

DETERMINATION AND REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: GEOFFREY FRANK DURRANT
APPLICATION NO: A30/08/642
PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR A E MONISSE (MEMBER)
DATE OF HEARING: 14 SEPTEMBER 2005
DATE OF DETERMINATION: 14 SEPTEMBER 2005

IN THE MATTER OF an appeal by Geoffrey Frank Durrant against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 29 August 2005 imposing 9 months disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr Durrant represented himself.

Mr J A Zucal appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

This is a unanimous decision of the Tribunal.

This is an appeal arising out of an inquiry conducted by the Stewards into a report received from the Australian Racing Forensic Laboratory that the post-race sample taken from CONTENTIOUS MISS after it had won Race 5 at Northam on 23 June 2005 had a level of testosterone in excess of 55 micrograms per litre in urine.

The inquiry began on 21 August 2005 and continued on 29 August 2005. At the conclusion of the inquiry the Stewards charged Mr Durrant with a breach of Australian Rule of Racing (AR) 178 in that on 23 June 2005 he had brought CONTENTIOUS MISS to Northam Racecourse with the prohibited substance testosterone being detected in the post-race sample taken from the horse at a level in excess of 55 micrograms per litre.

AR.178 states:

'When any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be punished.'

AR.178B specifies the substances that are declared to be prohibited substances.

AR.178C(1)(g) is in these terms:

- (1) *The following prohibited substances when present at or below the concentrations respectively set out are excepted from the provisions of AR.178B:-*
- ...
- (g) *Testosterone (including both free testosterone and testosterone liberated from its conjugates):*
- (i) *in geldings: at a mass concentration of 20 micrograms per litre in urine;*
- (ii) *in fillies and mares: at a mass concentration of 55 micrograms per litre in urine.'*

Mr Durrant pleaded not guilty to the charge.

After hearing some further evidence the Stewards found the charge had been sustained for the following reasons:

'Mr Durrant, the Stewards have considered the charge and all the evidence in relation to this matter. The Australian Racing Forensic Laboratory certificate of analysis states that sample numbered N013801 was received intact and analysis detected a level of testosterone at a concentration of 82.6 micrograms per litre in urine. The measurement of uncertainty is plus or minus 2.5 micrograms per litre and the threshold concentration with a 99.7 level of confidence. This reported level was approximately one and half times the threshold.

The Racing Science Centre in Queensland, the laboratory that conducted confirmatory analysis on Sample N013801 recorded a level of testosterone greater than 100 micrograms per litre with a level of uncertainty of plus or minus 3 micrograms per litre at a 99.7 per cent level of confidence. Sample N013801 was received by the Racing Science Centre in Queensland in good condition with seals intact.

Both laboratories, that is ARFL and Racing Science Centre in Queensland are NATA accredited.

Mr Stenhouse is the Official Analyst at ARFL could not offer any conclusive reason for the variation in readings. However, suggested degradation of the sample could be a contributing factor. That degradation referred to the analytical work carried out at ARFL.

Miss Samantha Nellis the Acting Analytical Principle Chemist for Racing Science Centre gave evidence and advised that sample N013801 had recorded a level of testosterone greater than 100 micrograms in urine.

Both laboratories have reported levels of testosterone in excess of the threshold of 55 micrograms per litre and after consideration the Stewards accept the findings of these laboratories.

Consequently, we find you guilty as charged, Mr Durrant.'

Some further evidence was taken in relation to the penalty and after an adjournment the Stewards concluded that Mr Durrant should be disqualified for a period of 9 months. The Chairman of Stewards announced their findings in these terms:

'The Stewards have taken into account your submission in relation to penalty.

Firstly, the Stewards believe any breach of the prohibited substance rules are a most serious matter.

It is apparent that you are a professional trainer with considerable interest both personal and financial invested in the business of horse, of training racehorses. Your business employs a number of people who like you, rely on your registered status as a trainer. The Stewards have taken into account these factors.

The detection of a prohibited substance in animals that have competed and won races is a situation detrimental to the integrity of racing. A fact you recognise and indicate that you are embarrassed at (sic) such a situation should arise. Your embarrassment must be worn by the industry as a whole, an industry that is dependent the (sic) support of the betting public for its financial viability and cannot afford to have the confidence of such public dented as is invariably the case when horses are found to have drugs administered to them.

The detriment to the image and integrity is all the worse when the drug involved is one that as (sic) seen as having performance enhancing capabilities. Dr Medd has described testosterone as the anabolic substance which by definition has muscle building capabilities which leads to increased strength and stamina, thus affording performance enhancing capabilities. Whilst we recognise that these are not the only uses for the drug, it is these attributes of it that give rise to it being listed as a prohibited substance when detected above the threshold levels.

Unfortunately it cannot be said that this was your first offence. In fact on the 9th of December 2002, a horse trained by you returned a finding of testosterone in excess of the permitted level. On that occasion there was no explanation that accounted for how the horse returned the high level except for the fact that it was found to have testosterone administered to it. On that occasion you were fined the sum of

\$5000. Consequently, no mitigation can be afforded to you on the basis of being a first offender.

