APPEAL - 638

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**SHANNON JAMES SUVALJKO**
APPLICATION NO:	**A30/08/638**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR J PRIOR (MEMBER)** **MR S PYNT (MEMBER)**
DATE OF HEARING:	**9 NOVEMBER 2005**
DATE OF DETERMINATION:	**17 FEBRUARY 2006**

IN THE MATTER OF an appeal by Shannon James Suvaljko against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 4 August 2005 imposing a 12 month disqualification for breach of Rule 188 of the Rules of Harness Racing.

Ms B Lonsdale with Ms R Coughlan instructed by DG Price & Co appeared for the Appellant.

Mr RJ Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

Background

Mr S J Suvaljko is a licensed harness trainer/driver with Racing and Wagering Western Australia ('RWWA') who drove AFTER THE RAIN in Race 6 at Gloucester Park on 24 June 2005. The pre-race blood sample taken prior to the horse having competed had a level of total carbon dioxide (TCO_2) in excess of 36 millimoles per litre in plasma. As a consequence,

the Stewards conducted an inquiry into the matter. In the course of the proceedings evidence was given that the Racing Chemistry Laboratory in Perth had examined the relevant sample and measured the TCO_2 content to be 37.9 millimoles per litre in plasma subject to an uncertainty measurement of plus or minus 1.2 millimoles per litre. The control sample was despatched to the Australian Racing Forensic Laboratory in Sydney which reported 37.2 millimoles per litre with a measured uncertainty of 1.2 millimoles per litre. Evidence was given to the Stewards as to the proper taking of the sample and compliance with formalities regarding procedures associated with its testing. Dr Medd, the official RWWA veterinarian presented the following evidence:

> *'... the finding of abnormally high total carbon dioxide levels in a horse on a race day is, is deemed to be prohibited as the elevated levels are considered to be evidence that excessive amounts of alkalinising agents have been administered to the horse and under the 188A prohibited substances part 1, (a) substances capable of acting on one or more of the following mammalian body systems, alkalinising agents are capable of acting on the - primarily the musculoskeletal system as a method to prevent fatigue or the build up of lactic acid, or the neutralisation of lactic acid, I should say. They can act on the digestive system as an antacid, they can act on the urogenital system as an alkaline diuretic and in part (b) of that rule, the substances are actually classified, they're actually listed as alkalinising agents being prohibited substances in excessive amounts.'* (T6 & 7).

Later in the proceedings Dr Medd stated:

> *'Excessive quantities of alkalinising agents are considered to be, considered to be highly likely or, or, there's certainly a possibility there of enhancing a horse's performance by neutralising, by buffering the lactic acid concentration in the blood, if you like, and thus allowing the horse to, to not fatigue as, as quickly as it might otherwise. There's some contention, I might add, and there always has been whether alkalinising agents or elevated levels of TCO2 are capable every single time of improving a horse's performance. There are other factors to be considered. Some experts believe that the side effects of the larger quantities of sodium and potassium often ingested at the same time will actually have a performance limiting effect on some horses. So, there are variations but basically under the Rules, they are considered to be prohibited.'* (T9)

Dr B Stewart, veterinarian for Mr Suvaljko, attended the inquiry and participated fully by presenting his own evidence and questioning witnesses who were called.

The Stewards charged Mr Suvaljko with a breach of Australian Rule of Harness Racing 190. That rule reads:

> *'(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.'*

Mr Suvaljko pleaded not guilty to the charge. The proceedings continued on 4 August 2005. The facts and issues are set out in detailed reasons contained in the Stewards' determination in the following terms:

> *'Mr Suvaljko, the Stewards have given consideration to the charge and considered all the evidence placed before them. This evidence, this included evidence given by Mr Charles Russo, Manager RCL, Mr Allen Stenhouse, Official Analyst ARFL, Dr Judith Medd, RWWA Veterinarian, Trainer - yourself, Trainer S. Suvaljko, Mrs J. Suvaljko , Mr Greg Mackintosh,*

RWWA Investigator, Dr Charlie Stewart, Veterinarian, Trainer Tim Earnshaw and Owner Mr Greg Hutchinson. In considering the charge it is important to consider the provisions of Rule 191 evidentiary certificates. The Rule states, and I'll read it to you in its entirety.

