APPEAL – 723

DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: ROSS STEPHEN ASHBY

APPLICATION NO: A30/08/723

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR J PRIOR (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 6 JULY 2010

DATE OF DETERMINATION: 3 AUGUST 2010

IN THE MATTER OF an appeal by Ross Stephen ASHBY against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 10 June 2010 imposing a disqualification of 6 months for breach of Rule 190(1) of the Rules of Harness Racing.

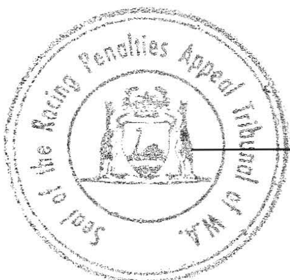
Mr Ross Ashby appeared in person.

Mr Denis Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

This is a unanimous decision of the Tribunal.

For the reasons published, the appeal against conviction is allowed with a direction that the matter be referred back to the RWWA Stewards of Harness Racing for re-hearing in accordance with the reasons for determination of Mr Robert Nash, Member.

Appeal against sentence is dismissed.



DAN MOSSENSON, CHAIRPERSON

APPEAL – 723

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**ROSS STEPHEN ASHBY**
APPLICATION NO:	**A30/08/723**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**6 JULY 2010**
DATE OF DETERMINATION:	**3 AUGUST 2010**

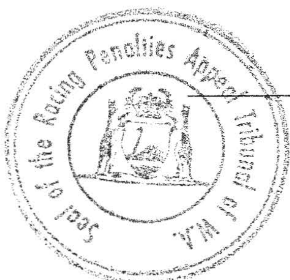
IN THE MATTER OF an appeal by Ross Stephen ASHBY against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 10 June 2010 imposing a disqualification of 6 months for breach of Rule 190(1) of the Rules of Harness Racing.

Mr Ross Ashby appeared in person.

Mr Denis Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr Robert Nash, Member

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



DAN MOSSENSON, CHAIRPERSON

APPEAL – 723

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:	**ROSS STEPHEN ASHBY**
APPLICATION NO:	**A30/08/723**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**6 JULY 2010**
DATE OF DETERMINATION:	**3 AUGUST 2010**

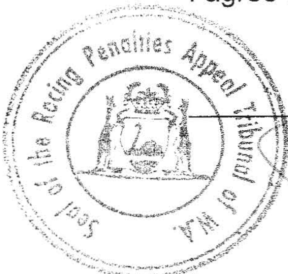
IN THE MATTER OF an appeal by Ross Stephen ASHBY against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 10 June 2010 imposing a disqualification of 6 months for breach of Rule 190(1) of the Rules of Harness Racing.

Mr Ross Ashby appeared in person.

Mr Denis Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr Robert Nash, Member

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



JOHN PRIOR, MEMBER

APPEAL - 723

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT:	**ROSS STEPHEN ASHBY**
APPLICATION NO:	**A30/08/723**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**6 JULY 2010**
DATE OF DETERMINATION:	**3 AUGUST 2010**

IN THE MATTER OF an appeal by Ross Stephen ASHBY against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 10 June 2010 imposing a disqualification of 6 months for breach of Rule 190(1) of the Rules of Harness Racing.

Mr Ross Ashby appeared in person.

Mr Denis Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

The appellant is a licensed trainer for harness racing. He was convicted on 10 June 2010 after a hearing by the Stewards of Racing & Wagering of WA of a charge that on Saturday 22 May 2010, contrary to rule 190 of the Harness Rules of Racing, he presented the horse DISCO GEMINI to a race at Gloucester Park with a TCO2 blood level in excess of 36.0 millimoles per litre of plasma.

The appellant appeared to plead guilty to the charge before the Stewards, but it is fair to say from a reading of the Stewards hearing transcript that he still sought to query whether in fact his horse did have a TCO2 level in excess of 36 mmol/L, in light of the fact that there were two separate laboratory measurements of the TCO2 level which differed significantly.

The Stewards, having found the appellant guilty of the charge, imposed a six month disqualification on the appellant.

