in thoroughbred racing for approximately 15 years, initially in New Zealand and later Australia, and has been a registered trainer for about 6 years.

10. He has no criminal record nor any prior convictions under the Rules in either Australia or New Zealand.

11. He was the trainer of the Horse when it won Race 4 at Ascot on 9 April 2022.

12. The post-race urine sample taken from the Horse was analysed and showed the presence of testosterone (at a level of 396 μg/litre) and boldenone (at 4 μg/litre). The threshold for testosterone is 55 μg/mL in mares and there is no threshold for boldenone.

13. The analytical results from the ChemCentre WA dated 31 May 2022 were confirmed by RASL Victoria on 29 June 2022. Both the ChemCentre and RASL are analytical racing laboratories that have been approved by Racing Australia and are accordingly Official Racing Laboratories as defined by AR 2. Both the ChemCentre WA and RASL formally confirmed in writing that the analytical results of the samples were in excess of the threshold, thereby constituting Certificates of Analysis within the meaning of AR 2. As such, the two Certificates of Analysis constituted *prima facie* evidence that the relevant samples contained a prohibited substance: AR 259(6).

14. On 8 July 2022, the RWWA Stewards commenced an inquiry which led to the Appellant being charged with the offence under AR 240(2).

15. On 5 September 2022, the Appellant pleaded not guilty to the charge.

16. The matter ran over a number of hearing dates, 8 October 2022, 25 November 2022, 5 January 2023, culminating in the Stewards publishing written reasons on 20 February 2023 (**Reasons for Conviction** or **RFC**) finding the Appellant guilty of the charge.

17. A further hearing was convened by the Stewards on 8 March 2023 to hear submissions on penalty. By letter dated 28 March 2023, the Stewards gave written reasons for imposing a penalty of 10 months disqualification (**Reasons for Penalty** or **RFP**) on the Appellant, which penalty was backdated to 20 February 2023.

18. By way of overview, the position of the Appellant during the inquiry and in response to the charge was that:

    (a) he denied any responsibility for the positive test results showing the Horse's post-race urine had the concentrations of testosterone and boldenone referred to above;

    (b) he denied any knowledge of an administration of those substances to the Horse;

    (c) he said that he had never treated a horse with testosterone or boldenone and had never possessed either substance;

    (d) he said the Horse never had any condition which may have been assisted by the treatment with testosterone;

(e) he said winning the race at Ascot was not a form reversal, noting that there was no significant betting on the Horse and also that the Horse won at Pinjarra on 5 May 2022 (about 4 weeks later) where the post-race testing results were negative;

(f) he said there was nothing abnormal about the Horse's behaviour on 9 April 2022 that would indicate or suggest the Horse had the high level of testosterone found in the urine sample;

(g) he referred to a hair follicle test performed on 1 June 2022 which did not indicate the presence of testosterone in the Horse's system;

(h) he noted that a surprise search of the Appellant's stable on 1 June 2022 (before the Appellant was made aware of the positive test result) revealed nothing of relevance; and

(i) apart from the certificates of analysis from the ChemCentre and RASL, there was no other independent or circumstantial evidence that supported the charge.

19. The Appellant called evidence from world renowned equine toxicology expert, Professor Thomas Tobin (**Professor Tobin**). Professor Tobin gave evidence that in his 50 years of practice he had not encountered a level of testosterone as high as that found in the Horse's post-race test sample. Given the level he said he expected to see residual traces of testosterone for possibly up to 6 weeks after an administration. The fact that no testosterone was detected in the Horse after the Pinjarra win on 5 May 2022 cast doubt on the correctness of the levels detected on 9 April 2022.

20. The Appellant's defence was that given the above factors, the only possible plausible explanation for the test results was a sampling or testing error.

21. The Appellant argued the Stewards should not have been satisfied on the balance of probabilities, having regard to the *Briginshaw standard*, that the presentation offence under AR 240(2) was made out.

Appeal against conviction

General Legal Principles

22. The jurisdiction of the Tribunal in conducting an appeal under the *Racing Penalties (Appeals) Act 1990* (**Act**) is by way of re-hearing.[1]

23. The Tribunal may interfere if there are identified errors of law (or principle) or if findings of fact have been made by the Stewards that were either contrary to incontrovertible facts or uncontested testimony, are glaringly improbable or contrary to compelling inferences, or if the Stewards had palpably misused their advantage as the primary triers of fact.[2] In the case of challenging factual findings, an appellant must demonstrate that the factual finding was wrong, not merely that an alternative finding was open.[3] Appellate restraint with respect to interference with factual findings applies with respect to findings based on assessments of

[1] Danagher v Racing Penalties Appeal Tribunal (1995) 13 WAR 531, at 554; Harper v The Racing Penalties Appeal Tribunal [2001] WASCA 217, [16].
[2] Fox v Percy (2003) 214 CLR 118, per Gleeson CJ, Gummow and Kirby JJ at [28], [29], Joyce v Anderson [2020] WASCA 48, [207]
[3] Joyce v Anderson, supra, [205]

credibility and reliability of witnesses where the Stewards have had the opportunity to hear and assess the evidence in real time.[4]

Appeal Ground 1

24. By this ground the Appellant contends that the Stewards erred in imposing an evidentiary burden on the Appellant to provide reliable and acceptable evidence that he was not guilty of the charge.

