

THE RACING PENALTIES APPEAL TRIBUNAL

**REASONS FOR DETERMINATION OF
MR D MOSENSEN (CHAIRPERSON)**

APPELLANT:

KRISTIAN HAWKINS

APPEAL NO:

A30/08/522

PANEL:

**MR D MOSENSEN (CHAIRPERSON)
MR J PRIOR (MEMBER)
MR A MONISSE (MEMBER)**

DATE OF HEARING:

17 APRIL 2001

DATE OF DETERMINATION: **17 JULY 2001**

IN THE MATTER of an appeal by jockey Kristian Hawkins against the determination made by the Stewards of the Western Australian Turf Club on 30 January 2001 imposing a 9 month suspension for breach of Rule 81A(ii) of the Australian Rules of Racing.

Mr PE Harris, instructed by DJ Price & Co, appeared for Mr Hawkins.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

Background

On 8 January 2001 the Stewards of the Western Australian Turf Club commenced an inquiry into a report received from Western Diagnostic Pathology that a urine sample taken from Kristian Hawkins, a licensed jockey, was found to have detected in it sympathomimetic amines and also opiates. Mr Hawkins has been a jockey for

over 6 years including his apprenticeship. The sample was taken by the racecourse investigator Mr P O'Reilly.

Mr O'Reilly gave evidence that on 12 December 2000 he attended at trackwork and randomly selected several persons for a urine drug test. When Mr O'Reilly requested Mr Hawkins to deliver the sample Mr Hawkins asked if he could give it later in the morning at the Turf Club Offices. Mr O'Reilly agreed. Mr Hawkins duly attended. Steward Mance was also present at the time however it was Mr O'Reilly who acted as the only witness when the sample was passed. Mr Mance was acting as overseer. There was no dispute that the sample was from Mr Hawkins.

Ten days later when Mr O'Reilly took a statement from Mr Hawkins, Mr Hawkins admitted using speed as follows:

'I have been using speed as a social drug on occasions no more than five times over recent months.

I am just trying different things and socially today it is everywhere you go.

I would never let it get in the way of my work.

I mean, if I have it, it is only on a Saturday night and will probably miss trackwork on a Monday if I have used some speed.

I take it orally in a bottle of coke.

I don't believe I am addicted to speed.

The last time I had some speed was on a Saturday night about three weeks ago.'

The inquiry continued on 30 January 2001 after Mr Hawkins had the opportunity to obtain legal advice. At the hearing on the 30 January 2001 Mr Hawkins argued the point that someone other than a Steward actually took the sample. It was submitted that the racecourse investigator, unlike a Steward, lacked power to do so.

Mr Alan Richardson, head of the Drug and Alcohol Testing Laboratory of Western Diagnostics gave evidence at the continuation of the hearing that sympathomimetic amines:

'... is a general name that covers a class of compounds which are all grouped together based on their chemical structure and includes a number of different compounds including methamphetamine, usually referred to as street speed,

amongst other names. It also includes compounds such as dexamphetamine, pseudoephedrine and ephedrine and also the appetite suppressant Duramine, as well as a large number of other ones, but those are the most common compounds we detect in that class.'

Mr Richardson's evidence was:

'...they're accelerants, they speed up reaction times, they speed up decision-making, however, that is only at the time that the person is under the influence of amphetamines. The main problem with methylamphetamine usage is after the acute effects of the drug have worn off, the person does experience a period of lethargy, delayed reaction times, and delayed decision-making ability. There's no evidence here to suggest that that was the case, that there was opiates present or the person was under the influence of opiates at the time that they were recovering from the affects of amphetamines, but that could potentially be the case. If that was the case, then they could potentiate their effects.'

During the course of the inquiry Mr Hawkins gave the following explanation to the Stewards:

'The only reason it was in my system is because, because to get my weight off so I could work, not like I take it all the time. I mean I was just trying too hard I think and it's backfired on me. It was coming up to Carnival time and I had a lot of good rides coming up. I wanted to get my weight off as fast as possible.'

