APPEAL NO. 853

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT:	**MS JULIE ANNE MITCHELL**
APPLICATION NO:	**22/1704**
PANEL:	**MR ROBERT NASH (PRESIDING MEMBER)** **MR ANDREW E MONISSE (MEMBER)** **MS BRENDA ROBBINS (MEMBER)**
DATE OF HEARING:	**6 MAY 2022**
DATE OF DETERMINATION:	**22 JULY 2022**

IN THE MATTER OF an appeal by JULIE ANNE MITCHELL against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing imposing a $6,000 fine for breach of Rule AR 240(2) of the Rules of Thoroughbred Racing

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Ms Mitchell self-represented.

Mr Denis Borovica represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Summary

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

_____**ROBERT NASH, PRESIDING MEMBER**

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Summary

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

Appeal Overview

1. Julie Anne Mitchell ("Ms Mitchell" or "the Appellant") is an RWWA Licensed Trainer in the WA Thoroughbred Racing Industry.

2. Ms Mitchell has appealed against the penalty imposed by the RWWA Stewards on 18 March 2022 in which they imposed a $6,000 fine on her having found that she breached AR 240(2) of the Rules by, as the trainer of the horse, GRINNING RUPERT ('the Horse'), presented the

Horse to race at Ascot on 4 December 2021, with a prohibited substance, namely Meloxicam, being detected in a post mortem 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. Meloxicam is a Prohibited List B substance under the Rules.

5. By her notice of appeal dated 29 March 2022, as clarified at the outset of the hearing of the appeal, Ms Mitchell contends that the fine of $6,000 imposed on her was manifestly excessive. She does not assert any specific legal or factual error on the part of the Stewards.

6. In essence, Ms Mitchell contends that penalty was manifestly excessive, given:

   a) she is 58 years of age;

   b) she has spent her lifetime in the industry and has a previous unblemished record; and

   c) she has taken measures to improve the standard of integrity of her stable's procedures so as to eliminate future risk of future environmental contamination.

7. In an undated handwritten note sent by Ms Mitchell to the Stewards which was submitted with her notice of appeal to this Tribunal, she contended that given her unblemished record in the industry the penalty should have been a $3,000 fine and a 12 month good behaviour bond.

Background

8. Ms Mitchell is 58 years of age. She has had a lifetime involvement in the Racing and Breeding industry. She has an unblemished record.

9. Ms Mitchell has been a trainer for approximately 6 or 7 years, and prior to that she spent about 20 years as a track work rider. She is a hobby trainer, and as at March 2022 she had four horses in training. She still primarily earns income from strapping and doing track work for other trainers. She does not have employment outside of the racing industry.

10. She was the trainer of the Horse, GRINNING RUPERT, a gelding, when he raced at Ascot in Race 1 on 4 December 2021 ('the Race'). She'd had the Horse for about 2 years from when he was a weanling.

11. During the Race, the Horse suffered a catastrophic fracture to the mid shaft of the near hind tibia for which there is no viable treatment.

12. As a result of the fracture, the Horse was euthanised at the track.

13. Samples of urine were taken from the deceased Horse and were analysed by RASL and the ChemCentre.

Inquiry

14. The Stewards Inquiry was convened on 14 March 2022.

15. At the inquiry, the results of the ChemCentre analysis were produced and showed a Meloxicam level in the Horse of 86 ng/ml, being substantially above the screening limit of 10 ng/ml. RASL issued a confirming report of the presence of Meloxicam. Ms Mitchell accepted the analysts' reports (T13).

16. Dr McMullen, RWWA Veterinarian, gave evidence to the Stewards Inquiry that Meloxicam is a non-steroidal anti-inflammatory drug and therapeutic medication. It acts on the mammalian musculoskeletal system as an anti-inflammatory and analgesic agent, and is therefore a prohibited substance under Part 2, Division 1-Prohibited List B of the Rules. There is a screening limit of 10 ng/ml, but there is no threshold limit in the Rules. It is a prescription medication.