25. There is no evidential burden on a trainer charged under AR 240(2) 'to provide reliable and acceptable evidence that he or she was not guilty of the charge.' If the Stewards had imposed such an evidential burden on the Appellant, that would have been an error.

26. The Appellant's written submissions refer to what was said by the Stewards at paragraph [5] of the RFC in support of this ground of appeal.

27. In my view, the Stewards did not reverse the onus of proof as alleged.

28. Before the Stewards could find the charge proved, they needed to be satisfied that:

    (a) the Horse was brought to a racecourse;

    (b) it was brought to a racecourse for the purpose of participating in a race;

    (c) a sample was taken from the Horse prior to or following its running in a race;

    (d) a prohibited substance was detected in the sample taken;

    (e) in the case of testosterone, the level of prohibited substance detected was not at or below the prescribed threshold; and

    (f) the Appellant was the trainer of the Horse.

29. The was no issue in respect of (a), (b), (c) and (f) above. In relation to (d) and (e), it is relevant to consider the evidence before the Stewards in relation to the chain of custody of the sample from the time it was taken from the Horse to the testing of the sample.

30. Julie Mitchell, a representative of the Appellant trainer at the racecourse, observed the urine sample collection process from the Horse and the sample package sealing procedure following the race.[5]

31. Dr Buddhika Dorakumbura from the ChemCentre (WA) noted the samples were received in good order with the seals intact.[6] The result of testing was that the urine sample had a testosterone level exceeding 110 μg/L (with a level of uncertainty of 11 μg/L), and also detected the presence of boldenone.

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[4] ibid

[5] Exhibit 2

[6] Exhibit 3

32. The control sample was forwarded to Racing Analytical Services Ltd (**RASL**). The samples were recorded to have arrived in good condition with the seals being intact.[7] By certificate of analysis dated 29 June 2022, RASL confirmed that the urine sample had a testosterone level at a mass concentration of greater than 100 μg/L and was also detected to contain boldenone.

33. The evidence of there being a prohibited substance in excess of the threshold level in a sample taken from the Horse following it running in the race was *prima facie* established by the certificates of analysis of the ChemCentre and RASL.

34. Dr Nicola Beckett, the team leader at the ChemCentre, gave evidence to the Inquiry explaining the process when samples are delivered to the ChemCentre for analysis and how the samples are checked and handled through the testing process.[8] In relation to the Horse's urine sample, she gave the following evidence:[9]

CHAIRMAN *That's alright. Alright, just a few points of clarification on the evidence that you've just given. So, and I've got in mind the question 1. that the owners have put to us in relation to the two urine samples and the control fluid etc and they said "please advise whether the two samples tested by your two laboratories were from the same sample?". So, firstly can you answer that question?*

BECKETT *Yes, of course. So, as I had mentioned, the receival of the samples, the chain of custody and seals were intact. So that means that we only opened the A Sample of the urine in question and for the B sample and the control fluid don't get opened by us, so, that's all intact and so that gets sent off to RASL. So, by our analysis and their analysis, they have come to the same result using different samples from the same animal.*

CHAIRMAN *Right. So, if there was any possibility or chance that something might have unknown goes wrong at your laboratory, the B sample goes to the other laboratory untouched, sealed. It would then trigger, I suppose, or reveal that there was an error at one end if the two don't match but in this instance they match. Is that they case?*

BECKETT *Yes, absolutely. So, if there was some introduction of contamination at either or the laboratories, it wouldn't be reflected by the other laboratory. So, the fact that we have the same results from two different samples of the same animal supports the fact that there isn't, or there hasn't been contamination introduced by either of the laboratories.*

CHAIRMAN *I understand that. Thank you for that. And there aren't any other samples left in reserve for owners to take to other laboratories is there?*

BECKETT *No, there's not.*

CHAIRMAN *And is that an Australian wide position, or is that just peculiar to WA?*

BECKETT *No, it's an Australian wide practice.*

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[7] Exhibit 5
[8] T14 et seq
[9] T16 to 17

35. Dr Judith Medd, RWWA Head of Veterinary Services, gave the following evidence[10] about the strict chain of custody protocols that apply to the taking of postrace samples:

> *'...when samples are collected on race day from horses we have a, you know, very strict protocols in respect of the collection. You know, in this case we collect one horse at a time so we don't have multiple horses in there being collected at the same time. We have strict protocols in that our chain of custody needs to be followed, correct documentation is filled out, the trainer provides a witness, the witness accompanies the horse from the mounting yard or from the parade ring to the sample box and we have a witness as well, a security officer that also accompanies that horse. So, the identity the horse is checked, the identity of the horse is checked several times, it's checked when the horse arrives on course, it's checked when the horse is saddled up and it's also checked in the swab box. The brands and markings are written, the brands are written on the sample identity card which also confirm the identity the horse, and the trainer's witness, as I said, they don't leave the horse from the time it comes back from the race to the time it enters the collection box. The trainer's witness then signs the sample identity card to say that they have watched the whole process, that they have seen urine leave the horse's body and then they had followed the urine into the box where it's then poured into the receptacles. It's then sealed up in front of them and the chain of custody documents in this case, which have been provided to Dr Tobin, there's, in my view, and I've reviewed them as well, there's been no breaches of chain of custody and there was no abnormalities in the paperwork associated with the sample. So, but yeah I would be 100% confident that there is no other proposition that this sample did not arise from the mare in question.'*

36. Professor Tobin, in his evidence, did not question the manner in which the sampling was undertaken.

37. In my view, the Stewards correctly identified at paragraph [5] of the RFC that in considering whether a presentation offence has been made out, they are not required to make any finding as to how the prohibited substance came to be present in the post-race sample. The reference to the decision of Judge Thorley in *Gallagher*[11] was not strictly relevant since that was concerned with the evidentiary onus on a trainer who seeks to put forward an innocent explanation for a positive swab by way of mitigation when the issue of penalty is being considered. That fact was acknowledged by the Stewards in their reference to it. However, the reference to it did not involve the Stewards in any way reversing the onus in respect of any of the elements referred to in paragraph 28 above which were necessary to be established for the charge to be made out on a *prima facie* basis and subject to any potential defence under AR 240(3).

38. In my view Ground 1 should be dismissed.

Ground 2

39. This ground contends that the Stewards erred by holding that the offence is one of 'strict liability' which did not require the Stewards to consider alternative explanations as to the presence of the prohibited substance in the sample.

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[10] T184 to 185

[11] Appeal of Danny Gallagher - NSW Harness Racing Appeals Tribunal decision dated 28 April 2004

40. The Appellant's submissions in respect of this ground directed attention to AR 240(3), referred to above, which confers a discretion on the Stewards, in the case of testosterone, to find a breach of subrule (2) has not been committed if, on the basis of scientific or analytical evidence available to them, they are satisfied that the level in the sample was of endogenous origin and/or as a result of endogenous activity.

41. The discretionary carve out in AR 240(3) does not arise for consideration unless the Stewards first make a finding that they are satisfied, on the basis of scientific evidence, that the level of testosterone in the sample was of endogenous origin or as a result of endogenous activity.

42. In assessing this ground of appeal, it is necessary to consider the RFC as a whole. The Stewards clearly considered whether the discretionary carve might apply at paragraphs [69] to [70] of the RFC.

43. Subject to the limited discretionary carve out in AR 240(3) which was expressly considered and dealt with in the RFC, the Stewards correctly identified that the offence under AR 240(2) to be one of strict liability in the sense that the offence is committed by the presence of a prohibited substance in the sample taken from a horse regardless of how it came to be there, provided the sample did in fact come from the Horse.

44. The Stewards had regard to extensive chain of custody evidence, and were satisfied that the sample did come from the Horse.

45. In my view Ground 2 should, accordingly, be dismissed.

Ground 3

46. By Ground 3, it is contended that the findings of the Stewards as to the presence of the prohibited substance in the sample must necessarily have been the result of the prohibited substance being in the Horse, was against the evidence or weight of the evidence.

47. To succeed with this ground, the Appellant must establish that the findings made by the Stewards were clearly improbable or made contrary to compelling inferences. The observations of the High Court in *Pell*[12] and other criminal cases, which were referred to by the Appellant, were made in the context of a criminal trial where the test for the appellate court was whether on the whole of the evidence it was open to a jury to be satisfied beyond a reasonable doubt. The Stewards were not concerned with whether a reasonable doubt should have been entertained, but with whether they could be properly satisfied on the balance of probabilities that the AR 240(2) had been contravened.