He was then asked by the Chairman of Stewards whether he could employ other measures to 'get your weight off' to which he replied:

'I do. I take Duramine everyday Sir, but it's not as, you can't get your weight off as quick like that, like Mr Richardson said, it makes you go faster, makes your body work a lot quicker and my body was working quicker to get the weight off. I am not denying that it's not in my system, but that was the only reason, Sir.'

The Stewards were satisfied with the manner in which the samples were collected and decided to charge Mr Hawkins. This was despite Mr Hawkins' argument that based on the Rules the racecourse investigator Mr O'Reilly who actually took the sample did not have the authority to do so. The particulars of the charge were:

'...that you delivered a sample of urine following riding trackwork at Ascot Racecourse on the 12th December 2000, which upon analysis was found to have detected in it the drugs amphetamine and methylamphetamine.'

After Mr Hawkins pleaded guilty the Stewards heard some further evidence before deliberating on penalty. They concluded on penalty in these terms:

'... the Stewards have taken into account the type of substance that we have been dealing with and it is an illicit substance that has the potential to endanger the safety of all participants within the sport. Taken into account the levels, they being at the lower end of the scale, however, it is implicit in the Rules Mr Hawkins, that any level of a drug cannot be tolerated. The punishment we believe should be a deterrent to yourself and also others, that there is no place within the Racing Industry for riders that may wish to use any type of drug. We believe that it seriously effects the integrity and the public image of racing, Mr Hawkins. We've also taken into account your previous good record with the Stewards and cooperation with the Stewards and Mr O'Reilly throughout the Inquiry, and also your personal assurances that you will not re-offend. We looked at previous penalties around Australia, Mr Hawkins, and we noted that since 1994 there has been a range of penalties from between four months suspension up twelve months suspension of licence. We believe Mr Hawkins, that a, or that the appropriate penalty is a suspension of your licence and that being for a period of nine months, Mr Hawkins.'

Mr Hawkins appealed. The amended grounds of appeal are:

A. Conviction

1. *Despite his plea of guilty to the charge, the Respondents erred in convicting the Appellant under rule 81A(ii) of the Australian Rules of Racing in circumstances where the Appellant's urine sample was taken illegally or, alternatively, improperly in that it was not taken in accordance with either the Local Rules of Racing or the Australian Rules of Racing.*

Particulars

- (a) *The sample was not taken by a Steward, but rather an Investigator, Mr O'Reilly, who did not have power to take a urine sample from a jockey under Local Rule of Racing 12A (refer transcript Stewards Inquiry 36-39).*
- (b) *Local Rule 12A grants to Investigators some, but not all, of the Stewards powers under the Australian Rules of Racing. The powers granted include those under ARR8(j) but not those under the applicable rule : ARR8(jj).*
- (c) *ARR8(jj) provides the Stewards with the power to "make or cause to be made any test in their opinion desirable to determine whether any alcohol or drug is or are present in any sample taken from any jockey, apprentice jockey, trackwork rider, stablehand or any other person either prior to riding or after having ridden any horse in a race or official trial or trackwork."*

B. Penalty

2. *In determining penalty the Stewards took into account an irrelevant consideration, namely the fact that the Appellant would be unable to*

ride for at least 6 months in light of the significant injuries which he sustained on 16 December 2000 in the Cox Stakes.

3. *The penalty imposed by the Stewards was manifestly excessive in all the circumstances of the case.*

Particulars

- (a) *the Stewards placed excessive weight on the nature of the illicit drug detected.*
- (b) *the Stewards failed to attach sufficient weight to the following:*
 - a. *the Appellant's full co-operation with the Stewards Inquiry.*
 - b. *the Appellant's plea of guilty.*
 - c. *the fact that the Appellant was a first time offender for an offence of this nature with a riding career spanning six and a half years.*
 - d. *the low level of the illicit drug detected in the Appellant's system.'*

Argument was presented by both counsel. A written outline of submissions was produced by Mr Harris. Mr Davies QC responded and handed up a schedule listing a number of amphetamines offences.

