





millimoles per litre in plasma of the substance. The control sample went to the Racing Analytical Services Limited laboratory whose report confirmed the original analysis result. Both laboratories also reported that the expanded measurement of uncertainty for TCO<sub>2</sub> determinations at the threshold concentration 36 millimoles per litre is 1 millimole per litre at greater than 99.99% confidence. According to the Rules of Harness Racing the threshold concentration for total carbon dioxide presence in a horse is 36 millimoles per litre in plasma. The actual concentration of the substance was not measured because the equipment was not calibrated to do so at such a high level.

The usual veterinary evidence was presented of the significance of raised TCO<sub>2</sub> levels in horses of delaying the onset of fatigue resulting in a faster run time. This means that horses are capable of performing at high speeds for longer when they have alkalisating agents in their systems.

At the conclusion of the initial inquiry proceedings the matter was adjourned until 30 October 2008. Further evidence was taken which then lead to a charge being made pursuant to Harness Racing Rule 190. The relevant parts of the Rule read:

*'Presentation free of prohibited substances*

- (1) *A horse shall be presented for a race free of prohibited substances.*
- (2) *If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.*
- (3) *If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub rule (1), the trainer of the horse and the person left in charge is each guilty of an offence.*
- (4) *An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.'*

Mr Ferguson was charged with a breach under sub-rule (2) of having presented CLASS MATE to race with a TCO<sub>2</sub> level exceeding the threshold. Mr Ferguson pleaded not guilty but called no witnesses and gave no further evidence in defending of the charge. At no stage in the proceedings did Mr Ferguson dispute either the taking of the samples or the analytical results. After the Stewards deliberated they announced their determination of the matter in the following terms:

*'... The Stewards have considered the charge and your submissions. The Stewards in considering the charge are conscious of the principles of the Briginshaw Standard. The Briginshaw Standard is one based on the balance of probabilities. We have carefully considered the evidence to the requisite standard. Blood samples were taken from CLASS MATE on Friday the 12<sup>th</sup> of September 2008 prior to it competing in a race. There are no questions or queries on the sampling process. You have expressed in evidence that you were satisfied with the sampling procedure. The analytical data of the screening process by RCL has been supplied to you. You have had reasonable time to review that data. You raised no material concerns with the laboratories analytical process. The Stewards unreservedly accept the certificates of analysis from both laboratories, that's being the Racing Chemistry Laboratory and Racing*

*Analytical Services Limited in Victoria. You have put to the Stewards a number of possible reasons for this elevated level of TCO<sub>2</sub>. It should be noted that the level recorded in this case is greater than 39.0 millimoles per litre. This is a very high level. CLASS MATE has previously been pre-race tested on seventeen occasions. On fifteen of those times the level of TCO<sub>2</sub> has ranged from 29.8 to 36.3 millimoles per litre. On the other two occasions CLASS MATE has returned levels greater than 39. One of those occasions was with, when CLASS MATE was trained by Jon Gavin and that has been dealt with. This is the second occasion. Extensive evidence has been heard from RWWA Veterinarian Dr Medd. In part Dr Medd stated that statistically, for a horse to exceed 37.2 millimoles per litre is one in nine hundred and forty one thousand. The odds of a horse exceeding 39.0 millimoles per litre, is far great than that. The Stewards do not accept that CLASS MATE has a naturally occurring high level of TCO<sub>2</sub>. Mr Ferguson after considering all of the evidence the Stewards find you guilty as charged. Now it's left to the Stewards to determine a penalty Mr Ferguson. Do you wish to address us in relation to penalty?'*

After hearing evidence of Mr Ferguson's personal circumstances the Stewards determined the penalty as follows:

*'Mr Ferguson the Stewards have considered that matter of penalty, taking into account your submissions. The occurrence of positive swabs is a serious matter. The integrity and image of racing is severely dented when a racehorse is found to have competed with a prohibited substance in its system. The support of the betting public is vital to the survival of this industry. Anything that impacts on this is the serious category. The level of TCO<sub>2</sub> detected in CLASS MATE was greater than 39 millimoles per litre. This is a high level and indeed very few cases of that level of TCO<sub>2</sub> come before the Stewards. The nature of the prohibited substance is significant. While CLASS MATE finished sixth, the elevated levels of TCO<sub>2</sub> has the effect of inhibiting fatigue in a racehorse by delaying the onset of lactic acid and is potentially performance enhancing. You have been unable to explain the high level of TCO<sub>2</sub> present in CLASS MATE. Your explanations amount to nothing more than conjecture. Records show you have been licensed as a trainer for nine years in WA. You have no previous convictions in relation to the drug rules. Any penalty needs to be reminded again that presenting horses to race with prohibited substances in their system is totally unacceptable. The onus is on the trainer to present his horse drug free. The Stewards are very mindful of your personal circumstances. You are thirty nine years of age with a family and a mortgage, however in our opinion, in the absence of special circumstances, a breach of the drug rules should incur a disqualification. Previous recent cases have been, K Nolan, twelve months a second offence, S Suvaljko twelve months second offence, L Coulson six months first offence, J Gavin six months first offence. These are persons similar to yourself with a heavy reliance on the industry for their livelihood, who none the less were disqualified for a period of six months or greater. The high level of TCO<sub>2</sub> in your case would justify a starting point, higher than unusual, however after considering all the mitigating factors the Stewards believe a disqualification of six months effective immediately to appropriate.'*

## THE APPEAL

Mr Ferguson appealed against both the conviction and the penalty and at the same time sought a stay of proceedings. The stay application was refused. In the Notice of Appeal Mr Ferguson states his grounds as follows:

*'I am innocent of the charge. The conviction was unfair as the Stewards didn't explore all of the avenues to enable me to prove my innocence with regards to the horse "Classmates" previous history. The disqualification was severe compared to the rest of Australia. Other positive swabs have received fines. The loss of all my income, not being able to train, educate young horses and farriering will make me unable to support my family.'*

In the course of arguing the matter Mr Ferguson addressed each of the issues he raised in the appeal grounds. I have carefully considered all of the submissions. Many of the propositions were no different from those which he had put to the Stewards at their inquiry. I am satisfied the Stewards correctly addressed and properly considered each of those propositions. In my assessment the Stewards in their reasons have appropriately dealt with all relevant issues which emerged in their inquiry. Mr Ferguson has not presented anything on appeal which persuades me he is not guilty of this presenting charge.

Further, I do agree with the propositions put by Mr Zucal that this is a very clear cut and straight forward matter. The relevant Rule is intended to ensure that horses are presented to race drug free. The presentation Rule, unlike the administration Rule 196A, does not require there to be any evaluation or findings regarding the manner in which the prohibited substance found itself into the system of the horse in question. It matters not for the presentation Rule to be breached what the surrounding facts and circumstances are including, as in this case, what the previous history of the horse is.

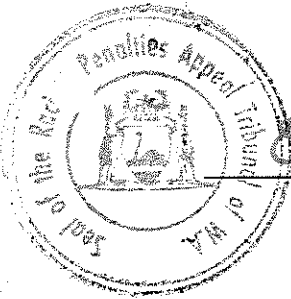
On the evidence before the Stewards there was no alternative but to convict. The various arguments which were put by Mr Ferguson as to the alleged unfairness of the conviction I have carefully considered. I have concluded there is absolutely no merit in them. The previous history of the horse does not lead to the conclusions which Mr Ferguson would have the Tribunal believe. For these reasons I would dismiss the appeal against conviction.