48. The Appellant contends that the Stewards erred in being satisfied to the requisite standard that the prohibited substance detected in the urine sample was in the Horse, since there was evidence that cast serious doubt on the Horse ever having such an elevated level of testosterone in its system. The Appellant's submissions point to the following evidentiary factors as supporting that argument:

    (a) the evidence was that the Horse had no condition requiring treatment with anabolic steroids;

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[12] [2020] HCA 12

(b) there were no observable behavioural changes demonstrated by the Horse during or after the 9 April 2022 race at Ascot;

(c) the Horse was subjected to a hair test on 1 June 2022, which retuned no abnormalities in terms of detected levels of testosterone;

(d) the extraordinary level of testosterone found in the urine sample;

(e) the negative test at the Horse's next start on 5 May 2022 at Pinjarra; and

(f) the absence of any behaviour consistent with a substantial administration of testosterone.

49. Mr Percy KC also referred to the following further matters:

(a) there was no unusual betting pattern; and

(b) there was no form reversal, the Horse won in its race outing in Pinjarra without returning a positive swab.

50. The Appellant relied on the evidence of Professor Tobin, in which he expressed the following opinions:[13]

(a) the reading of 394 μg/L of testosterone in urine for a 5 years old mare is unusual;

(b) one possible explanation for the reading is that the tested sample was not from the mare, and there has been confusion somewhere in the sample collection or chain of custody; and

(c) another possibility is that the testosterone entered the urine sample post collection.

51. The Appellant in essence argues that given the combined weight of the factors set out above, it beggars belief that the Horse would have had such a high level of testosterone and that something must have gone wrong either during the time the urine sample was taken or prior to the analysis of the sample being undertaken that has led to a false positive.

52. Dealing with each of the issues set out in paragraph 48 above in turn:

(a) The fact that the Horse may not have had a condition requiring treatment with testosterone does not mean someone may not have the motivation to use it with the aim of seeking a performance advantage. This was referred to by Dr Medd at T30 and T32.

(b) It is put that there were no observable behavioural changes in the Horse when it attended Ascot on 9 April 2022. The issue of the Horse's behaviour was given extensive consideration by the Stewards at paragraphs [41] to [45] of the RFC. The pre and post race video footage of the Horse at Ascot and Pinjarra was not of significant assistance in my view. Professor Tobin had initially expressed the view that it is difficult to predict what the behavioural effects would be.[14] The evidence of Professor Tobin (at T162) that there is a 'potential' for more male like behaviour doesn't add much to that. He did say that persons who knew the Horse and were with it on the day would have a more intimate observation of its behaviour than the video would disclose.[15] Dr Medd gave

[13] Exhibit 28 (Prof Tobin report dated 15 Nov 2022)
[14] Ibid (answer to qn 5)
[15] T156

evidence at T66 to T67, that in order for behavioural changes to occur, the testosterone would need to be given to a horse on a regular basis over a sustained period of time and that a single dose would be unlikely to have that effect. Mr Mullan, a strapper who knew the Horse and had been involved with it for some time, was called by the Appellant and observed the Horse on race day to be more aggressive than usual and also that she 'was a little bit more frighty' than usual when he saw the mare a few days later.[16]

(c) The Horse underwent a hair follicle test on 1 June 2022, about 7 weeks after the race on 9 April 2022. The hair test revealed no prohibited substance was detected. The Appellant asserted that this evidence was not considered by the Stewards in the RFC. In fact, the Stewards dealt with that issue at paragraphs [46], [49], [50] and [51] of the RFC. In doing so, they referred to Dr Tobin's evidence (T168) that the entry of testosterone into hair would depend on the dose and lipid solubility of the preparation used and if it was water based it would be rapidly metabolised and excreted and may not be detected in hair.

(d) The Appellant submits the level of testosterone was extraordinarily high. His initial argument before the Stewards was that the reading was so high, it must be regarded as a nonsense.[17] Professor Tobin did not seem to consider the level detected was in any way life threatening.[18] Dr Medd did not consider the level was a nonsense level.[19]

(e) The fact that the Horse did not return a positive swab for testosterone at the Pinjarra race which took place 5 May 2022, 3 weeks later, is not inconsistent with the use of a preparation that would be rapidly metabolised and excreted, such as a water based one.[20] The Stewards dealt with this issue at paragraph [52] of the RFC. They referred to Dr Medd's evidence (at T45, T46) where she said the Horse's levels could have returned to normal if there had been no further administrations in the interim period.

(f) The absence of any behaviour consistent with a substantial administration seems to pick up the same point made at (b) above.

53. The other factors referred to by Mr Percy (paragraph 49 above) were of very marginal significance in my view.

54. Having reviewed the evidence, I am not persuaded that the Stewards' findings of fact were improbable or contrary to any compelling inferences. The factual conclusions reached by the Stewards were not, in my view, unreasonable or unsupported by evidence.

Ground 4

55. By this ground, the Appellant contends that the Stewards erred by concluding on the basis of the scientific and analytical evidence, the presence of testosterone (including free testosterone and testosterone liberated from conjugates) detected in the urine sample was not of endogenous origin and/or as a result of endogenous activity.

