APPEAL - 655

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	DAVID ANDREW O'HEARE
APPLICATION NO:	A30/08/655
PANEL:	MR D MOSSENSON (CHAIRPERSON) MR P HOGAN (MEMBER) MR J PRIOR (MEMBER)
DATE OF HEARING:	21 AUGUST 2006
DATE OF DETERMINATION:	11 OCTOBER 2006

IN THE MATTER OF an appeal by David Andrew O'Heare against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 15 May 2006 imposing 9 months suspension for breach of Rule 81A of the Australian Rules of Racing.

Mr D Sheales appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

This is a unanimous decision of the Tribunal.

The appeal against penalty is upheld. The penalty imposed by the Stewards is varied to read as follows:-

1. The Appellant be suspended for a period of 9 months.

2. The period of 9 months suspension be concurrent with the period of suspension imposed for failing the breathalyser test.

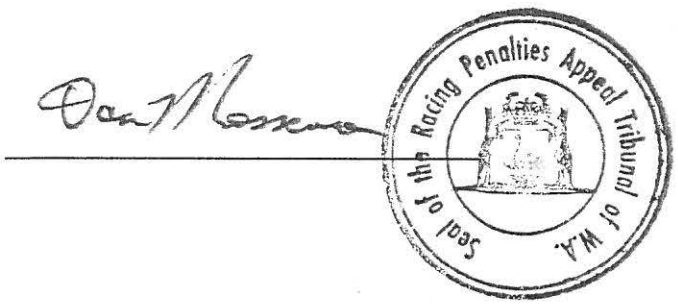
3. The period of 9 months suspension be backdated to commence on 20 April 2006.

4. After a period of 6 months from the commencement of the suspension, and after the Appellant provides a blood or urine sample free of any substance referred to in **AR.81B**, the suspension be stayed on the following conditions:

(a) The Appellant do undergo assessment and testing, and if necessary, appropriate treatment in relation to the abuse of alcohol, drugs or other substances as directed or approved by the Stewards;

(b) The assessment, testing and treatment be carried out at any time during the period of the 9 months suspension including before or after the commencement of the period of the stay;

(c) The Appellant bear the cost of the assessment, testing and treatment and authorise any service provider to provide such reports to the Stewards as they may request.



DAN MOSSENSON, CHAIRPERSON

APPEAL - 655

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRMAN)

APPELLANT:	**DAVID O'HEARE**
APPLICATION NO:	**A30/08/655**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR J PRIOR (MEMBER)**
DATE OF HEARING:	**21 AUGUST 2006**
DATE OF DETERMINATION:	**11 OCTOBER 2006**

IN THE MATTER OF an appeal by David Andrew O'Heare against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 15 May 2006 imposing 9 months suspension for breach of Rule 81A of the Australian Rules of Racing.

Mr D Sheales appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr P Hogan, Member.

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

Penalties Appeal Tribunal of W.A.

Dan Mossenson

DAN MOSSENSON, CHAIRMAN

APPEAL – 655

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT:	DAVID ANDREW O'HEARE
APPLICATION NO:	A30/08/655
PANEL:	MR D MOSSENSON (CHAIRPERSON) MR P HOGAN (MEMBER) MR J PRIOR (MEMBER)
DATE OF HEARING:	21 AUGUST 2006
DATE OF DETERMINATION:	11 OCTOBER 2006

IN THE MATTER OF an appeal by David Andrew O'Heare against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 15 May 2006 imposing 9 months suspension for breach of Rule 81A of the Australian Rules of Racing.

Mr D Sheales appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

This is an appeal against penalty.

Introduction

The Appellant is a licensed jockey. On Sunday 16 April 2006, he presented himself to ride at the Albany racecourse. At 4:45pm that day, he supplied a urine sample to the Stewards. On analysis, the sample was found to contain cocaine metabolites at a level of 0.3 micrograms per millilitre. The detection of metabolites is indicative of cocaine ingestion.

