APPEAL – 624

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**BARRIE CARPENTER**
APPLICATION NO:	**A30/08/624**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR A E MONISSE (MEMBER)** **MR W J CHESNUTT (MEMBER)**
DATE OF HEARING:	**14 FEBRUARY 2005**
DATE OF DETERMINATION:	**8 JULY 2005**

IN THE MATTER OF an appeal by Barrie Carpenter against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 1 October 2004 imposing 6 months disqualification for breach of Rule 178 of the Australian Rules of Racing.

The appellant represented himself.

Mr W J Delaney appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Background

Mr Carpenter was the trainer of the 6 year old mare, DAWN TROOPER which was placed first in Race 6 at Bunbury on 28 December 2003. The Australian Racing Forensic Laboratory reported the presence of the prohibited substance Verapamil in the post-race urine sample taken from the horse. The detection of that substance in the reserve portion of the sample was confirmed by Racing Analytical Services.

On 9 March 2004 the Stewards opened an inquiry into the laboratory findings. The Veterinary Steward, Dr J Medd advised the inquiry as follows:

> *'Verapamil under 178B(1) acts on several body systems, primarily it has action on the cardio vascular system but can also have an action on the respiratory system the digestive system and uro-genital system. Under 178B(2) which gives you specific drug classes, Verapamil would fall under the class as an Antiangina agent, an antiarrhythmic agent, an antihypertensive and also a vasodilator so it would, it would fall under four of those categories in part two of that rule.'* (T7)

> *'No I couldn't find, in Australia, I couldn't find a horse product that contains Verapamil. I could find evidence of several different brand names of products, of human products, that contain Verapamil. As I said it's primarily, it's, it's a reasonably common drug in human medicine for treating cardiac heart disease in humans. I've, I think experimentally it's been used in horses on a research basis in horses, old horses with heart disease, they've used it experimentally to see if it, if it prolongs these horses lives, but I haven't found, any obvious use for it in a horse, apart from in an old horse with heart disease and there is no horse form of the drug that exists, there is no marketable form.'* (T8)

> *'It is, it is an S4 drug meaning that it is not available over the counter in a pharmacy, it is only available on prescription from a doctor.'* (T9)

When the inquiry resumed on 11 June 2004 Ms B Lonsdale of counsel was given permission by the Stewards to represent Mr Carpenter.

On 3 September 2004 at the continuation of the proceedings the Chairman of the inquiry laid a charge against Mr Carpenter in these terms:

> *'Mr Carpenter, Australian Rule of Racing 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. Mr Carpenter, after considering all the evidence tendered to this stage of the inquiry, Stewards are issuing a charge against you under the provisions of that rule with the specifics being, that as the trainer you brought DAWN TROOPER to Bunbury Racecourse on Sunday 28 December 2003 to race with the prohibited substance Verapamil being detected in the post-race urine sample taken from that mare.'* (T99)

Mr Carpenter pleaded not guilty. Subsequently, at the final sitting on 1 October 2004 the Chairman announced a guilty finding as follows:

> *' Mr Carpenter, we have considered all that has been placed before us at this inquiry. The submission that there was no suggestion that you failed to take proper precautions to prevent the administration really, in our view, has now (sic) relevance as we're unaware of the circumstances of the administration. What we do know is that in the lead up to the race DAWN TROOPER was under the control and supervision of yourself or your wife as your agent at all times. The evidence provided by Exhibit 15, that is the paper, must in our submission be treated with considerable caution in relation to the detection time of Verapamil. Mr, Dr Vines, sorry, as previously mentioned at the bottom of page 70 of the transcript stated, "well that's*

what we found and I mean I would stress that this is only, this is only one horse and one horse does not necessarily represent the equine population but it was quite noticeable that Verapamil could only be found for a very short space of time in that horse." We are, however, satisfied that Verapamil can only be detected for a few hours as evidence on page 69, but as to how many hours it can be detected for, we're unable to state. The fact that the pre-race blood sample was not available for testing, in our opinion, matters not. The Australian Racing Forensic Laboratory first advised us of the swab irregularity on the 4th of February 2004, by which time the blood sample no longer existed. This is entirely consistent with standard operating procedure for negative TCO2 samples. We are satisfied from the evidence presented at this inquiry that sample no. 1705871 was taken from DAWN TROOPER. We do not accept that Verapamil was inadvertently administered by the Veterinary Surgeon during the pre-race collection of blood for TCO2 testing. We are further satisfied that the sample was handled in accordance with protocol and that an appropriate chain of custody has been established. There has been no evidence to suggest that the testing procedure was incorrect. We're of the opinion that the provisions of Australian Rule of Racing 178D were complied with. Accordingly, we find that the prohibited substance Verapamil was properly detected in the sample taken from DAWN TROOPER after it raced on the 28th of December 2003. As the trainer of DAWN TROOPER, Mr Carpenter, you presented the mare to race on that day and were in charge of her in the lead up to her race, therefore we find the charge sustained as we find you guilty. Now at this stage, we are prepared to receive submission on penalty.' (T115 & 116)