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[16] T256.4
[17] T94
[18] Exhibit 28, Report 15 Nov 2022, answer to qn 3
[19] T94 to 96
[20] T168, Prof Tobin

56. The Stewards addressed this issue in the RFC at paragraphs [69] and [70], and noted that there was no scientific or analytical evidence that the Stewards could rely upon to make a finding that the testosterone detected in the urine sample was of endogenous origin and/or as a result of endogenous activity.

57. The Appellants written submissions deal with this ground, together with Ground 6, at paragraphs 2.49 to 2.56.

58. Neither the Appellant's written submissions nor his counsel's oral submissions sought to develop an argument that specifically addressed this particular ground, but were rather directed to the alleged errors in reasoning in dealing with Professor Tobin's evidence in respect of the hair follicle test and the issue raised by Ground 6.

59. At paragraphs 2.50.3 of his written submissions, the Appellant submitted:

> *'The evidence of Prof Tobin that if the postulated administration of testosterone came from a commercial preparation (it would appear that on any view the administration must have been of a commercial rather than a naturally occurring substance) the effect would be long lasting, by design, in order that its effect would be sustained.'*
> (my underlining)

60. It is apparent from that submission that the Appellant does not press the ground that the Stewards erred in the manner alleged in Ground 4. Further, no specific submissions were put either in writing or orally that addressed what is actually contended by Ground 4.

61. In my view, Ground 4 must be dismissed.

Ground 5

62. By this ground, the Appellant contends that the Stewards erred in concluding that a finding of guilt necessarily followed from a finding that the presence of the metabolite of testosterone, namely boldenone, had not occurred endogenously.

63. This ground is also difficult to reconcile with the concession made in the Appellant's submissions that at paragraph 2.50.3 that '*it would appear that on any view the administration must have been of a commercial rather than a naturally occurring substance.*' Despite that, I will address it.

64. The evidence of Dr Medd[21] was that the presence of boldenone was more likely explained as a metabolite of testosterone given the relative levels of testosterone and boldenone detected.

65. At T177, Dr Dorakumbura gave the following evidence:

> *'....all our analysis strongly suggest the fact such as it has gone through the metabolic process of the horse. Why I am saying this is because we detected boldenone. Boldenone is a minor metabolite of testosterone and we detected it at a low concentration, 4 nanograms per ml, and we detected another major metabolite of Testosterone, which is 5 Alpha Androstane, 3 Beta 17 Beta Diol. This is a major metabolite of testosterone and literature suggests that that if you see this compound at a high concentration greater than*

[21] T37, T59

50 nanograms per ml, it suggests that testosterone administration. And we only performed a semi quantitative analysis on this compound and the approximate concentration was 140 nanograms per mL '

66. Professor Tobin gave evidence that the presence of boldenone in a urine sample can be explained as occurring endogenously and independently of any administration.[22] Simple detection of boldenone is not indicative of a horse having been administered testosterone. Professor Tobin's evidence was that boldenone can occur naturally in horses at a level of in the order of 25 picograms per milligram of blood plasma regardless of a horse's sex.[23] Professor Tobin said the level in urine would be higher than in plasma but was unable to say whether 4 μg/litre was irregular. [24]

67. Professor Tobin's evidence in that respect did not challenge what was said by Dr Dorakumbura at T177 (quoted above).

68. At the Stewards' inquiry, there was the following exchange[25] between the Chairman and Mr Percy KC:

CHAIRMAN *He includes a quote there from Dr Becket which said "given that boldenone is a metabolite of testosterone, the simplest explanation for the presence of boldenone is that it's present in the sample simply as a metabolite of testosterone" and he says "I believe this to be a scientifically correct and appropriately conservative statement"-*

PERCY *That right, that's just a scientific fact.*

69. The Stewards addressed these issues in detail at paragraphs [59] to [66] of the RFC.

70. The scientific and analytical evidence about the presence of boldenone at the level it was found in combination with other metabolites detected and having regard to the level of testosterone that was present, was not such in my view that the Stewards could have been reasonably satisfied that the testosterone present in the Horse's urine sample, was of endogenous origin or as a result of endogenous activity.

71. In my view the Stewards correctly concluded that the discretion in AR 240(3) was not capable of being enlivened given material scientific and analytical evidence was at best equivocal. The Stewards findings in this respect were not glaring improbable or contrary to compelling inferences.

72. I would dismiss Ground 5.

Ground 6

73. Ground 6 contends that the Stewards erred by holding that it was unnecessary to resolve the differences in expert opinion which were before them.

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[22] T157
[23] T168
[24] T169
[25] T292

74. The ground is stated in general terms. It is clear from a review of the RFC that in many instances the Stewards did in fact analyse the differences in evidence between the experts and how they reached the conclusions they did. The Stewards did consider it was unnecessary to resolve the differences of expert opinion in relation to TE Ratio at paragraphs [67] and [68] of the RFC, for the reasons explained at paragraph 68.