17. Dr McMullen stated that if a horse has an underlying concern, Meloxicam in the system has the ability to normalise a horse's performance by reducing the inflammatory component or providing a level of analgesia (T31), and said it has the ability to benefit a horse's performance if the horse has a musculoskeletal issue (T32). The level found in the Horse was, according to Dr McMullen, about 3 to 4 times the minimum required for a therapeutic effect (T33). Dr McMullen stated that the effect of the Meloxicam in the Horse's system may have compromised Ms Mitchell's capacity to make an assessment of the Horse pre-race in terms of its suitability/ fitness to race, by masking underlying symptoms (T33/34).

18. Dr McMullen gave evidence that race horses can develop stress fractures in the course of training and if left undetected, can result in catastrophic fracture (T41). She said that where a horse is receiving anti-inflammatory medication, that has the potential to mask signs of lameness arising from stress fractures (T43/44). She agreed that can pose a welfare risk for both horse and rider (T45).

19. Ms Mitchell did not challenge any of the evidence given by Dr McMullen at the Steward's hearing.

20. Mr Criddle, Senior Investigative Steward, together with Dr McMullen, attended at Ms Mitchell's Ascot stables on 10 February 2022. During the visit, they inspected the medical journal kept at Ms Mitchell's stables, and noted that there was no entry that the Horse was being medicated with Meloxicam, although a tub of oral paste was located in the medication fridge. Ms Mitchell advised the investigators during 10 February 2022 inspection, that she had not given the Horse, GRINNING RUPERT, Meloxicam for approximately 8 months. Ms Mitchell told investigators that she administered all treatments to her horses, did not believe there had been a mistake in administering medication to the Horse, and was not at the time of the inspection able to explain the presence of Meloxicam in the Horse's post mortem urine sample. She did not indicate to the investigators during their visit, that a foal in her stable called Angus was being treated with Meloxicam.

21. There was evidence in the form of entries in the medical journal that the foal, Angus, was receiving Meloxicam in October 2021. Ms Mitchell told the Stewards Inquiry that continued into November 2021.

22. At the hearing before the Stewards on 14 March 2022, Ms Mitchell raised the issue of a potential a cross-contamination in the stable environment resulting in the Horse receiving Meloxicam that was being used for the foal, Angus. The foal was at the stables until 3 December 2021.

23. In relation to the issue of possible cross-contamination, Dr McMullen gave evidence that it was a possibility and could not be dismissed, but considered the potential of it resulting in a 86 ng/ml level to be an 'outside possibility' (T36/37).

24. Dr McMullen said that there had been no prior positive results for Meloxicam found in urine in WA (T37).

25. After completing the Inquiry phase, the Stewards determined to charge Ms Mitchell with a breach of Rule AR 240(2) of the Rules. The particulars of the charge were that Ms Mitchell, being a licensed trainer of the Horse, GRINNING RUPERT, presented the Horse to race at Race 1 at Ascot on 4 December 2021 whilst the Horse had a prohibited substance in its system, namely Meloxicam, which substance was detected in a post mortem urine sample taken from the Horse.

26. Ms Mitchell immediately pleaded guilty to the charge.

27. Ms Mitchell provided the following further information in the course of her plea in mitigation:

    a. she had 4 horses in training at the time of the hearing before the Stewards;

    b. the horse racing industry was her only source of income, which included also doing strapping and track work riding for other trainers;

    c. the racing industry was both her life and livelihood;

    d. she had a mortgage over her home;

    e. she had had breast cancer when she was 45 years old which resulted in her lymph glands being removed causing her to suffer from lymphedema;

    f. she was given 10 years to live, but has lived another 13 to 14 years and takes each day as a blessing;

    g. her horses are part of her therapy, keeping her well; and

    h. she agreed that the small number of horses she had in training made her a hobby trainer and has had limited success.

28. During the hearing the Stewards noted that they had not previously had a positive test in respect of Meloxicam, and had to consider the seriousness of Ms Mitchell's offending by reference to other cases where similar types of substances had been detected in post-race samples, such as Phenylbutazone. The Stewards observed that the range for such offences seemed to be a fine of between $3,000 and $6,000, and indicated that more serious penalties such as suspensions or disqualifications tended to be reserved for more serious circumstances or substances.