The Tribunal unanimously confirmed the conviction and dismissed the first aspect of the appeal. The parties were advised the Tribunal would publish its reasons in due course. At the same time the Tribunal required the Stewards to produce more information regarding the offences listed in the schedule which senior counsel had produced. Without the extra information which was requested it was not considered possible to draw any meaningful comparisons with the circumstances of the appellant's offence. That schedule had revealed the following range of penalties for the same type of offence:

- Nelson (New South Wales) - 12 months suspension
- Maloney (Queensland) - 12 months disqualification
- Kinsey (New South Wales) - 12 months suspension
- Richards (Queensland) - 9 months suspension
- Russell (South Australia) - 6 months suspension
- Dakiz (Victoria) - 4 months suspension

Conviction – Reasons

Rule 81A(ii) specifies:

'Any Jockey, Apprentice or Rider who:

- ...
 (ii) *has delivered a sample of his urine or otherwise taken as directed by the Stewards prior to, during, or after fulfilling his riding engagements in any race or trial or at riding trackwork which upon analysis has detected in it alcohol, or any drug or its metabolites or artifacts may be punished.*
 ...'

Local Rule 12A specifies:

'Any investigator or investigators appointed by the Committee of the Club shall have the powers mutatis mutandis as are given to the Stewards under Australian Rule of Racing 8B, 8C, 8D, 8(j), 8(k)(i) and (ii), Local Rule of Racing 9 and 12 and Rule of Betting 3.'

ARR 8 specifies:

'To assist in the control of racing, Stewards shall be appointed according to the Rules of the respective Principal Clubs with the following powers.

- ...
 (j) *To make or cause to be made any test in their opinion desirable to determine whether any prohibited substance as defined in A.R.1 has been administered to any horse.*
 (jj) *To make or cause to be made any test in their opinion desirable to determine whether any alcohol (sic) or drug is or are present in any sample taken from any jockey, apprentice jockey, trackwork rider, stablehand or any other person either prior to riding or after having ridden any horse in a race or official trial or trackwork.*
 ...'

Mr Hawkins' plea of guilty is an admission of all of the necessary facts to establish the offence. The actual sampling process itself is not disputed as such. There is nothing untoward in the way in which the sample was taken. Only the competency of the official who participated in the exercise by observing the sample being delivered is in issue. The racecourse investigator appointed by the Club took the sample on Club property under the supervision of one of the Club's Stewards. Whilst Stewards clearly are empowered to take samples in the type of situation which Mr Hawkins found himself the Rules of Racing do not envisage that such powers must only be exercised personally by the Stewards. Although an investigator is cloaked with express authority by Local Rule 12A to do various matters which does not include sampling a jockey, clearly Mr O'Reilly was acting as the authorised

agent of the Steward on duty when he carried out the task. Steward Mance, acting within the scope of his authority under the Rules, had caused the test to be made.

Even ignoring the plea of guilty at the Stewards' inquiry, which on its own arguably could justify the finding of guilt, none of the particulars alleged in support of ground of appeal 1 have merit. Clearly there was no illegality involved. There was nothing improper in what transpired. The Rules were complied with. The appeal against conviction was therefore dismissed.

Penalty

As to the 1st ground of appeal against penalty the fact that the appellant sustained injuries on 16 December 2000 which caused him to be unable to ride for 6 months is an irrelevant consideration. If it can be demonstrated this consideration influenced the penalty it may result in this ground succeeding.

How then did the Stewards actually deal with this aspect? The transcript clearly reveals that the injury matter was raised in fact by Mr Hawkins himself at the continuation hearing (see transcript pages 50-52). Having been told of it the Stewards did inquire briefly into the severity of the injuries. However there is nothing in the Stewards' reasons which suggest that any consideration was taken of this aspect by the Stewards in arriving at the penalty. No mention of the injuries or their effect on Mr Hawkins is made or is capable of being implied. In those circumstances I am satisfied that the appellant has failed to demonstrate that an irrelevant consideration was taken into account. I would dismiss this ground of appeal.