75. The Appellant submitted in his written submissions that the primary issue he sought to alert the Tribunal to by this ground[26], was the non-acceptance of Dr Tobin's evidence that the hair follicle test taken from the Horse 56 days after the reading of 396 μg/ltr of testosterone in the urine sample, 'would almost certainly shown detectable traces of testosterone'[27], which it did not.

76. This issue is considered above in relation to Ground 3. Professor Tobin accepted[28] that the detection of testosterone in the hair of a horse would depend on the dose and lipid solubility of the preparation that had been used.

77. The Appellant points to what is said to be a conflict between the evidence of Dr Medd and Professor Tobin as to how long it would take for signs of testosterone to show up in hair if the form of preparation used incorporated an oily ester that attaches to the testosterone. I have reviewed the evidence of both Dr Medd[29] and Professor Tobin[30] on this issue. It is true that Dr Tobin considered that 56 days would be plenty of time for evidence of testosterone to show up in hair, whereas Dr Medd considered it may not. However, to the extent there was conflict between them in that respect, nothing turned on it given that both Dr Medd and Professor Tobin were both consistent that if the testosterone was in a water-based form of preparation, it may not have got into the hair follicles.

78. The Stewards dealt with these issues at paragraphs [46] to [51] of the RFC. The Stewards, correctly in my view, did not consider the evidence about the hair sampling 'discredited' the reported analytical results.

79. The remaining points made at paragraphs 2.51 to 2.56 of the Appellant's submissions essentially assert in general terms that the Stewards erred by favouring the evidence of Dr Medd and Dr Dorakumbara over that of Professor Tobin.

80. Having reviewed the Stewards reasoning and findings, I am not persuaded that there is any demonstrable error in their process of reasoning at paragraphs [46] to [53] which dealt with the hair follicle issue and subsequent urine analysis issue.

81. I am not persuaded that there have been any demonstrated errors in the Stewards' processes of reasoning in dealing with, assessing and weighing the expert evidence.

82. In my view, Ground 6 should be dismissed.

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[26] See para 2.50 (sub paras 2.50.1 to 2.50.4)
[27] Para 2.50.1
[28] T168
[29] T42 to 43
[30] T167

Ground 7

83. By Ground 7, the Appellant contends that the Stewards erred in requiring any alternative scenario consistent with innocence to have been established by the person charged to the 'comfortable satisfaction' of the Stewards.

84. This ground substantially overlaps with grounds 1 and 2 which have been dealt with at paragraphs 24 to 45 above and do not need to be repeated.

85. In my view, when regard is had to the RFC as a whole, the approach of the Stewards was to consider and assess whether the evidence adduced at the hearing was of sufficient weight and force to displace the *prima facie* evidence of the two certificates of analysis.[31] The Stewards concluded that it was not.

86. I did not discern any error in the Stewards approach, and accordingly would dismiss this ground.

Appeal against penalty

87. The Stewards imposed a 10 month disqualification on the Appellant. The Appellant's appeal against penalty asserts four different grounds of error. Before dealing with each of those grounds, I will make some brief observations about the established legal principles that this Tribunal has consistently applied in considering appeals against penalty.

Principles applied

88. The imposition of a penalty involves the exercise of a discretion, albeit that discretion must be exercised in a principled way. It is a discretion that is entrusted to the Stewards by reason of their considerable background experience and knowledge of the racing industry.

89. The approach that this Tribunal ought to take in reviewing discretionary determinations of the Stewards was the subject of analysis by Murray J in *Danagher v Racing Penalties Appeals Tribunal (1995)* 13 WAR 531 at 554. In that case, Murray J said that the Tribunal should approach the matter in the same way as an appellate court would review a discretionary judgment of a lower court where the appeal is by way of rehearing. In that respect, Murray J referred to the High Court decision in *Australian Coal and Shale Employees Federation v Commonwealth (1953)* 94 CLR 612 at 627, where Kitto J said:

> *'...the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.'*

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[31] AR 259(6)

90. As stated in the decision of *Prentice, Appeal No. 816,* this Tribunal will not substitute its own opinion for that of the Stewards simply because it may disagree with the Stewards' opinion as to what the appropriate penalty ought to be. The Stewards' deep understanding of the industry and how actions of its participants impact the industry and perceptions of the industry, are matters which are accorded considerable weight by this Tribunal.

91. There is a strong presumption in favour of the correctness of the Stewards' determination. Only if it is demonstrated that the penalty imposed by the Stewards is manifestly excessive, or if the Stewards have misdirected themselves in some material way, or their decision has been the product of taking into account an irrelevant consideration or of a failure to take into account a relevant consideration, is it open for this Tribunal to reconsider the Stewards' determination of the penalty imposed.