Ms Lonsdale responded as follows:

'The first thing that I'd say is that the ruling of Australian Rule of Racing 178 would appear to make the imposition of a penalty on, for example, a trainer discretionary and we say that because of the use of the word 'may'. ....The last part of Rule 178 says that "in any race, the trainer or any other person who is in charge of such horse at any relevant time, may be punished." And we say that the inclusion of the word 'may' in the Rules means that the Rules do contemplate cases where it is not appropriate to impose punishment on the trainer and the present case we say is one such case. We say that because there was no evidence that the substance was either administered by Mr Carpenter or that he knew or could have known of any administration, there's just simply no evidence of that. And there is no evidence or indeed any allegation that Mr Carpenter failed to take reasonable precautions to prevent an administration, particularly it's not been demonstrated that there was any inadequacy of his feeding regime which would have contributed to the, to the finding of Verapamil in the system. There's been no suggestion that his security was not proper. There's no suggestion that any other person either he and Mrs Carpenter had access to the horse at the time that substance could have been administered and indeed, there's no, there's no, nothing has been put to Mrs Carpenter to suggest that she was responsible or that she had failed to take proper precautions. A search warrant, actually I'm not sure that a search warrant was executed, but certainly the Carpenter's home was searched and there was no suggestion or evidence that they were possessed of any drug which would have afforded them an opportunity to administer the drug. Of course, that's not conclusive evidence that they didn't they didn't have at some stage access to that drug but it's a piece of circumstantial evidence which we say that Mr Chairman and the Stewards, you can take into account. There's been no suggestion that there was anything unusual in the betting

on DAWN TROOPER on the day in question, who would suggest that anyone knew that there was a drug administered that would give the horse some advantage. There's just no evidence of that and, of course, if there was evidence of a run on DAWN TROOPER then that would be a matter of some significant concern to the Stewards. Now, the fact that the Rules actually describe different offences of, that is actual administration which is Rule 175(h) and failing to take reasonable precautions which is Rule 177B, does we say, suggest that the Rules contemplate that there are different levels of culpability. Otherwise, the Rules would simply have the one offence which is the offence which, with which Mr Carpenter has been charged with. So, to successfully prosecute Mr Carpenter under one of the other Rules, the Stewards would have had to have shown that there was some guilty conduct on his part. That is, that they must prove that he actually performed the administration or had some knowledge of it, or by his conduct in failing to observe proper security or a proper feeding regime, that that conduct constituted a failure to take reasonable precautions and was thereby responsible for the administration. In those sorts of case we say a person's culpability is significantly increased because there's an element if you like of mens raya (sic) or a guilty mind or some, some conduct which the Stewards can point to, to say that the person's mind has been turned to these issues. A charge under this Rule, Rule 178, requires no such proof of guilty conduct and indeed, in this case, the Stewards have not, it would seen (sic), sought to have proved any such conduct. It's submitted that for those reasons alone, this is an appropriate case for the Stewards to exercise the discretion which is given to them by the inclusion of the word 'may' in Rule 178 to impose no penalty on Mr Carpenter. Alternatively, if the Stewards thought that that wasn't appropriate for the same reasons we say, we would say only a modest penalty is appropriate. It is, it was accepted in the proceedings on the 19th of February 1999 that Mr Carpenter was a person of good character who's contributed a lot to the community in which he's lived. Although he has a record, he's never been the subject of a suspension or disqualification. He had been training for 32 years before being convicted for an offence in January 1999. And just may I add these comments about Mr Carpenter's contribution to racing over the years. He was at one stage the president of the Katanning Race Club and held that position for twenty years. I understand that the Katanning Race Club closed in the late 80's which is unfortunate but nevertheless in twenty years, he contributed significantly to racing. He sat on the Board of the Great Southern Racing Club for eight or nine years, he thinks in the 70's. He's been training horses since he was, he was fourteen. He's ridden in races as an approved, as an approved rider. So for a man of his Mr Carpenter's age, his record we'd say on the whole, is a good one and in those circumstances together with the actual circumstances which are at mind, it is our submission that either no penalty or a modest penalty is the appropriate one in the present case.' (T116 - 119)