The length of the period of disqualification is not inconsistent with the many decisions of the Stewards in this State and the determinations on appeal of some of those decisions by this Tribunal. It is clearly the case that some of the other jurisdictions in Australia impose lesser penalties for these types of offences but that fact does not afford Mr Ferguson any assistance. No attempt has been made to show the racing scene in other jurisdictions is or should be the same as in this State. Clearly the attitudes and approaches to wrongdoings can vary from jurisdiction to jurisdiction. The frequency of these types of offences varies from State to State. That fact in part possibly is influenced by the varying attitudes adopted by Stewards in other jurisdictions in setting of penalties.

I have given consideration to the list of penalties for drug offences presented by Mr Ferguson and am satisfied, for the reasons advanced by Mr Zucal, that it does not demonstrate that the six month disqualification is inappropriate. In that regard I am also mindful of the penalties which have been imposed on other TC02 presenting offenders whose appeals have come before the Tribunal. Whilst I am very conscious of the severe impact of the penalty on Mr Ferguson and his family I have not been persuaded that the

Stewards were in error in imposing the length of disqualification which they did in all of the circumstances of this particular case. The Stewards were duty bound to evaluate all of the relevant considerations. Amongst other things they were required to weigh up a wide range of relevant factors including the circumstances of the presentation, the background to the horse's history, the conduct of Mr Ferguson at the inquiry, the financial and other personal circumstances of the appellant, the appellant's past record, the impact on the industry and the need for deterrence. I am not persuaded that there is anything untoward in the way the Stewards evaluated these factors. I note the Stewards concluded that the high level of the prohibited substance '*... would justify a starting point higher than usual ...*'. Such a conclusion is warranted. The mitigating factors combined to reduce the penalty which was otherwise appropriate to one of six months disqualification.

I am not persuaded that the Stewards have fallen into any error as to the penalty. As I am satisfied that the penalty is appropriate I would dismiss the appeal as to penalty as well as conviction.



**DAN MOSSENSON, CHAIRPERSON**



**THE RACING PENALTIES APPEAL TRIBUNAL**

**REASONS FOR DETERMINATION OF MS K FARLEY**  
**(MEMBER)**

**APPELLANT:** BRIAN COLIN FERGUSON

**APPLICATION NO:** A30/08/698

**PANEL:** MR D MOSSENSON (CHAIRPERSON)  
MS K FARLEY  
MR W CHESNUTT

**DATE OF HEARING:** 2 December 2008

**DATE OF DETERMINATION:** 17 February 2009

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IN THE MATTER OF an appeal by Mr Brian Colin FERGUSON against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 30 October 2008 imposing a six month disqualification for breach of Rule 190(2) of the Rules of Harness Racing.

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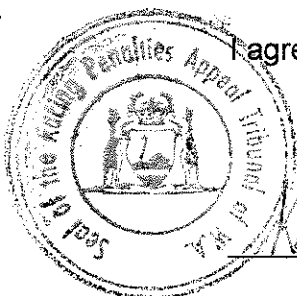
Mr B C Ferguson appeared in person.

Mr J Zucal represented the Racing and Wagering Western Australia Stewards of Harness Racing.

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I have read the draft reasons of Mr D Mossenson, Chairperson.

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



*Karen Farley*

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**KAREN FARLEY, MEMBER**

**THE RACING PENALTIES APPEAL TRIBUNAL**

**REASONS FOR DETERMINATION OF MR W CHESNUTT**  
**(MEMBER)**

**APPELLANT:** BRIAN COLIN FERGUSON

**APPLICATION NO:** A30/08/698

**PANEL:** MR D MOSSENSON (CHAIRPERSON)  
MS K FARLEY  
MR W CHESNUTT

**DATE OF HEARING:** 2 December 2008

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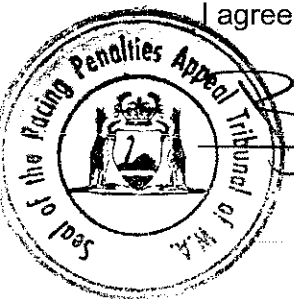
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**WILLIAM CHESNUTT, MEMBER**