92. The purpose and object of AR 240(2) is to ensure that horses race without prohibited substances in their system. As far as possible, the integrity of racing needs to be protected, racing must be conducted safely, and conducted fairly from the perspective of the betting public. It is now well-established and accepted that:

> *'[to maintain] the integrity of racing and ... 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 away from them if for any reason, even without fault on their part, they present a horse [which is not free of a prohibited substance]' Harper v Racing Penalties Appeal Tribunal of Western Australia & Anor (1995) 12 WAR 337 at p. 349.*

93. Each case must be dealt with on its own unique facts both in terms of the specific facts of the offending and the assessment of the relevant aggravating and mitigating factors. Subject to that, the aim is for there to be a degree of consistency in approach within this jurisdiction in respect of penalties being imposed for similar offences.

94. Sometimes it is apparent that there are differing approaches being taken by the authorities in other jurisdictions. That may be due to differences in the applicable rules, differences in the local conditions and policy priorities of the regulating authorities, and/or differences in the prevalence of certain types of offending and whether there is a greater or lesser need for general deterrence in particular jurisdictions.[32] Although regard can be had to approaches being taken in other jurisdictions, that does not fetter or detract from the right of the local authority, namely the RWWA Stewards, to exercise their judgment as to what is necessary for the control of the local industry by setting the standards they consider are appropriate for the regulation and control of the local industry.

Ground 8

95. By this ground, it is argued that the Stewards erred by holding that penalties for testosterone, being a permanently banned substance, should be more severe than penalties for substances that are not permanently banned.

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[32] See Britton v RWWA Stewards, RPAT Appeal 775, per Member Prior at [49] to [52], adopted with approval by all the members of the Tribunal in Ferguson v RWWA Stewards, RPAT Appeal No 843

96. The above proposition was referred to with approval by this Tribunal in the case of *Terrence Ferguson, Appeal 843.*

97. The Appellant contends that the Tribunal's observations in *Ferguson* were not correct, and in effect asks this Tribunal to determine they were erroneously expressed. In my view, in the interests of comity and consistency, the Tribunal should only do so if we are satisfied the observations in *Ferguson* were clearly wrong.

98. The Appellant argues at paragraphs 4.1.3 to 4.1.12 of his submissions that the underlying reason for the rule against horses being presented to race with prohibited substances in their system, is concerned with the integrity of racing, the need for a level playing field, and the interests of the wagering (or betting) public. It is submitted that there is no hierarchy of prohibited substances. It is argued that the fact that a relevant substance may be permanently banned for use in the industry at all, does not inform or aggravate the penalty.

99. In considering this ground, as was noted in *Ferguson*, it is now well accepted that animal welfare considerations also underpin rules such as AR 240(2) which prohibit certain proscribed substances being present in a horse's system on race day. The industry's public support and political licence to operate is reliant on the maintenance of strong standards of animal welfare.

100. The complete prohibition and permanent banning of the use of testosterone in the racing industry is based on animal welfare considerations and the view that such substances have no place in the treatment of race horses. Prior to the complete prohibition, some trainers used testosterone to treat horses.

101. I do not agree with the argument that the nature of the prohibited substance found in a horse's system is completely irrelevant to penalty. In my view, if the substance is of a kind for which there can be no excuse for it being in the horse's system at all, that is likely to be more serious breach than if it is a substance that has a legitimate use for treating horses but cannot be in their system when presented for racing. The likely damage to the public confidence in the industry from a positive swab in the former case is greater than in the latter.

102. I am not persuaded that the Tribunal's observations in *Ferguson* were clearly wrong, and do not consider the Stewards erred by having regard to the fact that testosterone is a permanently banned substance in considering the level of seriousness of the breach.

103. I would dismiss Ground 8.

Ground 9

104. By this ground, it is contended that the Stewards erred in imposing a penalty which was in excess of those which have been imposed in other jurisdictions in Australia.

105. To the extent that this ground seeks to agitate the issue of manifest excess, it is covered by Ground 11, which I deal with below. To the extent that this ground contends that the Stewards were required to follow the sentencing ranges imposed in other jurisdictions, I repeat what is said in paragraph 94 above.

106. Although the question of manifest excess can be informed to some degree by a consideration of what penalties have been imposed in other jurisdictions primarily when there are no local sentencing precedents that provide guidance[33], the mere fact that a penalty imposed by the Stewards in this State exceeds an identified range established in other jurisdictions will not, in and of itself, constitute an error.

107. I would dismiss this ground of appeal.

Ground 10

108. This ground contends that the Stewards erred in imposing a penalty similar to that imposed in the matter of *Ferguson,* notwithstanding Mr Ferguson:

(a) was not a comparatively young offender;

(b) had previous convictions for presentation offences; and

(c) has been dealt with for '2 x instances of presentation which resulted in the impost of penalties in question'.