29. The Stewards referred to a similar case of trainer Robert Matthews, who had pleaded guilty and received a fine of $5,000 when his horse, Call Me Princess, was euthanised after a catastrophic fracture and was found to have Phenylbutazone in its system. Mr Matthews gave

evidence of having administered his horse with 'Bute' and having made a mistake in failing to withdraw the horse after the date of the trials changed due to bad weather.

30. Ms Mitchell made the submission that Phenylbutazone was a stronger substance than Meloxicam, which had been the evidence of Dr Mullins. The Stewards agreed with that submission.

31. Ms Mitchell submitted that the Stewards should impose a fine. She asked that they have regard to her integrity and honesty and that she sought to do the best for racing.

32. The Chairman of Stewards made the comment at the end of the hearing that Ms Mitchell had 'handled herself well before [them]' during the hearing.

Stewards' Determination

33. By letter dated 18 March 2022 sent by the Stewards to Ms Mitchell, the Stewards informed Ms Mitchell that the panel of Stewards had unanimously determined to impose a fine of $6,000 on her, disqualified the Horse from the race, and advised of her right to appeal to the Tribunal. The letter was accompanied by the Stewards' reasons for determination.

34. The Stewards' reasons were set out over four pages.

35. By their reasons the Stewards noted that they were required to consider a broad range of matters, including Ms Mitchell's personal circumstances, the circumstances of the offence, the broader interests of the racing industry, animal and rider welfare, past precedents, and the seriousness of the offence in the context of the racing industry. In particular, the Stewards noted the following mitigating matters:

    a. that Ms Mitchell was a long-time participant in the industry;

    b. that she had an unblemished record;

    c. that her life and livelihood revolve around the racing industry; and

    d. that she had pleaded guilty.

36. The Stewards stated that they considered the offending a serious matter particularly given that the prohibited substance was found in the Horse after it had suffered a catastrophic injury resulting in euthanasia, where the nature of the substance found was to relieve pain and inflammation which had the potential to mask signs of lameness and allow a horse to travel more freely than it otherwise would.

37. The Stewards made it clear that they were not suggesting that there was an established causal link between the catastrophic injury and the presence of the Meloxicam.

38. In their reasons the Stewards noted:

    a. the level of Meloxicam, being 86 ng/ml compared to the screening limit of 10 ng/ml;

    b. that given the level found, Dr McMullen had opined that it must have been received into the Horse's system between 24 to 48 hours prior to the race;

    c. there was evidence that the Horse had been showing signs of discomfort in the period prior to the race that had resulted in Ms Mitchell engaging a chiropractor and would have raised concerns about its condition;

d. Dr McMullen had given evidence that the nature of the catastrophic fracture was such that it was not spontaneous but the result of bone reaction to cyclical loading such that the Horse would likely have shown some level of lameness beforehand, with the potential for Meloxicam to mask the signs of lameness both prior to and during the race;

e. that a dangerous situation is created by a horse running whilst medicated with such masking medication and poses a risk to both horse and rider;

f. the presence of Meloxicam in the Horse in circumstances where it had suffered a catastrophic injury had the strong potential to reflect negatively on the racing industry;

g. that the industry was coming under increasing scrutiny and the detection of such substances in such circumstances risked both the future of the industry to sustainably operate financially and from a social acceptance standpoint;

h. the public spectre of a horse having to be euthanised at Ascot and later found to have a prohibited therapeutic substance in its system; and

i. it was necessary for the penalty imposed to not only provide specific deterrence but also act as a general deterrence.

39. The suggestion by Ms Mitchell that the Horse may have ingested the Meloxicam as a result of cross-contamination arising from treatment of the foal, Angus, was first raised during the Stewards inquiry and had not been raised when the investigators were at Ms Mitchell's property. The Stewards did not accept the cross-contamination theory as a plausible explanation for the reasons set out in paragraphs 10 to 14 of their reasons.