The 2nd ground of appeal against penalty asserts the 9 month suspension to be manifestly excessive for a number of reasons. Submissions were made to the Tribunal at the hearing by senior counsel for the Stewards by reference to penalties imposed both locally and in other Australian jurisdictions for similar offences. The Stewards were asked to clarify whether the penalties relied on related to first or subsequent offences, whether pleas of guilty had been entered, the concentration of the substance, the offenders' personal circumstances and a number of other relevant aspects. Although written information was subsequently provided in relation to the eastern states offences relied on, neither party required the Tribunal to reconvene for further submission.

Consideration of all that additional material and the initial submissions made on 17 April 2001 reveals in Western Australia no other person has come before the Stewards for a breach of Rule 81A(ii) of the Australian Rules of Racing where the drug found in the urine sample was amphetamines. In this State where the prohibited substance cannabis or one of its metabolites was found in a rider's urine sample the range of penalty for a first offence, whether at first instance before the Stewards or upon Appeal to this Tribunal, has been a range of 6 weeks to 3 months suspension (see for example Galea Appeal No. 112, Davies Appeal No. 231 and Innes Appeal No. 399). A similar offence attracted the same length of suspension in Queensland (Carrigg (Racing Appeals Reports 20.5.94 at p811)).

Counsel for Mr Hawkins in his written submissions concedes that where a drug such as amphetamines is found in a urine sample a penalty in excess of the penalties for a positive sample of cannabis should apply. In this case it is submitted on Mr Hawkins' behalf that 4 months is the appropriate length of suspension in the circumstances (see appellant's written submissions 'B. Penalty' paras 4 and 5).

The range of penalties in other Australian jurisdictions for positive urine samples where amphetamines was the only drug detected is 3-9 months suspension for a first offence in circumstances where there has been a guilty plea to the charge.

The additional information which has been supplied is helpful. The cooperation of all those who have assisted in its compilation is gratefully acknowledged. However, as is usually the case, detailed records are not kept at all of the surrounding circumstances of past offences. No specific details as to the circumstances of each offence is provided. This limits the value of the information as to tariff. Further, it appears none of the penalties imposed by Stewards in any jurisdiction for offences of this nature involving positive samples for amphetamines has been subject to scrutiny on appeal.

The information supplied by the Stewards, involving convictions for breaches of ARR81A(ii) is be summarised, as well as I am able, as follows:

| Name/ Licence | Date, State Penalty | First offence | Concen- tration level | Guilty plea | Co- operation |
|--------------------------|---|------------------|--|----------------|------------------|
| A Baker Jockey | 20/12/2000 Queensland 3 months suspension | Yes | Not quantified | Yes | Not undue |
| M Dakiz Jockey | 15/06/1998 Victoria 4 months suspension | Yes | High | Yes | Full |
| S Hazelton Stablehand | 20/12/2000 Queensland 4 months suspension | | | Yes | |
| J Healy Jockey | 01/06/1998 Queensland 6 months suspension | | | No | |
| SR Kinsey Stablehand | 19/03/1998 New South Wales 12 months suspension | Yes | | No | |
| C Moloney Apprentice | 31/10/2000 Queensland 12 months disqualification | | No (Previous cannabis offences) | | Reserved |
| J Murray Track Rider | 17/09/2000 New South Wales 12 months suspension | | | | |
| K Nelson Track Rider | 29/06/1998 New South Wales 12 months suspension | Yes | | Not known | |
| M Randle Stablehand | 27/04/1998 Queensland 6 months disqualification | | | | |
| M Richards Jockey | 15/04/1994 Queensland 9 months suspension | | | Yes | |
| D Russell Track Rider | 26/08/1996 South Australia 6 months suspension | Yes | | Yes | Not undue |
| CL Smith Stablehand | 09/04/2001 New South Wales 9 months suspension (final 3 months suspended if undertook counselling) | Yes | | Yes | No |