109. The penalty in *Ferguson* was 12 months' disqualification, two months longer than in this case. Mr Ferguson pleaded guilty. The testosterone level in *Ferguson* was measured at 73 micrograms, significantly less than the level in this case. Although Mr Ferguson had previous convictions for arsenic, the Stewards explained why they did not regard that as being a particularly significant factor at paragraph [31] of the RFP. Although there were some factors that justified a higher penalty in *Ferguson*, I do not consider they were such that a 10 month disqualification in this case is demonstrable of a harsher approach to penalty than was adopted in *Ferguson.*

110. Even if the Appellant could demonstrate that the penalty imposed on him (after having regard to all the sentencing factors) was harsher than that imposed in the case of *Ferguson*, that will not result in the appeal being allowed unless the Appellant can also establish that penalty imposed was manifestly excessive. The mere contention that the Appellant had been more severely dealt with than Mr Ferguson was, does not of itself reveal error in the exercise of the sentencing discretion.

111. A comparison with the decision in *Ferguson* is but one factor that goes to the broader assessment of whether the penalty imposed by the Stewards in this case was manifestly excessive. Accordingly, Ground 10 on its own does not constitute a sufficient ground to set aside the penalty imposed, but the penalty imposed in *Ferguson* can be considered as part of the broader review of the penalty required by Ground 11, namely whether the penalty imposed on the Appellant was manifestly excessive.

Ground 11

112. By this ground, it is argued that the imposition of a 10 month disqualification was manifestly excessive.

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[33] Taylor v RWWA Stewards, RPAT Appeal 856

113. In considering this ground, it is necessary to reiterate the matters referred to above at paragraphs 88 to 91. The question for this Tribunal is whether it has been shown that the penalty was manifestly excessive in the sense that it is so unreasonable or plainly unjust that the Tribunal may infer that there has been a failure properly to exercise the sentencing discretion.

114. Mr Lewthwaite's personal circumstances are set out in detail in Exhibit 48. He is aged 31 years. He has been in the industry for 15 years and has no prior blemishes on his record. He is respected in the industry. He has made a significant personal investment in the industry. Many of the matters referred to in paragraph 18 above were emphasised in mitigation.

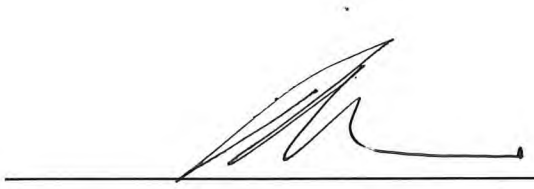
115. I have considered the various penalties that have been previously imposed in the table of cases contained in Exhibit 49. Disqualification for periods ranging from 6 months to 12 months have been commonly imposed for cases of presentation with testosterone, with a hardening up in sentencing following the permanent ban on the use of testosterone.

116. Despite the Appellant's good personal antecedents, personal circumstances and unblemished record, he did not get the benefit of an early guilty plea and the level of testosterone found to be in the Horse's urine sample was very high. The Stewards provided extensive reasons at paragraphs [33] to [39] of the RFP for concluding that a penalty of 10 months disqualification was an appropriate disposition. I am not persuaded that the Stewards acted on any error of principle or that their conclusions as to penalty were so unreasonable or plainly unjust as to imply error in their exercise of sentencing discretion.

117. I would dismiss Ground 11 of the appeal.

Decision

118. For the reasons set out above, I would dismiss the appeal against conviction and penalty.



ROBERT NASH, CHAIRPERSON

APPEAL NO. 863

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR THE DETERMINATION OF

MS JOHANNA OVERMARS (MEMBER)

APPELLANT:	**BROCK MITCHELL WILLIAM LEWTHWAITE**
APPLICATION NO:	**23/1091**
PANEL:	**MR ROBERT NASH (CHAIRPERSON)** **MS JOHANNA OVERMARS** **MS NATALIE SINTON**
DATE OF HEARING:	**17 JULY 2023**
DATE OF DETERMINATION:	**26 SEPTEMBER 2023**

IN THE MATTER OF an appeal by BROCK LEWTHWAITE against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing imposing a 10 month disqualification for breach of Rule AR 240(2) of the Rules of Thoroughbred Racing (the Rules)

Mr Tom Percy KC and Mr Jack Young appeared for the Appellant.

Mr Konrad De Kerloy and Mr Stephen Waddington appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Background

1. I have read the draft reasons of the Chairperson, Mr Nash.

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

JOHANNA OVERMARS, MEMBER

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

APPEAL NO. 863

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MS NATALIE SINTON (MEMBER)

APPELLANT:	**BROCK MITCHELL WILLIAM LEWTHWAITE**
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NATALIE SINTON, MEMBER