40. The Stewards were not satisfied that any plausible explanation for the presence of the prohibited substance had been established by Ms Mitchell. I observe that it is not an element of a presentation offence that the manner in which a horse comes to have a prohibited substance in its system must be established. In fact, it is common that the cause of the presence of the prohibited substance will remain unknown. If a trainer can satisfy the Stewards of the reason for the presence of a prohibited substance, it may have the potential to provide additional mitigation if it is shown to have occurred innocently. However, the failure of a trainer to provide an explanation that can satisfy the Stewards cannot be an aggravating factor nor does it reduce the level of mitigation that would otherwise be accorded in the case.

41. The Stewards referred to a number of decisions that have emphasised the serious impact prohibited substances found in race horses has on public confidence in the integrity of the racing industry, including the decision of this Tribunal in *Nicholson [1994] Racing Appeals Reports 945,* and what was said by Sir Thomas Bingham MR in the Agha Khan Case [*R v Disciplinary Committee of Jockey Club; Ex Parte Aga Khan [1993] 1 WLR 909*] which was referred to with approval by the lead judgment of Anderson and Owen JJ in *Harper v Racing Penalties Appeal Tribunal of Western Australia & Anor (1995) 12 WAR 337* (in which a five (5) member bench of the Full Court sat).

42. As the Stewards observed in this case, the issue of public confidence in the racing industry is not confined to the need for the betting public to have confidence that races are conducted fairly and honestly, but extends to being satisfied that the industry is maintaining high standards of animal welfare, and those responsible for the regulation of the industry are taking necessary measures to safeguard the welfare not only of the riders but also of the horses.

43. In considering penalty, the Stewards had regard to various past cases where the range of penalties imposed for horses found to have been presented with therapeutic substances to be fines ranging between $3,000 and $6,000. The lower end of the range was usually applied where horses were competing in trials and no prize money or wagering was involved. Where offenders did not have good antecedents, or the circumstances of the case were considered particularly serious, disqualifications have issued.

44. The Stewards referred to the case of the trainer, Robert Matthews, who had received a $5,000 fine. As noted above, that case involved a high level of Phenylbutazone, which is a stronger substance than Meloxicam. The Stewards considered that case was, however, distinguishable from Ms Mitchell's in that Mr Matthew's horse was running in a trial, not a race, and Mr Matthews had been able to provide a satisfactory explanation for the errors he had made resulting in the high level which explanation was supported by Mr Matthews treatment logbook records.

45. The Stewards considered that Ms Mitchell's case did not warrant disqualification, but considered that in all the circumstances the appropriate penalty was a $6,000 fine.

Appeal

46. In the appeal, Ms Mitchell contends that the imposition of a $6,000 fine was manifestly excessive. She argues that the Stewards should have imposed a $3,000 fine in combination with a good behaviour bond. She emphasised that Meloxicam was a weaker substance than Phenylbutazone, and that the Stewards should have imposed a lesser penalty than that imposed in cases where Phenylbutazone was present. Ms Mitchell also emphasised to the Tribunal that she had an unblemished record, she was a person of integrity, that she had made a substantial contribution over many years to the industry, and that she had changed the way things were done at her stables.

47. Mr Borovica, representing the Stewards, emphasised that this was a serious presentation case. He noted that the Horse suffered a catastrophic fracture and was euthanised in front of a public race going audience, although he was careful not to suggest the presence of the prohibited substance was established to be a cause of the catastrophic fracture. He argued the case was distinguishable from the Matthews case in that the Horse in this case was racing at Ascot for prize money with wagers placed on it by the betting public, whereas Mr Matthews' horse was running at a trial.

48. During the course of the appeal hearing, Mr Borovica read from a letter from an anonymous author in which the author expressed a view as to the impact of the incident on the image of racing. Having listened to the letter being read, I did not find it helpful, particularly given the author was anonymised. Accordingly, I consider the letter to be of no evidential weight and have disregarded it.

49. 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.

50. 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:

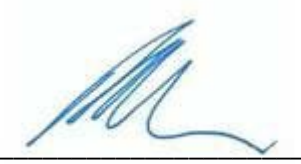
> *'…the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied 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'*

51. 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.

52. 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 relevant consideration, is it open for this Tribunal to reconsider the Stewards' determination of the penalty imposed.

53. Ms Mitchell was articulate and presented her case with clarity. The racing industry is her life and she has a long-standing record as an honest and dedicated participant. I have considerable sympathy for her and acknowledge that the fine of $6,000 will be a substantial penalty for her to bear. That being said, the decision of the Stewards was carefully considered and was the subject of comprehensive reasons for decision. There is a presumption in favour of its correctness that can only be overcome if it is shown to be manifestly excessive. In my view, the penalty imposed was probably at the upper end of the range, but it has not been shown to be demonstrably wrong or manifestly excessive.

54. Accordingly, in my opinion the appeal should be dismissed.



_____ROBERT NASH, PRESIDING MEMBER

APPEAL NO. 853

RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR THE DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT:	**JULIE ANNE MITCHELL**
APPLICATION NO:	**22/1704**
PANEL:	**MR ROBERT NASH (PRESIDING MEMBER)** **MR ANDREW E MONISSE (MEMBER)** **MS BRENDA ROBBINS (MEMBER)**
DATE OF HEARING:	**6 MAY 2022**
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IN THE MATTER OF an appeal by JULIE ANNE MITCHELL against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing imposing a $6,000 fine for breach of Rule AR 240(2) of the Rules of Thoroughbred Racing

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Ms Mitchell self-represented.

Mr Denis Borovica represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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1. This is an appeal by a licensed thoroughbred trainer Ms Julie Anne Mitchell ("the Appellant") against a penalty of a $6,000 fine. This penalty was imposed by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing ("the Stewards") for breach of Rule AR 240(2) of the RWWA *Rules of Thoroughbred Racing* ("the Rules").

The Inquiry

2. On 4 December 2021 a gelding GRINNING RUPERT ("the horse") competed in Race 1 at Ascot Racecourse. The horse finished unplaced. After it had passed the finishing post the horse suffered a catastrophic injury being a complete fracture of the mid-shaft of the near-hind tibia. While it was still on the track it had to be euthanised in the presence of the Ascot crowd.

3. On 14 March 2022, the Stewards conducted an inquiry ("the inquiry") into a post-race urine sample taken from the horse on 4 December 2021. The analysis of this sample detected Meloxicam, a therapeutic substance, at a level of 86 nanograms/ml. At all material times the Appellant was the trainer of the horse.

4. After hearing evidence, the Stewards charged the Appellant with contravening Rule AR 240(2) of the Rules. That rule relevantly provides:

> *"… 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."*

5. Under the Rules Meloxicam is a prohibited substance if it is detected in a horse greater than 10 nanograms/ml. The screening limit for that substance is 10 nanograms/ml.

6. The Stewards charged the Appellant with breaching Rule AR 240(2) with particulars that:

> *"… you, Mrs Mitchell were the licensed trainer of GRINNING RUPERT when it was brought to race at Ascot on 4 December 2021, where it raced in Race 1, with the prohibited substance meloxicam, being a prohibited List B substance, being detected in a post mortem urine sample taken from that gelding".*

7. The Appellant advised the Stewards that she understood the charge and pleaded guilty to it.

<u>The Investigation</u>

8. During the inquiry, Senior Investigative Steward Paul Criddle gave evidence that on 10 February 2022, he and RWWA veterinarian Dr Caroline McMullen attended the Appellant's Ascot stables and Belmont residential address to investigate the elevated reading of Meloxicam in the sample taken from the horse. In being questioned about it, the Appellant was unable to explain the reading, but was able to inform them that she:

   a) uses the tub of Meloxicam that was located in her medications fridge as a general medication for several horses;

   b) had not used Meloxicam on the horse for approximately 8 months; and

   c) administers all treatments to her horses and does not believe there was a mistake in administering meloxicam to the horse.

9. Mr Criddle examined the Appellant's medical register of treatments to her horse. There were no entries in it of Meloxicam being given to the horse, nor were there any entries in it of Meloxlicam being given to her other horses in the week before the 4 December 2021 race. He also noted that the tub of Meloxicam located in the fridge was dispensed after that day.