The Stewards held an enquiry on Monday 15 May 2006. After hearing evidence, the Stewards laid a charge pursuant to Australian Rule of Racing (ARR) 81A(1)(a). That rule states:

> *"**AR.81A** (1) Any rider commits an offence and may be penalised if –*
>
> *(a) a sample taken from him is found upon analysis to contain the presence of a substance banned by AR.81B; ....."*

The Appellant pleaded guilty. The enquiry then proceeded on the matter of penalty only.

After hearing further evidence, and submissions in mitigation, the Stewards imposed a penalty of 9 months suspension. The Stewards added conditions designed to mitigate the penalty and allow the Appellant back into riding during the suspension period. The Stewards said at page 105 of the transcript (T105):

> *" After due consideration, the Stewards are suspending your jockey's license (sic) for a period of nine months.*
>
> *.....*
>
> *While this suspension is of your jockey's license (sic) in full and therefore it does not allow you to ride track work or in trials, the Stewards advise that after a period of four months and on the provision that you supply a clear urine sample the Stewards will consider allowing you to ride track work and trials for the remainder of your suspension"*

On 29 May 2006, the Appellant lodged a notice of appeal against the penalty.

The Grounds of appeal

The grounds of appeal are as follows:

" (1) That the penalty is manifestly excessive.

(2) That the Stewards erred in placing weight in their determination only upon the evidence in chief of the expert witnesses and giving insufficient or no weight to the evidence given under cross-examination.

(3) That the Stewards when determining the length of suspension gave insufficient weight to:

(a) the length and structure of suspensions given for similar offences in other states;

(b) the length of suspensions given for similar offences in Western Australia;

(c) the absence of any prior history of the Appellant relating to drug/abuse offences;

(d) the character evidence led on behalf of the Appellant;

(e) the racing calendar of Western Australia and particularly the timing of the summer carnival.

(4) That in acknowledging for offences of this type the desirability of structured and conditional penalties, the period of 5 months between when the Appellant may resume some licensed activities and when the Appellant may resume licensed activities for reward is disproportionate and manifestly excessive.

(5) The Appellant reserves his position as to further grounds until after the receipt of the transcript of the hearing.

At the hearing of this appeal, the Appellant abandoned ground 2. No further grounds were sought to be added pursuant to paragraph 5 of the grounds of appeal.

Events leading up to the positive finding

Before the enquiry, the positive finding was investigated by Mr O'Reilly. He is the Principal Investigator for Racing and Wagering WA. As part of the investigation, Mr O'Reilly interviewed the Appellant at the Appellant's home. When questioned, the Appellant maintained that he had not ingested cocaine. Mr O'Reilly was aware that the Appellant had been at a party the night before providing the sample, and he asked the Appellant about the party. Fairly early on in the questioning process, the possibility of "drink spiking" was brought up, albeit in a round about way. It arose in the following way:

O'REILLY Was it something that was at the party?

O'HEARE Well could have been. It could of...

O'REILLY Where (sic) you offered it?

O'HEARE No I wasn't offered it. But it could have been and I left the party at one o'clock....."

After Mr O'Reilly left the Appellant's home, and whilst en route to his next stop, he received a telephone call on his mobile from the Appellant's brother, Mr Michael O'Heare. Michael O'Heare said that he wished to discuss the matter of his brother, the Appellant. Later that day at his office, Mr O'Reilly recorded a telephone interview with Michael O'Heare. Michael O'Heare said that he was also at the same party as his brother, the Appellant. He said that at the party he was drunk, and he was handed a bag which had a little bit of "stuff" in it. He did not know what it was. It was given to him by an unknown person. He said he put a little bit of the stuff in his own drink and that of the Appellant. He said that he didn't think it was worth telling the Appellant.

Michael O'Heare also gave evidence at the enquiry. His evidence was substantially the same as what he had said in interview with Mr O'Reilly. He described the contents of the bag as "white powder".