1) A certificate from a person or drug testing laboratory approved by the controlling body which certifies the presence of a prohibited substance in or on a horse at or approximately at a particular time or in blood, urine, saliva or other matter, or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse, is prima facie evidence of the matter certified.

2) If another person or drug testing laboratory approved by the controlling body analyses a portion of the sample or specimen referred to sub-rule 1 and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub-rule 1, is conclusive evidence of the presence of a prohibited substance.

3) A certificate furnished under this rule which relates to blood, urine, saliva or other matter or sample or specimen taken from a horse at a meeting shall be prima facie evidence if sub-rule 1 only applies, and conclusive evidence if both sub-rules 1 and 2 apply, that the horse was presented for a race not free of prohibited substances.

4) A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse shall be prima facie evidence if sub-rule 1 only applies, and conclusive evidence if both sub-rules 1 and 2 apply, that the prohibited substance was present in or on the horse at the time the blood, urine, saliva or other matter or sample or specimen was taken from the horse.

5) Sub-rules 1 and 2 do not preclude the presence of a prohibited substance in or on a horse, or in blood, urine, saliva or other matter or sample or specimen, or the fact that a prohibited had at some time been administered to a horse, being established in other ways.

6) Sub-rule 3 does not preclude the fact that a horse was presented for a race not free of prohibited substances being established in other ways.

7) Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.

It is clear to us from a reading of this rule that it's (sic) purpose indicated by it's (sic) very title, relates to the evidentiary effect of the certificates which may emanate from the laboratories. It does not create the offence, but merely facilitates the proof of it. It's (sic) structure indicates that where a second laboratory issues a confirmatory certificate which indicates that a particular horse was over the permitted level of 36 millimoles per litre then that evidence is held to have conclusive quality. In the absence of second laboratory confirmation, then the evidence from the first laboratory that indicates a particular horse was over the permitted level of 36 millimoles per litre can only be regarded as prima facie evidence. The absence of a second certificate in these circumstances therefore does not equate to a person having no case to answer or necessarily of itself alleviating a person from being charged under the relevant offence provision of rule 190. The determination of such charge, however, must be cognisant of the fact that the analytical evidence supporting the finding is deemed to have only a prima facie quality. Effectively this means that the evidence is sufficient to establish a fact or case unless disproved. In other words, the evidence contained within the certificate from the RCL is considered to be rebuttable, but that means that there must be some sort of evidence that serves to rebut it to a degree that

negates its veracity. Such evidence may emanate from any of the material before the Stewards or elsewhere from which such rebuttable inference may be drawn. In the process of considering this point, and indeed all matters requiring determination in this inquiry, the Stewards are also mindful of the applicable burdens of proof that operate with serious cases of this nature.

In this case, the Racing Chemistry Laboratory reported a level of TCO2 in the pre-race blood sample taken from AFTER THE RAIN at 37.9 millimoles per litre plus or minus 1.2 level of uncertainty. Allowing for this level of uncertainty, the range of TCO2 reading is 36.7 to 39.1. In any event the lower reading is above the threshold level of 36 millimoles per litre allowable under the rules.

The referee sample which went to the Australian Racing Forensic Laboratory for analysis gave a reading of 37.2 millimoles per litre plus or minus 1.2 millimoles and consequently the range is from 36 millimoles per litre to 38.4 millimoles per litre. Applying the lower level, this puts the reading at 36 millimoles per litre which is not above the threshold level and consequently would not qualify as a prohibited substance under the rules.

Mr Charles Russo gave extensive evidence at the inquiry. Mr Russo is an experienced racing chemist with 17 years experience in racing chemistry. He has analysed and overseen the analysis of a considerable number of TCO2 tests. He is a member of the National Equine Integrity Welfare Advisory Group and Manager of the Racing Chemistry Laboratory.