We've heard that, in this inquiry, testosterone is an unpredictable drug when it comes to the issue of withdrawal times. So much so, that the Controlling Body has continuously published since 2001 a warning to the industry that the use of the drug should be avoided. You acknowledge that you were aware of this warning. The criticism that there is absence of professional information with regard to the use of the prohibited substance testosterone in racing horses ignores the fact that such advice that does exist, strongly warns against the use in any racing horses.

Despite the fact that you've already been penalised with the same prohibited substance being detected in your horse, such penalty clearly did not deter you sufficiently from using testosterone. Through varied consultation with your vets, you chose to ignore the specific warning of the authority and sought in fact guidelines that permitted you to administer testosterone to horses without such administrations being detected. Yet the industry veterinarian Dr Judith Medd who is available to advise on such matters, was not consulted by you even though given what had transpired previously with MAROONED PRINCE. No veterinarian actually examined and prescribed testosterone to CONTENTIOUS MISS. The reason you used testosterone was this was your blanket approach to the use of this unpredictable prohibited substance. It has clearly been demonstrated that such advice that you may have had from your vets was based upon little more than anecdotal evidence and unsound extrapolations with regard to the use of the drug. The Stewards share Dr Medd's incredulous reaction that advice based on no scientific evidence should be proffered as professional advice. It has not been demonstrated that this advice is based upon any sound, scientific documents and indeed, the evidence presented by you in the form of a letter from Lark Hill vets supports the common understanding that no such evidence does exist and hence the need for extreme caution.

The Stewards of course, do not hold you accountable for the less than ideal advice from veterinarians however, neither were you completely naïve in regard to this product. You've have (sic) already had one animal return a level previously and were aware that the authority warned against the use of the drug.

The important consideration and exercise of discretion with regard to penalty is the issue of deterrent. Any penalty issued in such cases must have both a general and specific value. Clearly the issue of a fine against you previously was not of sufficient deterrent to prevent your use of testosterone in racing horses. Given that in the earlier matter you had no explanation for the elevated level, it seems to have only lead (sic) you to actively seek more information that allows you to administer the drug in such a way as to maximise its benefit without falling foul of the rules. If the impetus to you of the previous penalty was only to find ways to use a drug the authority warned against its use at all then it has been misunderstood and has failed in its deterrent value.

This is of no moment in the matter of the exercise of discretion on this occasion.

Given all the circumstance and reasons discussed, the Stewards do not feel a fine of any value appropriate and instead impose a penalty of nine months' disqualification.'

The notice of appeal which is dated 29 August 2005 states the grounds of appeal to be:

'Analysis reports are not supporting each other & I believe my horses swab was compromised. (Another persons swab traveled (sic) with mine to laboratory – it was positive)'

Mr Durrant applied for the suspension of operation of the penalty which was refused.

At the outset of proceedings before the Tribunal, with no objection from Mr Zucal, Mr Durrant was allowed to proceed on the basis that this was an appeal both against the conviction and the penalty.

In support of the appeal Mr Durrant confirmed the fact that he does use or did use the drug testosterone on veterinarian advice. There was no dispute as to the administration of the substance to the horse. The Tribunal was told of the fact that there was another horse on the race day which recorded a high level of the same substance. The argument in support went on to claim that there had been contamination, it was the wrong urine, or that something had gone wrong in that mistakes were made with the way the samples were handled.

In response to that Mr Zucal submitted that the contamination argument had not been raised before the Stewards at their inquiry. Further, that there could be no argument with the way the sample was taken. The protocols or proper practices had been followed and there was an admission of that in the course of the Stewards' inquiry by Mr Durrant. Further, a control sample was collected and analysed. The proposition was also put to the Tribunal on behalf of the Stewards that the swabbing procedure was such that the alleged problem with the sample could not have occurred. In that regard we were invited to take into consideration the steps associated with the labelling, the sealing, the packaging and other aspects of the handling of the sample.

In terms of the discrepancy between the results of the respective laboratories Mr Zucal advanced a possible explanation which he invited us to accept, namely degradation having occurred to the sample that was analysed by the New South Wales laboratory.

We were also told of the coincidence of the timing of the swabbing. CONTENTIOUS MISS' swab was taken subsequent to other intervening swabs which were taken on the same day from two other horses following the swabbing from GOLD ASSETT, which resulted in a positive reading for the same drug on the same race day.

We have taken into account all of the submissions that have been made and obviously have had the opportunity of reading the Stewards' transcript and also of considering the various exhibits that were produced before the Stewards.

We are not persuaded by anything that has been put to us by Mr Durrant that the Stewards were in error in arriving at the conclusion which they did to convict Mr Durrant of the offence. We are satisfied that as there is nothing to contradict the explanation that was offered for the discrepancy in the samples that there is no reasonable doubt that something went awry in

terms of the procedures or the testing of the sample which was taken from CONTENTIOUS MISS.

For these reasons we dismiss the appeal as to conviction.

In terms of the penalty we have listened intently to what Mr Durrant has told us. We have also carefully considered the reasons which the Stewards gave at the inquiry.

It appears to us that the Stewards took into account all of the relevant facts and circumstances and applied their minds to arrive at an appropriate penalty within the range of penalties that have been imposed for this type of offence. After taking into account all of those relevant facts and circumstances nothing has been presented to us which persuades us that the Stewards were in error in arriving at the penalty of 9 months disqualification.

Accordingly we dismiss the appeal as to penalty as well.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