The Appellant himself gave evidence at the enquiry. His evidence was quite short, and to the effect that he had not knowingly taken anything.

The relevance of inadvertent ingestion

The offence under ARR 81A is one of absolute liability. The Stewards do not have to show a mens rea, or a guilty mind. There is no defence, once the factual elements are made out. The Appellant's counsel at the enquiry correctly accepted that to be the position (T73 – T74) and informed the Stewards that his client's plea of guilty was an acceptance of the inevitable.

The question of whether the Appellant voluntarily or accidentally ingested the drug then remained relevant only to any penalty that might be imposed. The relevance of inadvertent ingestion is well illustrated by the case of **Reed** (Appeal 614 delivered on 18 August 2004) in this Tribunal. In that case, Mr Reed returned a positive result to a drug, but the Stewards of Harness racing found as a fact that it may well have been a case of inadvertent ingestion. They entered a conviction, but imposed no penalty. The matter came to this tribunal on a different point, but the Steward's disposition was unchallenged and it remains a good example of the relevance of inadvertent ingestion to the sentencing process.

In their reasons for decision, the Stewards also accurately and succinctly stated the position with respect to inadvertent ingestion (T98). The large part of the Stewards reasons comprise their findings of fact on that issue.

The Stewards' findings on inadvertent ingestion

The Stewards did not accept the evidence of Mr Michael O'Heare. They said at T103:

> *"…. It is difficult in this case to place reliance on the unsupported evidence of Mr Michael O'Heare, who by his own admission was at the time twelve hours into a drinking session. In these circumstances the Stewards cannot be satisfied and (sic) Michael O'Heare's explanation account for the finding and thus are left with no reliable explanation as to why Mr O'Heare returned the finding that he did."*

The Stewards did not positively find that the Appellant ingested the drug voluntarily. However, the inference that he did so is available on the facts. The Appellant's counsel accepted that at the hearing of the appeal before the Tribunal.

The position at the appeal

Counsel for the Appellant quite properly had to accept that the Stewards had rejected the primary mitigatory fact, namely involuntary ingestion. Because the Stewards had rejected the Appellant's evidence that he did not use the drug, Counsel submitted that it was open to treat him as a person who was suitable for drug counselling. Counsel therefore argued for a structure of the 9 months period of suspension which would include a stay of part of the period on condition that the Appellant undergo testing and counselling. This was the same position which counsel adopted at the hearing before the Stewards (T83 – T84).

This submission falls under ground 4 of the grounds of appeal.

In opposition, Counsel for the Stewards submitted that there could not be a rehabilitative aspect to the penalty because the Appellant had maintained that he did not voluntarily ingest the drug, and was not a drug user. It was submitted that there was no evidence on which to base a finding that the Appellant was a person suitable for drug counselling.

The other remaining grounds of appeal were in effect argued as being in support of what was argued under ground 4. The ultimate outcome sought by the appellant depends on ground 4 being upheld.

The factual basis for imposing the penalty

Sentencing is a matter of discretion. The Tribunal will normally not interfere unless there has been an error of principle, or some feature of the evidence has been overlooked or undervalued.

The factual basis for the process of imposing the punishment is of primary importance in this case. The Stewards recognised the importance of the fact finding process. They said at T103:

> *"This case as is often the case in any substance related inquiries highlights the difficulties that arise in the determining the cause of administration in any given case with any level of certainty. It is for this reason that the rules are couched in the terms they are. The rules by their structure recognised they would be otherwise an almost impossible task for Stewards to find this fact, how a substance came to be administered to either person or animal, if that was required to make. It is no less difficult to arrive at such a conclusion on the question of penalty and this must be considered when assessing such matters"*

Having rejected the primary evidence in mitigation, the Stewards were left with the available inference that the Appellant voluntarily ingested the drug. This inference is almost the only one available on the facts, there being no other reasonable inference. People most often ingest substances on a voluntary basis, whether they be legal or illegal substances. The drug in question is notoriously a recreational drug, commonly used at parties. Michael O'Heare, the Appellant's brother, telephoned Mr O'Reilly to give the excuse within a very short time after the Appellant had been confronted with his positive result. The facts as found, point towards a conclusion of voluntary ingestion. As noted above, Counsel for the Appellant conceded as much at the hearing of this appeal. Counsel for the Stewards described the inadvertent ingestion explanation rather more colourfully as a "cock and bull" story.