Mr Russo made available the RCL's data and documentation in relation to the TCO2 analysis of AFTER THE RAIN. Further, he was questioned and cross-examined by Dr Stewart and yourself, Mr Suvaljko.

It is clear from Russo's explanations with regard to the procedures undertaken by his laboratory in the testing of this sample, that such procedures were in keeping with the established protocols and no serious doubt was cast as to the accuracy of the results reported as a result of any inappropriate departures from such procedures. It is also apparent that the methodology applied was also in keeping with established protocols. Given the RCL's role, it is hardly surprising that their approach is a well defined and meticulous procedure, one that has been refined over a great deal of time and innumerable number of such tests. If practice makes perfect, then it is understandable why Mr Russo was before the Stewards, confidant (sic) in his approach, methodology and ultimately reporting.

Whilst the cross-examination by Dr Stewart was commendable in its thoroughness, and fully explored available avenues with regard to testing the voracity (sic) of the reported result, it did not, in the Stewards' opinion, elicit evidence that served to cast sufficient doubt as to the reliability of the reported result. In truth, many of the difficulties associated with the testing of TCO2 samples, which Dr Stewart made reference or analogy to, are not unique to RCL and could equally be directed to any racing laboratory to suggest that a particular reading was less than 100% reliable. Inevitably these questions are only asked of the laboratory that has reported a sample to be above a threshold and not of the second laboratory that has not. Obviously these questions have to be asked of the first laboratory but if that laboratory is able to satisfactorily indicate that the correct procedures and approaches have been applied, there is an ability to be satisfied to the requisite standard that the result is reliable. These general queries with regard to TCO2 testing and its general reliability do not of themselves invalidate a particular laboratory's finding.

Much of this so called uncertainty regarding TCO2 testing is due to the volatility of the substance in the blood, where as we have heard in this inquiry from both Mr Russo and Mr

Stenhouse, a single laboratory apply the same test to two blood tubes taken from the same horse at the same time will produce variations in result. It is for this reason that the RCL, or any laboratory for that matter, run the same test on the same blood on several occasions, which is supported in the data submitted by Mr Russo. That data illustrates those variations. It is because of this inevitable variation that the rule makers, after taking into account scientific studies, set a permissible level of TCO2 sufficiently high enough to ensure that only those horses which have had an administration of an alkalinising agent are likely to reach a level in excess of the permitted level. In this case, Dr Medd, using the lower uncorrected reading from the ARFL of 37.2, indicated that the chances of a horse being found to be over such a level were 640,000 to 1. In fact the consensus of the experts heard at this inquiry agreed that for a horse to reach such a level as this, an alkalinising agent must have been administered.

In relation to the variation of results between the RCL and the ARFL, Mr Russo explained that the results are within laboratory expectations and therefore acceptable. Mr Stenhouse, who was made aware of the variation of result between the laboratories, did indicate that whilst sample degradation was a known factor, he would not attribute the variation necessarily to this consideration due to the closeness of the two tests. Mr Russo similarly did indicate that sample degradation was a known factor that tended to occur in an exponential or accelerated fashion where the greatest variations are likely to be seen in the region of three to four days after the taking of a sample. It is noted that this sample was tested by the two laboratories around this time frame albeit that neither Mr Russo or Mr Stenhouse offered with any certainty that this was the explanation for the variation. It would seem that this was partly because neither of the two expert analysts thought the variation to be of such significance as to cast doubt as to the reliability of the RCL result. The variation between samples, being at the level it is, was not such that Mr Stenhouse was unable to reconcile the difference. On the contrary, he shared the opinion of Mr Russo that the difference was within laboratory expectations.

Having been tested and probed thoroughly as to its accuracy and reliability, the prima facie evidence of the certificate from the RCL has not been demonstrated to be wanting. Whilst it was at the outset, evidence that was open to rebuttal, the evidence before this panel satisfies us that the certificate, whilst of prima facie value, is one that can now be relied on as to the matters it indicates.