The following exchange then took place between the Chairman and Mr Carpenter:

'CHAIRMAN *Mr Carpenter, could you just clarify your personal circumstances, like do you have an income outside racing at all, or do you, are you purely a hobby trainer or what's your, what's your personal circumstances?*

CARPENTER *I sold my farm last year or eighteen months' ago and I've just, just fiddling around with a few horses as something to wind*

down on that's all. I've got fifty acres at Capel which cost me a lot of money, just purely and simply to have a little hobby ranch.

CHAIRMAN *Okay, so you're semi-retired?*

CARPENTER *Yes.'* (T119)

The Chairman of the inquiry subsequently announced the Stewards' finding on penalty as follows:

> *'Mr Carpenter, we've given careful consideration to the submission made on your behalf here this morning. The Principal Racing Authority has maintained a policy of racing free of prohibited substances for a considerable period of time. It has gone to great lengths through the publication of this Racing Calendar to keep trainers advised in this regard. You've been licensed as a trainer with the Principal Racing Authority as RWWA or the Western Australian Turf Club for many years. You should be well aware of your obligations as a trainer to present your horses for racing free of prohibited substances. This industry depends on the level of support it receives from the racing public to ensure it's (sic) ongoing success. That support is dependent on the integrity of the industry as a whole and the integrity of its individual participants. Any undermining of that support through a loss of confidence could have serious consequences. It is imperative that racing be seen as being conducted fairly. A breech (sic) of the prohibited substance rule is considered a serious breech (sic). There has not been a previous case determined in Western Australia involving this particular prohibited substance. The evidence of Dr Medd was that Verapamil is a schedule 4 human preparation but nobody's given it use in horse racing. It is a substance with the potential to affect performance. You have a record of one previous conviction under the prohibited substances rules. In determining penalty we are mindful of your personal circumstances and standing in the industry. We are conscious of the effects that any penalty can have, however given your previous record, we do not consider that you should be given any reduction from what we believe to be the appropriate penalty. We are of the opinion that given the circumstances of this particular offence, the appropriate penalty is a six month disqualification.'* (T120-121)

DAWN TROOPER was disqualified from the race pursuant to AR177.

Mr Carpenter lodged a notice of appeal on 14 October 2004 and applied for a stay of proceedings which was refused. The grounds of appeal are:

> *'A.* *CONVICTION – The decision to convict was unsafe and unsound and not open on the evidence.*
>
> *B.* *PENALTY – The penalty imposed was manifestly excessive in all the circumstances of the case.'*

The appeal hearing

At the outset of proceedings, the appellant's wife, Mrs Carpenter made a number of general statements and asserted certain facts. As nothing was presented which went to the heart of

the issues for determination I will not comment further on the matters presented by Mrs Carpenter.

In support of the appeal, various parts of the transcript of the Stewards' inquiry were referred to and relied on by Mr Carpenter. This included the passage quoted above in which Ms Lonsdale addressed the penalty. A number of the features of the case were highlighted. In essence the argument presented for the appellant amounted to no more than an abridged version of the approach which had been adopted on Mr Carpenter's behalf at the Stewards' inquiry.

One of the issues raised was the refusal by the Stewards of the request made on behalf of Mr Carpenter to allow a separate testing of the sample. By letter dated 17 June 2004, Mr Carpenter's solicitors wrote to the Western Australian Turf Club in the following terms:

> *'We are instructed that Messrs Stenhouse and Vine revealed in their evidence that they have kept the remainder of the samples at their respective laboratories. We would be grateful if those samples, or portions of those samples, could be made available to our clients so that they can have independent tests conducted on them.'*

I will comment on this issue later.