In summary, there was evidence that the appellant used the drug voluntarily. The evidence comes from drawing the inference that he did so, once his exculpatory evidence had been rejected.

In my opinion, the Stewards erred in not finding as a fact that he Appellant had voluntarily ingested the drug.

Decision on grounds

(1) That the penalty is manifestly excessive.

This ground requires the Tribunal to consider whether the sentence itself was so excessive as to manifest error. That question is sometimes expressed differently, namely whether the sentence is so far outside the range of sentences commonly imposed for offences of its type as to manifest error. Whichever way it is put, the question is answered by reference to the statement of the principle in ***Lowe's*** case. In that case, Mason J. said:

"Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of Justice." ***Lowe -v- R*** (1984) 154 C.L.R 606 at 611.

To say that a sentence is "within range" or otherwise is simply to say that there is no disparity or inconsistency of the kind referred to by Mason J. in Lowe's case.

This was the first time in this state that cocaine metabolites have been detected in a urine sample from a jockey. In my opinion, cocaine should be treated at the same level as other common serious drugs, including amphetamine. The ***Misuse of Drugs Act (WA)***, in broad terms, treats those drugs in the same way, as do the criminal courts in sentencing offenders. There is no reason in principle to adopt a different approach here.

There have been cases of cocaine in other states, and there have been cases of amphetamine in this state. It is notoriously difficult to specify a tariff in relation to any offence, because the facts of each case vary so widely. Despite that, some guidance can be found in past decisions of this Tribunal. In the case of **Hawkins** (appeal 522), the Tribunal reduced a period of 9 months suspension to 6 months for an amphetamine offence. In **O'Donnell** (Appeal 582 delivered 4 March 2003), 9 months suspension again was reduced to 6 months for an amphetamine offence.

The submission advanced on behalf of the Appellant in this case was not for a reduction in the period, but rather for a different structure. Further, the 9 months is not outside the range. For these reasons, I am of the opinion that this is not an appropriate case to revisit the subject of tariff.

For these reasons, I would not uphold ground 1.

(2) ..... abandoned.

(3) That the Stewards when determining the length of suspension gave insufficient weight to:

(a) the length and structure of suspensions given for similar offences in other states;

(b) the length of suspensions given for similar offences in Western Australia;

(c) the absence of any prior history of the Appellant relating to drug/abuse offences;

(d) the character evidence led on behalf of the Appellant;

(e) **the racing calendar of Western Australia and particularly the timing of the summer carnival**

There is nothing in the Stewards' reasons to indicate that they did not take all these matters into account. In my view, the matters complained of amount to no more than particulars of ground 1. During the course of submissions, Counsel for the Appellant was asked whether that was the case, and he explained that grounds 1 and 3 were indeed separate, each requiring consideration. With respect, I can see little difference. For the same reasons as in ground 1, I would not uphold ground 3.

(4) **That in acknowledging for offences of this type the desirability of structured and conditional penalties, the period of 5 months between when the Appellant may resume some licensed activities and when the Appellant may resume licensed activities for reward is disproportionate and manifestly excessive.**

I would uphold ground 4.

In my view, the Stewards made an error of fact in not finding that the Appellant ingested the drug voluntarily. In doing so, the option of staying part of the penalty on conditions relating to drug counselling was not considered. Had the Stewards proceeded on the correct factual basis, they may have considered that option.

Because the sentencing discretion has miscarried in the way I have described, it is appropriate for this tribunal to carry out the process again.