It is relevant to consider the comments of Dr Medd, RWWA Veterinarian, in relation to the level of 37.9. When asked what this level was indicative of, Dr Medd stated "is indicative that excessive quantities of alkalinising agents have been administered in some way to this horse."

In addition to matters enunciated thus far, it is clear from other evidence that AFTER THE RAIN was the recipient of alkalinising agents are (sic) various times in its preparation. A quantity of bicarbonate powder was found at your premises and you admitted to using a product known as Rapid Acid on the night before the race by way of 25ml over the tongue. It is noted that, according to Dr Medd, this would not account for an elevated reading, but clearly this is not a case which it could be said that the horse was never in a position where it did, or could have received the necessary administration of an alkalinising agent to produce the elevated reading it did. You did at your interview with Mr Mackintosh, and to a lesser extent even before this panel, present as someone completely absent of an explanation for the elevated level. Even before the inquiry after hearing Dr Medd's advice that 25ml over the tongue would be negligible in effecting TCO2 levels, it was clear to us that you remained concerned with regard to your use of the Rapid Acid product.

Whilst based on your evidence of the administration of Rapid Acid, Dr Medd was able to discount such administration as an explanation, significantly, it was not the only explanation

offered at some time for the result of the analysis. On the 30th of July 2005, your wife Mrs Julie Suvaljko, contacted RWWA Investigator Mr Greg Mackintosh claiming that a big mistake had occurred. Amazingly, according to her, she had not had any discussions with you with regard to this big mistake, which had caused the RWWA Investigator to attend your premises. That she would not consult with you before contacting Mr Mackintosh is difficult to accept or understand. When interviewed by Mr Mackintosh, she, in essence, indicated that she believed she might by mistake have given AFTER THE RAIN a quantity of Rapid Acid at the lunchtime feed, 1 to 1.30pm on Friday, 24 of June 2005. She believed that she might have mistaken the Rapid Acid for molasses, which the racehorses get in their feed. It was at her invitation that Mr Mackintosh attended so it was not as if she was surprised by his visit. Her comments clearly came after some consideration which included a decision not to tell you about it. Having seen her give this evidence by way of video, she was most convincing that this was her belief. She had clearly thought carefully about the events, been down to the stabling area where the mistake was said to have occurred and satisfied herself that this event she was describing in vivid terms had occurred. Again, she is said to have done all this without any consultation with you, a difficult proposition to accept. Then it is apparent that after telling you about it after she had spoken to Mr Mackintosh, you were also satisfied that this was what occurred. Clearly the events she described to you were at the very least, a distinct and likely explanation in your mind for how the horse returned an elevated TCO2 reading. We say this because according to the evidence before us, it was not until you told your friend about it some time later, in the terms that you did, that he is said to have given you reason not only to doubt your wife's explanation, but you were now convinced that this could not have happened. As the person in control of your horses, we are told you're responsible for the mixing of the molasses and administration of Rapid Acid as described by you. Once told by your wife of her recollections, you surely would have been able to recall whether the substance she found, described in such detail, as having been left in the stables by you, which she administered to horses, was molasses or Rapid Acid. Obviously it was not inconceivable to you that you may have left a 3 to 4 litre container of Rapid Acid lying around the stables that she may have picked up. Otherwise, you could have discounted her theory long before meeting up with Mr Earnshaw. How it took Mr Earnshaw to open your eyes to the impossibility of this occurring is difficult to understand in the circumstances. The truth of this whole scenario is bound to remain a mystery and none of it is of any great moment. In this case, like many others before it, it is not necessary or indeed possible for Stewards to find as a fact how the administration occurred when dealing with a charge framed under the rule in question. These fluctuations in explanation and the reasons offered for them do no favours to your creditability. Furthermore, they clearly indicate that in this case, it could not be said that this horse could never have been in a position to receive an administration of an alkalinising agent at a relevant time and indeed, one such likely scenario was adopted by you at one stage before being recanted despite the circumstances.