| Name/ Licence | Date, State Penalty | First offence | Concen- tration level | Guilty plea | Co- operation |
|-----------------------|---|------------------|-----------------------------|----------------|------------------|
| S Soar Jockey | 01/12/1999 South Australia 8 months suspension | No, second | Above average | Yes | Initially no |
| LM Todd Stablehand | 09/04/2001 New South Wales 12 months suspension (final 2 months suspended if undertook counselling) | Yes | | | No |

It is worth noting as well that the Chairman of Stewards of the Queensland Principal Racing Club advises:

'...in the most recent cases I have had cause to admonish the Stewards' panel, who , due to a misunderstanding applied what I believe to be inappropriate penalties.

It is fair to assume that in Queensland either suspensions or disqualifications of at least six months will be applicable for offences relating to the detection of amphetamines/methylamphetamines'.

A breach of Rule 81A(ii) of the Australian Rules of Racing where amphetamines is detected is a serious offence. The effect on a rider engaged in either races or track work being under the influence of such a drug or its residues is that the safety of both the rider in question, other riders and their mounts are all put in significant jeopardy. It appears that Mr Hawkins was conscious of this fact. He took the substance he says to lose weight. Clearly it is not legitimate for those engaged in professional riding to use this form of chemical for this purpose. If such use is common it is the duty of those responsible for the administration of the sport to deal with offenders in such a way as to send the clearest message that this type of behaviour will not be tolerated. Added to this important safety aspect is the fact that there is a serious undermining of public confidence in the industry, particularly from the betting public viewpoint. For those reasons, general deterrence is an important factor when imposing a penalty for breach of this Rule.

I am satisfied the appropriate penalty for this offence is a suspension from riding. I agree with the submission for Mr Harris that this is not a worst case scenario. The Stewards have indicated in their reasons the factors which they have taken into consideration. Bearing them in mind, as well as all of the other relevant

circumstances and the information from the other jurisdictions I am convinced by the argument that the Stewards have fallen into error and that the penalty is excessive.

Hutchinson's case (Appeal 387), where a 6 weeks suspension for alcohol was imposed is not of much help. The substance in that case is quite different as are the reasons for administration in each case. The difficult question becomes what is the appropriate period? The penalties imposed for offences involving cannabis are not severe enough. The relevant circumstances of this case were:

- the appellant pleaded guilty
- the appellant cooperated generally with the Stewards at the inquiry
- this was his first offence in a career spanning 6½ years, and
- the appellant has expressed some remorse.

Taking into account the range of penalties imposed referred to earlier I am satisfied that the appropriate penalty to be imposed in the circumstances of this case would be a period of 6 months suspension.

For these reasons I would allow the appeal against penalty on this ground. I would substitute a penalty of 6 months suspension in lieu of the 9 months suspension imposed by the Stewards.



DAN MOSENSON, CHAIRPERSON



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
MR J PRIOR (MEMBER)

APPELLANT:

KRISTIAN HAWKINS

APPEAL NO:

A30/08/522

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MR D MOSENSEN (CHAIRPERSON)
MR J PRIOR (MEMBER)
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Mr PE Harris, instructed by DJ Price & Co, appeared for Mr Hawkins.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

I have read the draft reasons of Mr D Mossenson, Chairperson. I agree with the reasons and conclusions and have nothing to add.

John Prior

JOHN PRIOR, MEMBER



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF
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ANDREW MONISSE, MEMBER



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Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

This is a unanimous decision of the Tribunal.

For the reasons published the appeal against conviction is dismissed and the appeal against penalty is upheld.

A period of 6 months suspension is substituted for the 9 months suspension imposed by the Stewards.



DAN MOSENSEN, CHAIRPERSON