Mr Delaney on behalf of the Stewards responded comprehensively and persuasively to the arguments raised. Amongst other things he asserted:

> *'It has often been said at proceedings before this Tribunal that very rarely if ever are Stewards able on inquiry to ascertain the true facts of a case of this nature. I just wish to make a few points here, however these were mostly covered in the handing down of the guilty finding from page 115 of the transcript. Mr Carpenter was responsible for presenting DAWN TROOPER to race at Bunbury on Sunday, 28 December 2003. The post race urine sample taken from the mare at 4 o'clock after she raced at 3.35 was found to contain the prohibited substance Verapamil. How do we know it was prohibited? Because Dr Medd said so at page seven and that clearly confirms that Verapamil is a prohibited substance. And it's important to remember that a prohibited substance only has to be detected, it doesn't have to be quantified. Now it's been contended that Verapamil can only be detected for two hours post administration and that the most likely means of administration was as a result of contamination by the staff who took the pre race blood sample from DAWN TROOPER at 2.45. The pre race sample was taken in accordance with the standard operating procedures. Documentation signed by the race day staff including Dr Trimmer, the veterinary surgeon, confirmed that they had bought no human medications containing prohibited substances to the racecourse. In addition, the documentation confirmed that clean gloves were worn prior to the sampling of each horse. The protocol was followed correctly. Therefore Stewards simply did not accept that the sample was contaminated at the time of pre race sampling. There had been no other issues relating to post race samples taken from horses which had been subjected to pre race sampling either before, during or since this Bunbury meeting. The proposition that the administration must have occurred within two hours pre race is, in our opinion, flawed as it was based on an incorrect interpretation of Dr Vine's evidence and exhibit 15, the paper referred to in his evidence. It is important to bear in mind that the administration study referred to*

in that paper only analysed urine samples obtained at 0, 2 24 hours post administration. With such a large time frame of 22 hours between the 2 hour and 24 hour samples, it would be extremely unsafe to draw any firm conclusions from this study. This point is made by Dr Vine at page 70: '...I would stress this is only, this is only one horse and one horse does not necessarily represent the equine population.' Dr Vine earlier at page 69 stated: '...Verapamil in fact as Verapamil persists for a very short space of time after it's administered, a matter of, well a few hours at most.' So whilst it's been acknowledged that Verapamil is detectable for a relatively short period of time post administration, we are unable to conclusively state for how long. We really don't know. The mare left the stables at 12.30, three and half hours prior to sampling and arrived on course, as Mr Carpenter stated today, two and half hours prior to its race.

Mr Carpenter has attempted to ridicule both laboratories. Both laboratories are NATA accredited. NATA means the National Association of Testing Authorities Australia. Mr and Mrs Carpenter both referred to ISO. Dr Vine at page 68 stated that he believed his laboratory was ISO accredited and conformed with their standards.

Mr Carpenter's taken issue with the length of time that it's taken for the analyst to report the finding of the Verapamil. I might add that this was not an issue during the inquiry and the time in the Stewards' submission is not overly long. The sample was taken on 28th December over a period containing a number of Public Holidays and the report was issued on 4th February.

As I said before, we simply do not know the true circumstances of this case. The Rules contemplate just such an occurrence by placing the onus on the trainer to prevent his horse to race free of prohibited substances and this simply did not occur. And that's the reason that Mr Carpenter was found guilty.

That's the submission on the conviction Mr Chairman.

This Tribunal as recently as the Wolfe case has stated that: 'Any breach of the rules involving prohibited substances, whether in the course of racing or trialling, is a very serious matter. There is the need to impose an appropriate punishment on the offender.' Going further: 'Over the years the Tribunal has on many occasions determined that it is appropriate for Stewards to impose periods of disqualification on trainers who have presented horses to race...' At page 120 and 121 of the transcript I have covered it at some length.

Mr Carpenter had a previous conviction under the prohibited substances rule. Under the circumstances, was not entitled to any discount that may have applied to someone with a good record. In all the circumstances a disqualification in the Stewards' mind is the appropriate penalty and this case, the penalty of six months was entirely appropriate.'

Conviction

As to the question of the separate testing referred to earlier, a not dissimilar issue arose in the context of greyhound racing some time ago in *P Kaltsis v WAGRA* (Appeal 342 at pages

14 and 15). Just as I had concluded on the facts in that other case, I am satisfied on the evidence before me in Mr Carpenter's case that the Stewards did in fact comply with the requirements under the Rules. The Stewards conducted the inquiry properly and dealt with the results of the swab and the evidence of the analysts appropriately. The Rules do not contemplate a party having access to the samples for private testing. Further, after the request for private testing was refused, no further action was taken in the matter by Mr Carpenter. The Stewards were not asked, for example, to send the sample off for a third test at an official laboratory. Had they been so asked one could well understand they may have had some misgivings which would justify a refusal. But it would be quite inappropriate, indeed fraught with danger, simply for a sample to be released at large for general testing by a trainer whose horse had returned a positive swab.

Rule 178D states:

> *'(1) Samples taken from horses in pursuance of the powers conferred on the stewards by AR.8(j) shall be analysed by only an official racing laboratory.*
>
> *(2) Upon the detection by an official racing laboratory of a prohibited substance in a sample taken from a horse such laboratory shall:*
>
> *(a) notify its finding to the stewards, who shall thereupon notify the trainer of the horse of such finding; and*
>
> *(b) nominate another official racing laboratory and refer to it the reserve portion of the same sample and, except in the case of a blood sample, the control of the same sample, together with advice as to the nature of the prohibited substance detected.*
>
> *(3) In the event of the other official racing laboratory detecting the same prohibited substance, or metabolites, isomers or artifacts of the same prohibited substance, in the referred reserve portion of the sample and not in the referred portion of the control, the certified findings of both official racing laboratories shall be **prima facie** evidence upon which the stewards may find that a prohibited substance had been administered to the horse from which the sample was taken.'*

The practical application of this rule is that:

- only an official racing laboratory may analyse samples taken by Stewards in regard to testing whether a prohibited substance is in a horse's system;
- the first testing laboratory, upon detecting such substance, shall inform the Stewards and choose which other official racing laboratory shall test the reserve portion of the same sample;
- if the second testing corroborates the first, that is sufficient on its own for the Stewards to 'find that a prohibited substance had been administered to the horse so tested';
- having reached such a conclusion it would be open to the Stewards under the Rules to punish the trainer.

Whilst further testing is not prohibited by the Rules, it would be a very rare case, which is not this case, for such a step to be appropriate or desirable. In any event, the Rules would require any further testing to be done only at another official racing laboratory and the release of the sample to a party or potential party would be out of the question.

I am satisfied the response given by Mr Delaney at the appeal, which is quoted above, is a complete answer to all matters raised by Mr Carpenter in the appeal. I adopt Mr Delaney's response quoted above. I highlight the following key points:

- in presenting offences, the circumstances of administration are not usually known;
- the circumstances of administration are not necessarily relevant as to culpability;
- a trainer who presents a horse to race with a prohibited substance in its system is in breach of the Rules and liable to be punished;
- presenting a horse to race with a drug in its system is a serious offence;
- detection of the prohibited substance is all that is required under the Rules as quantification is not relevant for conviction.

In all of the circumstances of this case I can see no basis to support any assertion that the rights of Mr Carpenter were in some way compromised. I am satisfied the Stewards were not in error in the handling of the matter.

For these reasons, I would dismiss the appeal as to conviction.

Penalty

I am satisfied a six month disqualification was open to the Stewards.

I agree with the Stewards' approach in the way they dealt with the mitigating factors. Those factors were quite properly identified. I also agree with their acknowledgment that those factors weigh in Mr Carpenter's favour. The approach which the Stewards adopted after that, of discounting the mitigation by virtue of this having been a second offence, has not been demonstrated to be incorrect in my opinion.

Nothing which has been advanced on behalf of Mr Carpenter demonstrates error on the part of the Stewards as to the penalty which was imposed. Accordingly, I would dismiss the appeal as to the penalty as well.

DAN MOSSENSON, CHAIRPERSON

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

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THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT:	**BARRIE CARPENTER**
APPLICATION NO:	**A30/08/624**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR A E MONISSE (MEMBER)** **MR W J CHESNUTT (MEMBER)**
DATE OF HEARING:	**14 FEBRUARY 2005**
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The appellant represented himself.

Mr W J Delaney appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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

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

A E Monisse

Seal of the Racing Penalties Appeal Tribunal of WA

ANDREW MONISSE, MEMBER

APPEAL - 624

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR W J CHESNUTT (MEMBER)

APPELLANT:	**BARRIE CARPENTER**
APPLICATION NO:	**A30/08/624**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR A E MONISSE (MEMBER)** **MR W J CHESNUTT (MEMBER)**
DATE OF HEARING:	**14 FEBRUARY 2005**
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I agree with those reasons and conclusions and have nothing to add.

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

WILLIAM CHESNUTT, MEMBER