You have made mention to the Stewards of a number of previous cases where you believed that other person had been in similar circumstances to yours, namely one reading over the level and at or below. Clearly, when dealing with such circumstances, the Stewards have before them a case largely based upon the prima facie evidence of the laboratory. As discussed in detail earlier, that evidence is subject to rebuttal. The circumstances in each case will necessarily differ and just as it would be inappropriate to suggest that an adverse finding in this respect in your case should be generally applied across the board for such cases, it is also inappropriate to suggest that a favourable finding in one case will automatically apply in another. The merits of each case themselves must form the basis of the decisions, mindful of the evidence presented.

Mr Suvaljko, in view of all the evidence before us and the Stewards' reasons as indicated, the Stewards believe that the specifics of the charge have been met and accordingly, find you guilty as charged. (T68-74)

The Stewards then proceeded to deal with the subject of the penalty and reached the following conclusion:

'Mr Suvaljko, the Stewards have considered the matter of penalty taking into account all that you and Dr Stewart have placed before the panel. The Stewards see that any breach of the drug rules as a serious matter. Horses competing with prohibited substances in their system undermine the integrity of this industry. That integrity underpins public confidence. The betting public's support is vital to the racing industry and any threat to that support impacts negatively on the wellbeing of the industry. The prohibited substance in this matter, elevated levels of TCO2, that is, above 36 millimoles per litre can be described as performance enhancing. Excessive levels of TCO2 in a racehorse effects the horse's system by inhibiting fatigue during a race.

In the Stewards' opinion this breach of the drug rule can be considered in the serious offence category. The Stewards maintain that the penalty must encompass a deterrent factor, both personal and general. The industry needs to be reminded that presenting horses to race with prohibited substances in their systems is totally unacceptable.

Your record shows that you have two prior convictions for breaches of the drug rules. In 1994 you were disqualified for twelve months for a positive swab, the substance being Dexamethasone. In 2004 you were fined $5000 for presenting a horse to race with an elevated level of TCO2. Under the rules at that time, you had the option of a fine or three months' suspension. Consequently, this is your second offence for elevated levels of TCO2.

The Stewards have taken into account your personal circumstances. The Stewards believe that unless there is special or extenuating circumstances, a breach of the drug rules should be dealt with by way of disqualification. The Stewards do not believe that there are any special circumstances in this case.

The range of penalties for TCO2 offences extends from fines to significant periods of disqualification. In the recent matter of Trainer K. Nolan, 2 February 05, which was Mr Nolan's second offence for elevated levels of TCO2 a twelve month disqualification was handed down.

Accordingly, the Stewards believe that you should be disqualified for a period of 12 months effective immediately.' (T79-80)

Appeal

Mr Suvaljko appeals against both the conviction and penalty. I refused his application for a suspension of operation of the penalty.

At the outset of the appeal proceedings leave was granted to amend the grounds of appeal to substitute the following:

'1 The Stewards erred in their assessment of the standard of proof required to establish the charge.

Particulars

(a) *In the absence of there being two certificates to verify the excessive reading, there was only a prima facie case against the Appellant;*

(b) *The prima facie case was capable of being rebutted;*

(c) *The Chairman erroneously concluded that, unless rebutted, the prima facie case would inevitably result in a conviction;*

(d) *The existence of a sample showing the lesser reading suggested that the charge could not be proved to the Briginshaw standard.*

2 *The Stewards erred by inferring that there was some onus on the Appellant to cast doubt on the reliability of the first sample.*

3 *The Stewards erred by imposing a penalty that was manifestly excessive in all the circumstances.'*

It is appropriate to set out in more than the usual detail the respective arguments presented in respect of grounds 1 and 2.