10. Mr Criddle also informed the Stewards in the inquiry on reports given by the jockeys on the performance of the horse in its three trials and then its first race prior to the one on 4 December 2021. It was only with the horse's first trial on 28 September 2021 that the jockey for it reported to the Appellant an issue of lameness when she stated that the horse had *"felt tight behind, especially on the off-side, up high".*

The expert veterinarian evidence

11. Veterinarian Dr Caroline McMullen gave unchallenged expert evidence in the inquiry. regarding the nature of the prohibited substance in question. She stated (Inquiry transcript, p. 31):

> *"McMullen: So, Meloxicam is a non-steroidal anti-inflammatory drug and it is a therapeutic medication. It's registered for use in horses and other species as an anti-inflammatory and as an analgesic agent for the management of both acute and chronic musculosketal pain and inflammation So, as an anti-inflammatory and analgesic agent it obviously has the ability to influence an injury or illness, sub-clinical or otherwise, when a horse is presented to compete."*
>
> *Chairman: When you say "influence", in what way, what does it do?*
>
> *McMullen: [I]f a horse had an underlying concern, it would at least have the ability to normalise that horse's performance. Specifically in the case of Meloxicam, by attempting to reduce the inflammatory component or provide a level of analgesia for the benefit of that performance."*

12. At the inquiry the Appellant gave evidence that included that she did not administer the Meloxicam to the horse found in the urine sample taken from it. To explain how the elevated reading of Meloxicam in the horse occurred, the Appellant raised for the first time with the Stewards that it could have been due to environmental contamination from her using Meloxicam on a foal named RUPERT in its recovery from an operation.

13. After considering the evidence on that contamination point, Dr McMullen considered that explanation to be *"fairly unlikely, or highly unlikely"* (Inquiry transcript, p. 57), having earlier stated that there would not be enough Meloxicam in the environmental phase to get a reading above the 10 nanograms/ml screening limit for that drug (Inquiry transcript, p 56). Notwithstanding that evidence the Appellant has maintained in her initial grounds of appeal (stated below) that the elevated reading for Meloxicam occurred due to environmental contamination.

14. As to the cause of the catastrophic injury to the horse, Dr McMullen did not state that the level of Meloxicam in the horse caused it. However Dr McMullen gave the following evidence:

> *"Chairman: [I]s there likely to have been a pre-existing or underlying issue that caused or contributed to his fracture?*
>
> *McMullen: Yes. In my opinion, it is well documented in the literature that these fractures are reported at certain …….sites, if you like, in the long bones, in the tibia there's 2 or 3 locations and they follow very predictable course, they have characteristic configuration and so they are not considered spontaneous, which is one of the big misnomers of them. They don't "just happen", there's always some underlying pathology whereby that stress injury's bone remodelling process becomes overwhelmed and unfortunately results in that catastrophic fracture…They're also frequently reported at slower speeds, we see them on training tracks, we see them on all sorts of surfaces, so we see them on grass, we see them on, you know viscoride, we see them on sand tracks around the world." (Inquiry transcript, p. 42)*
>
> *Chairman: Now when you say a horse will have, or will be likely to have these underlying issues to predispose it to this sort of a fracture, do those, if its (sic) at that stage, is that something that's detectable?"*

McMullen: So, stress fractures are a great mimicker and they can present very, much of a continual, and you can have very mild insidious type lameness to avoid the lameness which is far more readily recognised. So they can be challenging to diagnose and they often present with a brief or intermittent lameness. But, as I reported they almost (sic) exclusively seen in the sort of 2 and, particularly the 2 year old and into the three year old racehorse population." (*Inquiry transcript, pp. 42 and 43)*

"Chairman: And I think, if I understood you correctly earlier, given that the level of the Meloxicam here was 3 to 4 times higher than where it was considered to be having a, an action, or a therapeutic effect level, then it would be having that potential to mask the lameness or the pain on the day of the race. Is that right?

McMullen: Yes. So, I think that we can establish it was of some therapeutic benefit. Obviously, of what benefit was anti-inflammatory and what was analgesic, we would expect the analgesic to be at the higher dose range and the anti-inflammatory would persist into the lower dose range, or loser (sic) dose level. I think importantly, for me, that at some stage this horse may well have been, had a much higher level, depending on how it established it in its system and so that may influence the decisions to leading into the race as to whether that horse was suitable to present to race on that day.

Chairman: Alright. And when horses race with this level of this type of substance in there systems on race day, dose that represent as any form of welfare risk to horse or rider?

McMullen: Well, I think the premise is that the understanding of everybody involved with that horse in the day, making judgements on that horse's suitability to race, is that the horse is presenting free of prohibited substance, so what you see is what you get, so that comes down from officials on a racecourse, veterinarians, the jockey and obviously the trainer's decision to put the horse into the race. So, yes, you know, there's, we can't assume even at the dose at any, you know, that it had no risk to the horse being in the system, so yes, their welfare is also at risk at that time." (Inquiry transcript pp. 44 to 45)

<u>The Appellant's submissions on penalty</u>

15. The Appellant in the inquiry stated she was a hobby trainer. She also made submissions regarding the penalty to be imposed on her which included that: she was currently training four horses; her other sources of income were from trackwork riding and strapping; she had a mortgage on her home with no other financial commitments; a fine would be the appropriate penalty in her case; and she could pay a fine but depending on how much it is, may have to pay it in instalments.

The Stewards' decision

16. In a letter dated 18 March 2022 the Stewards informed the Appellant of their penalty for her breach of Rule AR240(2) of a $6,000 fine and their reasons for imposing this penalty.

17. The Stewards in their reasons stated they took into account the Appellant's mitigating circumstances when deciding that penalty. These circumstances included her length of involvement in the racing industry of being licensed with RWWA *"for approximately 6, 7 years as a trainer and probably 20 years doing the trackwork riding"* and her previously unblemished record.

The Appellant's grounds of appeal

18. The Appellant filed a *Notice of Appeal* dated 29 March 2022 against the penalty the Stewards imposed on her for her breach of Rule AR240(2). The grounds of appeal for it were:

> *"AT 58 YEARS OLD.*
> *- my lifetime involvement in the Racing & Breeding industries*
> *- my previous unblemished Record*
> *- I have reassessed my stables procedures to a higher standard of Integrity and professionalism my stable represents and conducted a review of my stable procedures to eliminate future risk to ensure this does not happen again thru enviromental (sic) Contamination."*

19. On 6 May 2022 at the hearing of her appeal this Tribunal permitted the Appellant to amend her grounds of appeal to be that her penalty of a $6,000 fine was manifestly excessive. Oral submissions were then made by both parties to the appeal as to the merits of that ground.

The manifestly excessive ground of appeal

20. The Appellant's ground of appeal is that the penalty the Stewards imposed on her was so excessive as to manifest an error in the exercise of their discretion. If the Stewards have made such an error of principle in arriving at their penalty, then this Tribunal can vary it, and if there is no error, confirm the penalty (section 17(9)(c) of the *Racing Penalties (Appeals) Act 1990*).

21. The error that the Appellant claims the Stewards made with its penalty is an implied error in that it requires an examination of all the relevant factual circumstances of a matter to determine whether the penalty was manifestly excessive. In this matter the circumstances are those concerning both the breach of the Rules in question and those personal to the trainer guilty of that breach (applying *Chan v R* (1989) 38 A Crim R 337, 342).

22. Where they exist, similar past decisions, especially by this Tribunal and to a lesser degree by the Stewards, can also generally assist in determining if the implied error was made. If the penalty imposed was within the range of penalties customarily observed for that particular type of breach of the Rules, then it may demonstrate that no implied error was made by the Stewards (again applying *Chan v R*, above).

23. The manifestly excessive penalty error can occur not only as to the amount of penalty that was imposed, but also as to the type of penalty that was imposed (*Dinsdale v R* (2000) 202 CLR 321, 325).

No error of principle demonstrated

24. For the following reasons I am of the view that the Appellant has not demonstrated that the $6,000 fine the Stewards imposed on her was manifestly excessive.

25. First, the circumstances of the Appellant's case have similarities with a previous case decided by the Stewards in 2015 of trainer Robert Matthews. The Stewards noted the following about *Matthews* in their reasons (at paragraph 18):

> *"We find the case of Robert Matthews, referred to in the inquiry to be of some guidance. In that instance he acknowledged putting the substance into the horse's feed following*

cancellation of trials as part of routine training practices, however with trials rescheduled the following day overlooked this fact and it proceeded to trial, sustained a catastrophic injury, was euthanised and was found to have high levels (40 times the screening limit) of phenylbutazone and its metabolite. In the circumstances of his error, it was not surprising the level was so high. Like you he did not describe this explanation until the inquiry however there was some reference to it within his logbook and the explanation accorded with the reported levels. There was no evidence of the horse having any prior condition and it was not trialling to clear it of any embargo. Although it was a trial and not a race as is the situation in your case, he was fined $5,000 after pleading guilty and it being his first offence after a long history of licensed involvement. His level of participation in racing at the time was commensurate with yours."

26. I agree with the Stewards' reasoning that the *Matthews* case is distinguishable and that it was necessary to impose a greater fine on the Appellant when they stated in their reasons (at paragraph 19) *"In your case the matter arises from a race and consequently has a broader public exposure."*

27. Second, the presence of a therapeutic substance like Meloxicam in a horse is indicative of a horse that was not fit to race without medicinal assistance. In such a case, and as I said in *Maynard*, Appeal No. 823 (at paragraph 33) which concerned the therapeutic substance Flunixen:

"[T]his raises welfare considerations not only for a horse that so races and its jockey, but for all the other participants in the same race. There can be the real potential for catastrophic consequences for all concerned when a horse races when the Rules prohibit it from doing so."

28. Third, the Stewards in their reasons stated that they could not safely establish a causal link between the horse's catastrophic injury and the presence of the Meloxicam at the level detected in it (at paragraph 17). However as to the seriousness of the presentation offence in this matter, I agree with their earlier statement in their reasons about it that (at paragraph 7):

"Whilst there is insufficient evidence to establish any form of causal link between the comparatively high levels of meloxicam present when having regard to the screening limit, it does vividly set out the seriousness of the matter as such circumstances have strong potential to reflect negatively on racing and the need to manifestly maintain high standards of animal welfare."

29. Consequently, what remains in this case is a horse which had just run a race involving the betting public being euthanised before a crowd at Ascot Racecourse. Further, that the same horse was later shown not to be free of a prohibited substance. From an animal welfare perspective alone, significant harm was at least then caused to the image of the racing industry in Western Australia by that type of death to one of its participating thoroughbred racehorses. At paragraph 9 of their reasons the Stewards made similar observations.

30. Given the above three matters, in my view a significant fine is the appropriate penalty for the harm caused to the integrity of racing in Western Australia resulting from all of the circumstances of the Appellant's presentation offence. Imposing such a penalty is consistent with the Criminal Law principle that offenders are generally punished for the harm that they cause. In my view the penalty that the Stewards imposed also takes into account the Appellant's personal circumstances.

Conclusion

31. For these reasons, I would dismiss the appeal.

A E Monisse **ANDREW E MONISSE, MEMBER**

APPEAL NO. 853

RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR THE DETERMINATION OF
MS BRENDA ROBBINS (MEMBER)

APPELLANT:	**MS JULIE ANNE MITCHELL**
APPLICATION NO:	**22/1704**
PANEL:	**MR ROBERT NASH (PRESIDING MEMBER)** **MR ANDREW E MONISSE (MEMBER)** **MS BRENDA ROBBINS (MEMBER)**
DATE OF HEARING:	**6 MAY 2022**
DATE OF DETERMINATION:	**22 JUNE MAY 202**

IN THE MATTER OF an appeal by JULIE ANNE MITCHELL against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing imposing a $6,000 fine for breach of Rule AR 240(2) of the Rules of Thoroughbred Racing

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Ms Mitchell self-represented.

Mr Denis Borovica represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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

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

B E Robbins
_____**BRENDA ROBBINS, MEMBER**

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