By the notice of appeal, the appellant sought to challenge both the sentence imposed by the Stewards and his conviction. Although the terms of the notice of appeal were not entirely clear, the Chairperson clarified the Appellant's intentions in relation to the appeal at the outset of the hearing of the appeal.

Appeal against Conviction

The issue, as I see it, is whether it was reasonably open to the Stewards to be satisfied to the requisite standard of proof that the TCO2 level of the horse, DISCO GEMINI, exceeded 36 mmol/L.

There were two laboratory tests undertaken in respect of the pre-race blood sample taken from the horse:

(a) The Racing Chemistry Laboratory (RCL) which measured the TCO2 level at 37.5 plus or minus 1.0 mmol/L which RCL stated could be given with better than 99.99% confidence; and

(b) The Racing Analytical Services Ltd (RASL) which measured the sample provided to them at 36.4 plus or minus 1 mmol/L, which RASL stated could be given with better than 99.99% confidence.

The respective measurements differ by 1.1 mmol/L. That would seem significant given that both the RCL and the RASL, by their certifications, state that their measurements are accurate within a 1 mmol/L range at better than 99.99% certainty.

In addition, when one takes into account the expressed level of uncertainty, the RASL measurement was, in effect, that the TCO2 level measured was between 35.4 and 37.4 mmol/L. Based on the RASL result, there is a real prospect that the TCO2 level was, in fact, less than 36 mmol/L.

The Stewards heard evidence from Mr Russo, the manager of the RCL laboratory, who had certified the RCL measurement of the TCO2 level. The Stewards did not hear evidence from Mr Batty, the Deputy Director of the RASL laboratory, who had certified the RASL measurement of the TCO2 level.

Mr Russo gave evidence that if a sample is more than four or five days old the measurement of the TCO2 level tends to be lower because the samples tend to degrade in that period of time. He also said that for the first two to three days the samples tend to be "pretty good" in terms of reliability. In this case DISCO GEMINI raced on 22 May 2010. RCL measured its sample on 24 May 2010 (within 2 days) and RASL measured its sample on 25 May 2010 (within three days).

Mr Russo, in his evidence before the Stewards, referred to having discussed the difference in the two laboratory results with David Batty from RASL. Mr Russo said that he was told by Mr Batty that there had been a problem with their machine which meant that the measurement of the TCO2 level was delayed after the blood tube had been opened. Mr Russo said the result of that delay in testing following the opening of the blood tube would have been that there would have been a lower concentration of TCO2 found in the blood.

Mr Batty was not called to give evidence to the Stewards nor does he appear to have been contacted by the Stewards to confirm the explanation given by Mr Russo. It is significant that neither the certification given by RASL nor the letter enclosing the certificate, refer to any difficulties experienced in the testing process or the sample being allowed to deteriorate before testing. Further, there is no suggestion in the certification of a greater level of uncertainty in the measurement of the sample as a consequence of the problems experienced in the testing process, assuming they have been accurately relayed by Mr Russo.

The RASL test is undertaken as a confirmatory test of the RCL test. In this instance the confirmatory test has not confirmed the result of the RCL test but suggests a significantly different reading of TCO2. Without a cogent and reliable explanation for the difference in the measurement reported by RASL it cannot be said, in my view, that the RCL test can be accepted as accurate and sufficient to be relied upon to convict the appellant of the charge.

The evidence that the horse was shown to have a resting TCO2 level of substantially less than 36mmol/L provides no assistance in determining what the pre-race level actually was. Rule 188A(2)(a) provides, in effect, that alkalinising agents will not constitute a prohibited substance when evidenced by a TCO2 level of 36 mmol/L or less. Therefore, the Rules do not prohibit the administration of alkalinising agents to horses provided that the consequential TCO2 level does not exceed 36 mmol/L. The normal TCO2 resting level of a horse may assist the Stewards in inferring that there has been an administration of alkalinising agent, but it does not otherwise provide any support for whether or not the level prescribed by the Rules has been exceeded.

The Stewards referred the Tribunal to the Victorian Harness Racing Tribunal decision of *Tonkin* (which was referred to with approval by this Tribunal in the case of *Nazzari (*Appeal 697*))*. In the case of *Tonkin* there was one laboratory TCO2 measurement of 37.3 and a separate laboratory measurement of 37.1. In light of the margin for uncertainty, being plus or minus 1.2 mmol/L in that case, the difference of 0.2 mmol/L between the two different laboratory measurements, was found not to be a significant difference. Further, in that case there was expert evidence given that even on the lower of the two laboratory measurements of 37.1 mmol/L plus or minus 1.2 mmol/L, there was still a better than 99% likelihood that the actual TCO2 level was in excess of 36 mmol/L, meaning that there was a less than 1 % probability that it was between 35.9 and 36 mmol/L.

The facts of this case differ substantially from *Tonkin* in that the measurements of RASL and RCL were significantly different and there is no evidence of what the percentage probability is that the RASL sample, measured at 36.4 plus or minus 1 mmol/L, would exceed 36 mmol/L.

The relevant standard of proof is the Briginshaw standard. Judge Williams in *Tonkin* said he was satisfied to the Briginshaw standard based on the expert evidence given that there was more than a 99% probability that the level exceeded 36mmol/L even if the lower of the two laboratory assessments was the one to be relied upon.

For my part, I could not be satisfied to the Briginshaw standard that the TCO2 level of DISCO GEMINI in this case exceeded 36mmol/L. I am concerned at the large disparity between the RCL and RASL measurements. Unless the RASL test can be impugned or discredited so that it can be said to be unreliable, I would not consider the charge against the appellant, on the current state of the evidence, as being established to the Briginshaw standard.

It may be that Dr Batty can give evidence confirming what was said by Mr Russo before the Stewards and go on to say that the results reported by RASL cannot be relied upon and the RCL measurements should be preferred.

In my view this Tribunal ought set aside the Steward's present decision with a direction that the Stewards rehear the matter by calling evidence from Dr Batty in order to establish whether there are good reasons to impugn the result of the RASL laboratory thus justifying the Stewards entitlement to rely on the RCL results.

I would, accordingly, allow the appeal against conviction with a direction that the matter be referred back to the Stewards for re-hearing. In re-hearing the matter, the Stewards will be entitled to rely on the evidence already given but will need hear further evidence to address the matters set out above and specifically will be required to hear evidence from Dr Batty, or another member of the RASL laboratory, as to the circumstances surrounding the making of the TCO2 measurement by RASL and how such a different measurement of the TCO2 level was arrived at to that measured by the RCL laboratory. Once the Stewards have heard the further evidence, the Stewards will have to consider whether the evidence, as a whole, satisfactorily proves to the requisite standard the charge against the appellant.

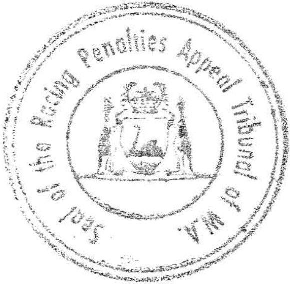
Appeal against Sentence

In my view the appeal against sentence must be dismissed. The sentence imposed by the Stewards was not demonstrated to be excessive or inappropriate.

As this Tribunal has stated on a number of occasions, it is rare that the circumstances will justify a sentence of less than six months disqualification where there has been a proven administration of a prohibited substance in breach of the Rules. The cases in which this Tribunal has considered imposing a penalty of less than six months have usually been cases where there has been substantial hardship demonstrated combined with other strong mitigating factors: *See cases of Gavin* (Appeal 694)*; Fergusson* (Appeal 698)*; and Nazarri* (Appeal 697).

In this case the appellant is a hobby trainer and there is no evidence that he will suffer significant financial or personal hardship as a consequence of the six month disqualification, other than that which would usually be suffered by a trainer in his position. Further, the

Stewards have indicated that in this case they will relax the restrictions arising from a disqualification to the extent it may impact on the capacity of the appellant to undertake work in the stock feeds industry.



ROBERT NASH, MEMBER