Appellant's argument as to conviction

Ms Lonsdale for Mr Suvaljko argues that as the onus is on the Stewards to prove the charge the Stewards fell into error by inferring there was an onus on the appellant to cast doubt on the veracity of the first sample. It is submitted the Stewards made a serious error by stating in reasons given by the Chairman of Stewards in the following passage at para 4 of page 69:

> *'The absence of a second certificate in these circumstances therefore does not equate to a person having no case to answer or necessarily of itself alleviating a person from being charged under the relevant offence provision of rule 190. The determination of such charge, however, must be cognisant of the fact that the analytical evidence supporting the finding is deemed to have only a prima facie quality. Effectively this means that the evidence is sufficient to establish a fact or cause unless disproved (emphasis added). In other words, the evidence contained within the certificate from the RCL is considered to be rebuttable, but that means that there must be some sort of evidence that serves to rebut it to a degree that negates its veracity.'*

Further, there is no '*reverse onus*' provision in Rule 191 unlike AR 178D which provides that '*an analysts' report...shall be evidence that a prohibited substance...has been administered unless the contrary be established*' (*Danagher v Racing Penalties Appeal Tribunal* (1995) 13 WAR 531 per Rowland J at 538A and per Murray J at 557E). As the rule in question has no such reverse onus provision the Stewards erred by approaching the task as it did.

It is also submitted that the *Briginshaw* standard contemplates better proof than a prima facie case, that is to say, '*clear and cogent evidence*' or evidence which, at the very least, establishes the charge on the balance of probabilities. The *Briginshaw* standard is higher than a '*mere*' balance of probabilities (*Bhardari v Advocates Committee* [1956] 3AllER 742).

Counsel claims the Stewards did not attempt to satisfy themselves that an offence had been committed other than to rely on the prima facie status of the first reading. But as the second sample indicated a reading which would not infringe the rules, the prima facie case did not advance beyond that point. Even if there were '*conclusive proof that the readings would*

infringe the rules, this was not, in any event an irrebuttable presumption' (*Munckton v Webb* [1986] WAR 183). The result of the second sample tended to rebut the first such that the first sample should not be held to demonstrate proof to the *Briginshaw* standard. This line of reasoning continues that had there been actual evidence that a sufficiently large quantity of alkalinising agent had been administered (a quantity which on the evidence would almost certainly result in TCO_2 levels above the prescribed limit), then it might have been possible for the Stewards in conjunction with the first test to conclude proof to the *Briginshaw* standard.

The integrity and accuracy of the first sample is conceded. However, there is no evidence to impugn the integrity of the second sample. It is said there is no evidence to prove the second sample was less likely to accurately reflect the true TCO_2 levels as the testing methodology of neither laboratory had been impugned, either could be accepted as prima facie evidence of the actual level to an acceptable confidence level. Merely because the second sample was tested after the first sample did not mean the second was likely to be less accurate as the gap in time was insignificant and the difference in the levels could be accounted for by variations between one tube and another and not degradation.

Where there is no proof of an illegal administration the laboratory tests in isolation only amount to prima facie evidence rather than conclusive evidence of the levels. As both results are equally valid there is a 50/50 chance that the actual level was above the legal limit and a 50/50 chance that it was below. That level of chance did not amount to proof to the *Briginshaw* standard. The totality of the evidence suggests that the evidence is equally consistent with an innocent explanation as there is no clear evidence of an administration. Whilst an administration was undoubtedly possible, there is no evidence that an administration would account for the levels detected. Dr Russo put it no higher than it *could* have been that alkalinising agents were administered. Even, for the sake of argument, had a quantity of alkalinising agent been administered that does not mean that the offence the subject of the charge (presentation not administration) is proved. Consequently, it is submitted that the Stewards erred in concluding that the prima facie evidence of the first sample was conclusive proof of the levels.