The option of staying part of a penalty on conditions is available under **ARR 81C**. That rule states:

> *"**AR.81C.** The Stewards may stay in whole or in part, and for such period and under such terms and conditions as they think fit, the operation of any suspension from riding imposed for a breach of AR.81A. Provided that, in the event of any failure to comply with any of the terms and conditions of the stay, the Stewards may order that the penalty takes effect"*

The Stewards have used that provision in the past. The case of **O'Donnell** is a good example. That case came to this Tribunal on appeal simply on the matter of the length of the term of suspension. However, the penalty of 9 months originally imposed by the Stewards had contained a stay provision. In that case, Mr O'Donnell had admitted a problem with drugs. The last month of his suspension was stayed on condition that he continue with his counselling and inform the Stewards of how he was progressing.

In my view, this case should be dealt with in a similar way. That is so despite the fact that the Appellant has not admitted taking the drug. It is not unusual that people will seek to avoid punishment by denying responsibility, as the Appellant has done in this case. That is not to say that counselling and treatment is of no use. Experts in the field no doubt have ways of dealing with that situation.

In my opinion, the period of suspension should remain at 9 months. Counsel for the Appellant did not press the point that it should be reduced, despite the wide ambit of the grounds of appeal. In my opinion, the last 3 months of that period should be stayed on conditions. The period of 3 months is longer than that granted in the case of **O'Donnell**, and

it is intended to reflect the mitigatory matters accepted by the Stewards in this case. It also serves the purpose of general deterrence. The presence of drugs in the system of a rider is an extremely serious matter, capable of tarnishing the image of racing. The imposition of a penalty with conditions serves to restore confidence in the integrity of the industry, and to ensure as far as possible that the safety of participants is not put at risk.

In their reasons for decision, the Stewards referred to a number of cases in other States where parts of a penalty have been stayed on conditions requiring counselling. In three cocaine cases, jockeys were suspended for 9 months with the final 3 months suspended subject to counselling. These were the cases of Ferris in New South Wales on 25 April 2001, Bowman in New South Wales on 13 February 2002, and Elissa in Queensland on 9 May 2006. In my view, the staying of part of a penalty on conditions is a disposition which should be applied where the facts of the case allow for it.

It is important to remember that the period of suspension is 9 months, and includes both the period actually to be served, and the period which may be stayed if the Appellant satisfies the conditions.

Conclusion

I would allow the appeal. I would vary the decision of the Stewards, so that the following penalty will apply:

1. The Appellant be suspended for a period of 9 months.

2. The period of 9 months suspension be concurrent with the period of suspension imposed for failing the breathalyser test.

3. The period of 9 months suspension be backdated to commence on 20 April 2006.

4. After a period of 6 months from the commencement of the suspension, and after the Appellant provides a blood or urine sample free of any substance referred to in **AR.81B**, the suspension be stayed on the following conditions:

    (a) The Appellant do undergo assessment and testing, and if necessary, appropriate treatment in relation to the abuse of alcohol, drugs or other substances as directed or approved by the Stewards;

    (b) The assessment, testing and treatment be carried out at any time during the period of the 9 months suspension including before or after the commencement of the period of the stay;

    (c) The Appellant bear the cost of the assessment, testing and treatment and authorise any service provider to provide such reports to the Stewards as they may request.

Seal of the Racing Penalties Appeal Tribunal of WA

PATRICK HOGAN, MEMBER

APPEAL - 655

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:	**DAVID O'HEARE**
APPLICATION NO:	**A30/08/655**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR J PRIOR (MEMBER)**
DATE OF HEARING:	**21 AUGUST 2006**
DATE OF DETERMINATION:	**11 OCTOBER 2006**

IN THE MATTER OF an appeal by David Andrew O'Heare against the determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 15 May 2006 imposing 9 months suspension for breach of Rule 81A of the Australian Rules of Racing.

Mr D Sheales appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr P Hogan, Member.

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

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

John Prior

JOHN PRIOR, MEMBER