Respondent's argument as to conviction

Senior counsel for the Stewards responded to all the propositions advanced for the appellant assertively and convincingly. The appellant's grounds are said to be simplistic and fail to address the real issue. Mr Davies argues that proof of the presence of a prohibited substance is all that is relevant. Stewards could abandon certificates and call laboratory evidence. Certificates can be supplemented with oral evidence, or oral evidence can suffice if found to be sufficiently reliable. The laboratory evidence would not be prima facie but rather fully capable of establishing facts as to the presence of prohibited substances. R.188A(2) provides an exemption from the definition of a prohibited substance. Therefore one requires the level of alkalising agents to be in excess of the prescribed level for it to be a prohibited substance. As the Stewards could have proceeded without any certificates the simple question is whether the substance in question was present in the first sample at a level in excess of 36 millimoles per litre. The certificates were described as being merely proof facilitating mechanisms. If there are two certificates there is no need to call a witness. In this case Stewards looked at the strength and reliability of the other evidence and not the certificates. The Tribunal was taken to some of the supporting medical evidence, by senior counsel. It is submitted this medical evidence was sufficient, it overtook the sample evidence

and indicated there had been administration. This clearly was not just a case of two certificates having been the only evidence. As there was a whole lot more evidence than merely the certificates the Stewards had to decide the matter on the totality of the evidence.

Degradation was said not to explain the difference between the two samples but it could explain the one thousandth of a millimole which resulted in the second sample not exceeding 36 millimoles per litre.

A number of other cases have dealt with questions arising out of discrepancies in the testing results. One was the Victorian case of *Tonkin* (Racing Reports 27.5.2005 at 4480) where Judge Williams stated:

> *'I think it should be said as part of this decision, that if the industry view is that when a deduction of 1.2 mmol is factored into a particular reading and reduces that reading to something marginally under 36 mmol, that there is then no acceptable evidence that the limit is exceeded. If that is the industry view, it is not an accurate one when Dr Vine's evidence is analysed. The reality is that corrected readings of slightly under 36 millimoles per litre still represent a very high likelihood that the limit is exceeded in terms of the true value of the TCO_2 in the blood. This should carefully be borne in mind in future.'*

The approach of the Stewards had nothing to do with reversal of onus, rather the Stewards were properly analysing the reliability of the evidence. The decision to convict was fairly and squarely open to the fact finders and the Tribunal should not substitute its own view.

Decision

I entirely agree with the submissions made on behalf of the Stewards. I consider senior counsel's approach to the interpretation and application of the relevant Rules is clearly correct and there is no merit in the arguments raised for the appellant.

Part 12 of the Rules deals with prohibited substances. It is an offence to present a horse to race with a prohibited substance (Rule 190(1)). If a horse which has been so presented does have a prohibited substance in it then the trainer offends the rule (Rule 190(2)). The controlling body is empowered to decide what is a 'substance' and what substances are 'prohibited' (Rule 188(1)(a), (b) and (c)). There is the power to determine which substances, when in or on horses in the process of racing, are prohibited substances by virtue of a nominated level having been exceeded (Rule 188(1)(f)) and Local Rule 188A(1) specify what substances are prohibited substances. Sub-rule (2) of Rule 188A excludes *'Alkalinising Agents, when evidenced by total carbon dioxide (TCO_2) present at a concentration of 36 millimoles per litre in plasma'.*

Part 12 of the Rules also contain the provision relating to evidentiary certificates, namely Rule 191. That provision is set out in full in the Stewards' reasons for decision which are quoted above. The evidentiary certificate provisions simply provide one means of proving an offence of failing to comply with the prohibited substance rules. The certificates do not however exclude proof of a breach of Rule 190 by means of other evidence. If that other evidence is presented from duly qualified, experienced and credible witnesses, as in this case, then the Stewards are perfectly entitled to rely on that other evidence. In this case the Stewards have legitimately and properly relied on a combination of one certificate and the convincing evidence of others.

The Stewards dealt with all of the evidence in a careful manner and supplied thorough reasons to show how and why they arrived at their determination. The onus was not reversed. The *Briginshaw* standard of proof was satisfied and in all of the circumstances it cannot be said the two test results cancelled each other out and that an innocent verdict therefore must follow.

Penalty

I am not persuaded that the penalty imposed is inappropriate in the light of all of the relevant circumstances. It has not been shown that the penalty was outside the proper discretionary range that should be imposed for a repeat offender. The Stewards have clearly and appropriately enunciated the basis for their decision on penalty.

Conclusion

I would dismiss the appeal both as to conviction and penalty.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA