



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2017/A/5320 United States Anti-Doping Agency v. Ryan Bailey

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Ms. Carol Roberts, Attorney-at-Law, Vancouver, Canada
Arbitrators: Hon. Michael J. Beloff M.A. Q.C., Barrister, London, United Kingdom
Mr. Jeffrey Benz, Attorney-at-Law, Los Angeles, California and London,
United Kingdom

in the arbitration between

United States Anti-Doping Agency, Colorado, United States

Represented by Mr. William Bock, III, General Counsel, and Mr. Jeffrey T. Cook, Legal Affairs
Director

Appellant

and

Ryan Bailey, Oregon, United States

Represented by Mr. Howard Jacobs, Law Offices of Howard Jacobs, Westlake Village,
California, United States

Respondent

I. INTRODUCTION

1. This is an appeal by United States Anti-Doping Agency (the “Appellant” or “USADA”) against a 23 August 2017 decision of the American Arbitration Association (“AAA”) determining that Mr. Ryan Bailey (the “Respondent” or “Mr. Bailey”) demonstrated no significant fault or negligence in ingesting a prohibited substance during a bobsled competition in January 2017 and imposing a six-month sanction.

II. PARTIES

2. USADA is an independent anti-doping agency in the United States, which is responsible for providing drug education to athletes as well as conducting drug testing and adjudicating positive test results pursuant to the USADA Protocol for Olympic and Paralympic Movement Testing (“USADA Protocol”).
3. Mr. Bailey is a 28-year-old an experienced elite-level athlete who has competed at an international level in both athletics and bobsledding.

III. BACKGROUND

A. Facts

4. Mr. Bailey was a member of the United States Men’s 4x100-meter relay team at the London 2012 Olympic Games which won a silver medal. The team was later disqualified following an anti-doping rule violation (“ADRV”) by one of the team members, Tyson Gay, and Mr. Bailey’s silver medal had to be returned. Mr. Bailey has been competing in bobsled since 2016.
5. Due to his success in athletics, Mr. Bailey was enrolled in the USADA Registered Testing Pool (“RTP”) from 10 July 2010 to 31 March 2017. As a result of his enrolment in the RTP, Mr. Bailey received extensive anti-doping education, including yearly tutorials and quizzes to ensure that he was aware of the dangers of supplements and the resources available to him. Those resources included USADA’s online dietary supplement safety education and awareness resource – Supplement 411, and a drug reference hotline Global Drug Reference Online (“GlobalDRO”).
6. On 5 January 2017, Mr. Bailey, along with all the other athletes in the RTP, received an email reminding him that the 2017 WADA Prohibited List had recently come into effect and advising him accordingly to review that list, to research the status of substances, products and ingredients, and to learn how to realize, recognize and reduce risk from dietary supplements on Supplement411.
7. Mr. Bailey has regularly used pre-workout and protein powder supplements, including “Epiq” (which was one of his sponsors), “Shatter SX-7 Black Onyx,” “Hyde,” and “No Explode” at various times throughout his athletic career during which he has submitted

to at least 50 doping controls, with no positive tests until the one that is the subject of these proceedings.

8. In January 2017, Mr. Bailey competed in the 2-Man and 4-Man Bobsled events at the International Bobsleigh & Skeleton Federation (“IBSF”) North American Cup (the “Competition”). During the competition, Mr. Bailey used the pre-workout supplements “Hyde” and “Weapon X,” which were supplied by his teammates Geoff Gadbois and Patrick “Dillon” Schrodtt, respectively.
9. On 10 January 2017, Mr. Bailey competed in the 2-Man Bobsled event and finished in first place.
10. Following the event, Mr. Bailey was selected for doping control (urine). On his Doping Control Official Record (DCOR), Mr. Bailey declared the use of Ibuprofen and one scoop of a supplement which was identified on the DCOR as “Hive.”
11. On 12 January 2017, Mr. Bailey competed in the 4-Man Bobsled event, placing fifth. Mr. Bailey returned home and was selected for an out-of-competition test on 18 January 2017. On his DCOR, Mr. Bailey disclosed that he had used two scoops of “Hive” on 12 January 2017. That sample tested negative for any prohibited substances.
12. On 23 January 2017, USADA notified Mr. Bailey that his 10 January 2017 “A” sample tested positive for dimethylbutylamine (DMBA), a Prohibited Specified substance in-competition in the class of stimulants on the World Anti-Doping Agency Prohibited List (“WADC”). The WADC has been implemented by both the USADA Protocol for Olympic and Paralympic Movement Testing and the IBSF Anti-Doping Rules.
13. On the same date, 23 January 2017, USADA invited Mr. Bailey to provide an explanation of his adverse analytical finding.
14. On 29 January 2017, Mr. Bailey accepted the WADA-accredited laboratory’s finding and voluntarily agreed to a provisional suspension.
15. On 2 February 2017 during a discussion with USADA, Mr. Bailey stated that he took the pre-workout supplements “Weapon X” and “Hyde”.
16. Mr. Schrodtt and another athlete, J.C. Cruse, also used “Weapon X” on 12 January 2017, the day they competed in the 4-Man bobsled. They were notified about the same time as Mr. Bailey that their samples also tested positive for DMBA.
17. Mr. Schrodtt sent his “Weapon X” to a Laboratory which confirmed that it contained approximately 8.7 milligrams of DMBA per serving (or 2.5 milligrams per gram). Because Mr. Cruse and Mr. Schrodtt took “Weapon X” in-competition, they faced a sanction in the 16-24 month range. USADA proposed 16-month suspensions for each of these athletes, largely due to their lack of formal anti-doping education. They athletes both accepted the length of these suspensions, with the possibility of a reduced sanction depending on the outcome of Mr. Bailey’s appeal.
18. On 20 March 2017, USADA informed Mr. Bailey that his B sample also contained DMBA, and that the matter would be referred to the USADA Anti-Doping Review Board.

On 20 April 2017, following the Anti-Doping Review Board's examination of the case, Mr. Bailey was issued a charging letter for the ADRV. Mr. Bailey acknowledged that the presence of DMBA in his sample constituted his first ADRV and sought a hearing before the AAA Panel in accordance with the USADA Protocol.

19. The parties agree that the source of the prohibited substance was the supplement "Weapon X." The "Weapon X" supplement packaging identifies methylhexanaemine (DMAA) as an ingredient.

B. Proceedings before the AAA

20. On 25 July 2017 at a hearing before the AAA Panel, Mr. Bailey did not contest the positive result or the ADRV under the WADC. The only issues before the AAA were the length of sanction for the ADRV and appropriate start date for any period of ineligibility.
21. On 23 August 2017, the AAA Panel issued its reasoned decision finding that Mr. Bailey committed an ADRV under Article 2.1 of the WADC for use of a prohibited substance.
22. The AAA Panel determined that Mr. Bailey had met his burden of proving that he bore No Significant Fault or Negligence for his ADRV based on a variety of circumstances, including the fact that the substance was not prohibited out-of-competition, and that, while he should have perceived a risk in ingesting the substance, that risk was minimal because he did so while in the active start house among "similarly situated" athletes in the Competition who were taking the same pre-workout supplements. The AAA Panel then determined that Mr. Bailey had demonstrated that he bore a light degree of fault according to the analysis set out in *Cilic v ITF*, 2013/A/3327 ("*Cilic*").
23. The AAA Panel reduced Mr. Bailey's sanction from two years to six (6) months effective from 10 January 2017 (the date of the Athlete's sample collection) (the "AAA Decision"). In addition, the AAA Panel disqualified Mr. Bailey's medals, points, and prizes earned from 10 January 2017 through 29 January 2017 (the date of his provisional suspension).

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. The following briefly summarizes the proceedings before the Court of Arbitration for Sport (the "CAS"), the relevant facts as well as the submissions and pleadings of the parties. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties, it will refer only to the submissions and evidence it considers necessary to explain its reasoning in this Award.
25. On 15 September 2017, USADA filed its statement of appeal against the AAA Decision with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). USADA appealed the length of suspension, contending that Mr. Bailey should serve a longer period of ineligibility up to and including the entire two-year period of ineligibility under Article 10.2.2 of the WADC and that the period of ineligibility should start on the date of his provisional suspension, or 29 January 2017. In its statement of appeal, the Appellant nominated the Hon. Michael J. Beloff M.A. Q.C. as arbitrator.

26. On 28 September 2017, the Respondent nominated Mr. Jeffrey G. Benz as arbitrator.
27. On 18 October 2017, following an agreed upon extension of time, USADA filed its appeal brief in accordance with Article R51 of the Code.
28. On 18 October 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the appointment of the Panel as follows: President – Carol Roberts, Attorney-at-Law, Vancouver, Canada; Arbitrators – The Hon. Michael J. Beloff M.A. Q.C., Barrister, London, United Kingdom; Mr. Jeffrey Benz, Attorney-at-Law, Los Angeles, California and London, United Kingdom.
29. On 15 November 2017, Mr. Bailey filed his answer in accordance with Article R55 of the Code. Mr. Bailey argued that the AAA decision was correct and that the Panel ought to defer to that AAA decision. Mr. Bailey sought to have the appeal dismissed.
30. Mr. Bailey and USADA signed and returned the order of procedure to the CAS on 24 and 27 November 2017, respectively.
31. According to the timetable agreed upon by the parties, the Panel conducted a hearing in Los Angeles, California on 29 November 2017. The Panel was assisted by Mr. Brent J. Nowicki, Managing Counsel to the CAS. Mr. William Bock, III and Mr. Jeffrey T. Cook appeared as counsel for USADA, and Mr. Howard Jacobs, Esq. appeared as counsel for Mr. Bailey.
32. The United States Olympic Committee’s Athlete Ombudsman, Kacie Wallace, observed the hearing with the consent of the parties.
33. At the beginning of the hearing, the parties confirmed that they had no objection to the constitution of the Panel, and at its conclusion, that their right to be heard had been fully respected.

V. SUBMISSIONS OF THE PARTIES

34. USADA’s submissions may be summarized as follows:
 - The burden of proof is on the Athlete to establish no reasonable fault or negligence and the evidence supports a finding that, in using “Weapon X” without making any effort to determine whether it contained any prohibited substances, Mr. Bailey did not meet the standard of care that is expected of elite athletes in his position;
 - The WADC must be applied and enforced consistently and fairly, without an over-reliance on subjective factors. To uphold the AAA Panel’s decision and emphasize subjective factors over objective factors would be to create an unworkable exception to the standard of care and allow elite athletes to ignore product labels;
 - In the alternative, if the Panel finds that Mr. Bailey has met his burden, in consideration of all of the circumstances and the factors set forth in *Cilic*, the applicable sanction range is in the top end of the 16-24 month range.

35. USADA requested that this Panel:

- a) *find that the Respondent has not met his burden of establishing that he was not significantly at fault or negligent because he took no steps to satisfy the standard of care that is expected of elite athletes in his position;*
- b) *reverse the AAA decision and impose the default two-year period of ineligibility to run from the date of the hearing decision less any period of provisional suspension and;*
- c) *disqualify Mr. Bailey's competitive results for the 10 and 12 January 2017 competition.*

36. Mr. Bailey's submissions may be summarized as follows:

- Mr. Bailey used the supplement on one occasion out-of-competition, in a safe environment with athletes who were similarly situated;
- Although Mr. Bailey was negligent in using the supplement of a fellow competitor without properly inquiring into its ingredients, his fault was, in all of the circumstances, at the lower end of the spectrum;
- Mr. Bailey's negligence was mitigated by his history of Attention Deficit Hyperactivity Disorder ("ADHD");
- Mr. Bailey's degree of fault was properly analyzed through an extensive analysis of the factors outlined in *Cilic* by the experienced members of the AAA, and that the Panel's exercise of discretion in determining sanction length should not be "tinkered with" or disturbed unless it is "evidently and grossly disproportionate;"
- Mr. Bailey's sanction is consistent with numerous other awards and a sanction in excess of six months would be disproportionate in the circumstances;
- The AAA properly found that the start date of Mr. Bailey's sanction should have been 10 January 2017, the date of the positive test.

37. Mr. Bailey requested that the Panel reject USADA's appeal in its entirety.

38. A more detailed consideration of the substance of the submissions will be found in the "Merits" section below.

VI. JURISDICTION

39. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

40. Article R-45 of the USADA Protocol provides that appeals from AAA decisions “*may be appealed to CAS as provided in Annex A of the USADA Protocol, which incorporates the mandatory Articles on Appeals from the World Anti-Doping Code. . . Appeals to CAS filed under these rules shall be heard in the United States.*”

41. Annex A of the USADA Protocol further provides as follows:

13.2.3 Persons Entitled to Appeal

In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed

. . . .

42. The Respondent does not object to the jurisdiction of the CAS to decide this appeal, and both parties expressly confirmed the jurisdiction of CAS when signing the order of procedure.

43. Given the foregoing, the Panel confirms that CAS has jurisdiction to decide this appeal.

VII. ADMISSIBILITY

44. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

45. The Code, therefore, allows the presumptive 21-day time limit for the filing of the appeal to be varied by the statutes or regulation of the association concerned. In this regard, however, the Panel notes that both Rule R-45 of the AAA Supplementary Procedures and Article 17(b) of the USADA Protocol provide that any CAS appeal shall be filed within the same twenty-one (21) day period.

46. The parties were notified of the Appeal Decision on 24 August 2017. The Appellant filed its statement of appeal on 15 September 2017, i.e. within 21 days.

47. Given that neither party has contested admissibility, the Panel confirms that this appeal is admissible.

VIII. EVIDENCE BEFORE CAS

48. The evidence before this Panel was largely consistent with that adduced before the AAA Panel. Any material inconsistencies will be noted in this decision.

49. The Panel heard evidence from Mr. Bailey and on his behalf from John Parks, Mr. Bailey’s high school teacher, coach and mentor; Cynthia Richardson, the Principal of Mr. Bailey’s high school (by telephone); Patrick “Dillon” Schrodt (by telephone), J.C. Cruse

(by telephone) and Geoff Gadbois (by telephone), three of Mr. Bailey's teammates at the Competition; Darrin Steele, the Chief Executive Officer of USA Bobsled (by telephone); Dr. Ted Forcum, a doctor with the United States Olympic Committee (by telephone); and Dr. Dov Rapoport, a psychiatrist in Lake Placid, New York (by telephone). The Panel also heard evidence on USADA's behalf from Dr. Matthew Fedoruk, the Senior Managing Director of Science and Research at USADA (by telephone).

a. 9 -12 January 2017 IBSF North American Cup in Park City, Utah

50. Mr. Bailey said that he was not originally invited to compete at the Competition and that, upon his arrival, he was invited to share accommodation with Mr. Cruse, Mr. Gadbois and Mr. Schrodt, whom he had met at a previous Bobsled camp.
51. Mr. Bailey said that because he had received a last-minute request to attend the Competition, he forgot to bring his usual pre-workout powder and mentioned that to the other athletes.
52. After hearing Mr. Bailey tell them that he had forgotten to pack his pre-workout powder, both Mr. Gadbois and Mr. Schrodt invited him to use theirs. Mr. Bailey did not ask either Mr. Gadbois or Mr. Schrodt anything about their pre-workout powders.
53. Mr. Gadbois, who is a 23-year-old pilot for USA Bobsled, testified that he told Mr. Bailey he could use his supplement "Mr. Hyde" at any time. Mr. Gadbois said that Mr. Bailey used his supplement, but did not recall how often or when. Mr. Bailey said that he used Mr. Gadbois' pre-workout powder on 10 January and 12 January.
54. Mr. Schrodt is 25 years old. He has a Masters degree in Sports Administration and is currently a 7th Grade math teacher. A former NCAA athlete in Football and Track and Field, Mr. Schrodt began competing in Bobsled in September 2016.
55. Mr. Schrodt said that he began using the pre-workout supplement "Weapon X" in December 2016 based on his brother's recommendation. Mr. Schrodt obtained "Weapon X" free from his brother's roommate and brought it to Park City. Mr. Schrodt, who had little or no anti-doping education and was not in the Registered Testing Pool ("RTP"), conducted no research into the ingredients of "Weapon X" until after he tested positive.
56. Both Mr. Schrodt and Mr. Bailey testified that on the morning of 9 January 2017, they were together in the start house; Mr. Schrodt was competing and Mr. Bailey was working out. Mr. Schrodt handed his container of "Weapon X" to Mr. Bailey. Mr. Bailey took the container, placed the powder directly into his mouth, and washed it down with water. Mr. Schrodt recalled that Mr. Bailey held the container in his hands for about 5 seconds before handing it back and did not ask Mr. Schrodt any questions about his pre-workout supplement at any time during the Competition.
57. Mr. Schrodt said that Mr. Bailey used his "Weapon X" on only one occasion, a fact he remembered because "Weapon X" was expensive and he would not have just handed it out to other athletes. Mr. Schrodt said that Mr. Cruse also used some of his "Weapon X" that day, a day on which Mr. Cruse competed. Although Mr. Schrodt brought "Weapon X" to the start house on 12 January, it was pre-mixed in his own water bottle.

58. Mr. Bailey testified before the AAA Panel that he did not look at the “Weapon X” label because he “trusted Schrodt.” At the hearing before this Panel, Mr. Bailey testified that he took the supplement on the “spur of the moment.” He said that he did not know the name of the supplement and did not look at the label on the container at any time either on 9 January 2017 or any date thereafter because he “never thought about it.” He also did not discuss the product with Mr. Schrodt at any time during the Competition. Mr. Bailey said that he did not like the taste or texture of the powder, and did not take it again.
59. Mr. Bailey said that he believed Mr. Schrodt and Mr. Gadbois knew about anti-doping rules and relied on their knowledge to assure himself that the substances they were taking were clean. Mr. Bailey acknowledged that he “dropped the ball” in failing to look at the ingredient list of “Weapon X.” He said that he first learned about “Weapon X” after being informed of the ADRV and asked Mr. Schrodt to send him a photo of the container.
60. Mr. Bailey said that he has used pre-workout supplements since high school, mainly for energy. For the past 11 years he has researched the substance on GlobalDRO, but largely “sticks to what he knows.” He said that he did not have a preference of one supplement over another as they were all similar in effect and ultimately used those whose taste he preferred.
61. Mr. Bailey acknowledged he had taken an anti-doping quiz as a result of his registration in the testing pool just before he went to the Competition, in which he was warned about the dangers of taking supplements. He also acknowledged that he knew it was his responsibility to look at the ingredients on the label and check them against the prohibited list, something he did on a regular basis.
62. Mr. Bailey testified that, during the doping control process on 20 January 2017, he informed the doping control officer that he had taken another substance he could not recall the name of, in addition to the Ibuprofen and “Hive.” He acknowledged that he had not testified about this communication before the AAA Tribunal nor had he told his lawyer about this conversation. Mr. Bailey also acknowledged that, although he had regularly used the pre-workout supplements “Mr. Hyde” and “Epiq” he had never previously declared his use of these products on any doping control forms.
63. On 2 February 2017, in the presence of his agent, Mr. Bailey spoke to USADA officials, including Mr. Bock. According to Mr. Bock’s notes of that conversation, Mr. Bailey stated that he had taken “Weapon X” two days before the competition when he took a drink of Mr. Schrodt’s mix and the next day he took a couple scoops out of Mr. Schrodt’s container. The notes also indicate that Mr. Bailey stated that he also used “Weapon X” on the third day of the competition, the day of the four-man race, by taking a couple of drinks out of Mr. Schrodt’s pre-mixed drink. When asked by USADA about his responses to the questions he was asked on 2 February 2017, Mr. Bailey said that he was either confused or misunderstood what he was being asked, and confirmed that he had only taken “Weapon X” one time on 9 January 2017. He denied that he had ingested two scoops of the powder or that he drank from Mr. Schrodt’s pre-mixed bottle.

b. Characteristics of DMAA and DMBA

64. Dr. Fedoruk testified that DMBA has a similar chemical structure to DMAA, both of which have similar performing-enhancing effects. DMBA is a Specified Substance

prohibited in-competition on the WADC Prohibited List. DMBA is most structurally similar to DMAA, which is specifically named as a specified stimulant on the WADC prohibited list. Dr. Fedoruk testified that DMAA is prohibited in competition as it enhances both physical and mental performance. Although the supplement “Weapon X” taken by Mr. Bailey has since been discontinued, “Weapon X-Extreme,” which lists DMAA on its label, is on USADA’s high-risk supplement list.

65. DMBA has a minimum required performance limit of 100ng/mL, and the reporting limit is 50% of that, or 50ng/mL. The reporting limit exists because athletes may use the substance out of competition even though, because of its serious side effects, it is not approved in the United States for any clinical use or as a dietary ingredient.
66. Dr. Fedoruk testified that specific information on both DMBA and DMAA have been placed on and updated regularly on USADA’s website and Supplement 411. Additionally, on 5 January 2017, athletes in the RTP were sent an email reminding them that the 2017 WADA Prohibited List was in effect, with links to substance profiles, including DMBA.
67. In Mr. Bailey’s case, the estimated DMBA concentration in his A and B samples were 4,586ng/mL and 5,586ng/mL, i.e. significantly higher than the minimum required performance limit. The Panel accepts that there are no published excretion studies on DMBA, and the studies on the excretion rates for DMAA are, at best, generalizations due to the low numbers of study subjects. Those studies show that relatively high concentrations of DMAA can persist for 24 hours after ingestion.

c. Evidence regarding Mr. Bailey’s diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”)

68. Mr. Bailey testified that he had been diagnosed with ADHD, first in Grade 6 and again in Grade 9. He said that although the doctors had recommended medication for this condition, his mother was concerned about the possible addictive effects of the medication and did not permit him to take it. When he was re-assessed in high school, Mr. Bailey refused to take any medication for the condition because of the possible side effects of the medication. Mr. Bailey acknowledged, however, that he had never discussed any side effects with a physician. Even after Dr. Rapoport suggested that Mr. Bailey consider taking medication for a two-week trial period following the November assessment, Mr. Bailey stated that he was still “sitting on the fence.”
69. Mr. Parks, who has been a track and field coach for over 30 years, taught Mr. Bailey in high school and was his primary coach during his competitive track career. Mr. Parks has become a mentor for Mr. Bailey and has continued to coach him in a limited capacity.
70. Mr. Parks and Ms. Richardson said that Mr. Bailey arrived at his high school having been diagnosed with ADHD. Although neither Mr. Parks nor Ms. Richardson had access to Mr. Bailey’s medical records, they were aware that Mr. Bailey was accommodated for his disability through an individualized educational plan. Although Mr. Parks’ knowledge about the disorder is limited to what he has learned in teachers’ seminars, he assumed Mr. Bailey suffered from ADHD based on his observations of Mr. Bailey’s conduct, which he described as “fidgety,” “impulsive” and “lacking focus.”

71. Mr. Parks testified that he repeatedly discussed with Mr. Bailey the importance of checking the ingredients in any supplements he was taking, and that, despite his ADHD diagnosis, Mr. Bailey fully understood his anti-doping obligations, including the requirement to declare all substances on his DCOR. Mr. Parks also said that Mr. Bailey was very diligent about using GlobalDRO, accessing the site through an app on his phone.
72. Mr. Parks testified that although he was concerned that, due to his disorder, Mr. Bailey might forget to complete his “whereabouts” (ADAMS) reports, Mr. Bailey was solely responsible for ensuring anything he was taking was in compliance with the WADC.
73. A psychiatrist for 33 years, Dr. Rapoport specializes in assessing children for ADHD. On 6 November 2017, Dr. Rapoport interviewed Mr. Bailey in person for over one hour. Following that interview, Dr. Rapoport formed the opinion that Mr. Bailey met the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) V criteria for ADHD. Dr. Rapoport concluded that Mr. Bailey had been experiencing symptoms and signs of ADHD, including poor impulse control, inattention and hyperactivity since early childhood.
74. Dr. Rapoport conceded that his opinion was based solely on the interview; that he did not review any of Mr. Bailey’s medical records, did not speak to any of his teachers, and took Mr. Bailey’s self-reporting to be accurate. He also agreed that, in order to make an accurate diagnosis, ADHD symptoms had to be present for six months prior to the diagnosis. Dr. Rapoport acknowledged that he had little information about Mr. Bailey’s symptomology for the past six months apart from Mr. Bailey’s own statement that he relied on his girlfriend to pay bills. Dr. Rapoport also noted that although Mr. Bailey’s thought processes were logical and coherent, he had difficulty following questions.
75. Dr. Forcum, who worked with Mr. Bailey for approximately 10 years in his capacity as the USA Track and Field team doctor, described him as “a wonderfully engaging individual and gifted athlete.” Over those 10 years, Dr. Forcum observed that Mr. Bailey was impulsive, inconsistent and easily distracted, and had concerns about Mr. Bailey’s inability to follow rules. Based on these observations, Dr. Forcum believed that it would be helpful for Mr. Bailey to be assessed by a psychologist. Although Dr. Forcum made a number of appointments for Mr. Bailey to meet with a doctor for a psychological referral, Mr. Bailey failed to show up for any of those appointments.

IX. SCOPE OF THE PANEL’S REVIEW

76. Article R57 of the Code provides that the Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.
77. Accordingly, this Panel has the authority to make a *de novo* review of the appropriate length of Mr. Bailey’s period of ineligibility as a result of his ADRV. (see also *Robert Kendrick*, CAS 2011/A/2518) This Panel is exercising that authority here.

X. APPLICABLE LAW

78. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

79. The applicable regulations are the WADC and the IBSF Anti-Doping Rules.

XI. MERITS

80. The following provisions are relevant to this Appeal:

It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance [...] found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1. (Article 2.1.1, IBSF Anti-Doping Rules)

81. The period of ineligibility for an Article 2.1 anti-doping rule violation is two years, subject to a potential reduction if an Athlete can establish, where the anti-doping rule violation involves a specified substance, that he or she bears No Significant Fault or Negligence. (Articles 10.2 and 10.5)

82. Appendix 1 of the WADC defines fault as

...any breach of duty or lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's ... degree of Fault include, for example, the Athlete's ... experience, whether the Athlete... is a minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's... degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's... departure from the expected standard of behaviour.

83. In summary, the WADC and the IBSF regulations are based on the personal responsibility of the Athlete: the Athlete's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility, and the Athlete has the onus of establishing that his or her degree of fault justifies a reduced sanction.

84. In determining fault, the Panel should consider (a) the degree of risk that should have been perceived by the athlete; and (b) the level of care and investigation exercised by the athlete in relation to the perceived level of risk. (see *Therese Johaug*, CAS 2017/A/5015 and CAS 2017/A/5110)

85. The issues before the Panel are

- a) whether or not Mr. Bailey has met his burden of establishing that he was not at fault, or demonstrated no significant fault or negligence;
- b) what is the appropriate sanction proportionate to Mr. Bailey's circumstances; and
- c) what is the commencement of Mr. Bailey's period of ineligibility?

a) Has Mr. Bailey has met his burden of establishing that he was not at fault, or demonstrated no significant fault or negligence?

Credibility and Reliability

86. The Panel is troubled by the inconsistencies between the information Mr. Bailey provided to USADA on 2 February 2017, shortly after being notified of the ADRV, as well as between his evidence before the AAA Panel and this Panel.
87. Notes of Mr. Bailey's 2 February 2017 conversation with USADA officials were made contemporaneously by USADA counsel. Those notes suggest that Mr. Bailey told USADA that he had taken "Weapon X" three times during the Competition, once being the day of the 4-man Bobsled race. Those statements were significantly different from the evidence given by Mr. Bailey at the AAA Panel hearing and before this Panel in which he testified that he took "Weapon X" on one occasion only. As noted above, Mr. Bailey did not deny the accuracy of USADA's notes but stated he was likely confused by the questions in order to have responded the way he did.
88. Mr. Bailey also testified, for the first time before this Panel, that on 10 January 2017 he told the doping control officer that he had taken another substance whose name he could not remember. There is nothing on the DCOR that suggests Mr. Bailey gave the officer any such information, although in signing the DCOR, Mr. Bailey attested that it "fully and accurately represented" his declarations to the doping control officer.
89. Given Mr. Bailey's evidence that he never looked at the "Weapon X" container at any time and did not discuss the pre-workout powders he accepted from the other athletes, the Panel is perplexed as to how Mr. Bailey could forget the name of a supplement whose name he never knew.
90. USADA argued that it expects that athletes declare their use of products, and if questions arise, their failure to disclose can and should be held against them. While noting the discrepancies in Mr. Bailey's testimony, the Panel is not satisfied that Mr. Bailey was intentionally dishonest in failing to disclose all of the substances he ingested. However, the Panel is of the view that Mr. Bailey's conduct was certainly extremely careless.
91. While USADA also argued that the AAA Panel's decision misstated Mr. Schrod's testimony, this Panel does not have a record of the evidence before that Panel. Mr. Schrod's testimony was that his evidence before this Panel was the same as it was before the AAA Panel; that is, that Mr. Bailey took his "Weapon X" on one occasion.

92. The Panel is prepared to proceed in the basis of Mr. Bailey's evidence, which was corroborated by Mr. Schrodt, that he only took "Weapon X" on a single occasion out-of-competition since it is not persuaded that Mr. Bailey took "Weapon X" on a second occasion in-competition. The only evidence that Mr. Bailey took "Weapon X" on 10 January 2017 was the notes of the conversation USADA had with Mr. Bailey on 2 February 2017. The Panel is prepared to consider any inconsistencies as the product of a misunderstanding, which may have been contributed to by Mr. Bailey's ADHD.
93. Furthermore, any conclusion as to the significance of the inconsistencies would not alter the outcome of this matter, since Mr. Bailey only had to ingest "Weapon X" on one occasion for the Panel to arrive at its decision on sanction. Whether Mr. Bailey took "Weapon X" on 12 January 2017 is only peripherally relevant to the issue of the circumstances of the ADRV on 10 January 2017 (although it does go to his credibility). The Panel notes that USADA has only relied on one out-of-competition ADRV; that is, on 10 January 2017, and has not asserted additionally an in-competition ADRV; that is, on 12 January 2017.

Duty of Care/Fault

94. An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations. The standard of care for top athletes is very high in light of their experience, expected knowledge of anti-doping rules, and public impact they have on their particular sport. (CAS 2017/A/5015)
95. Mr. Bailey's anti-doping education included yearly tutorials and quizzes on which he had to score perfectly before being permitted to file his whereabouts. He received an Athlete Handbook, Pocket Guide and Wallet Card, all of which warned of the dangers of supplements. The yearly tutorials also reviewed the risks associated with supplements. In 2015 and 2016, the tutorials referenced USADA's website Supplement411.org as a key resource for athletes. The website also offered guidance and warnings on DMBA. Mr. Bailey testified that he received and read the educational materials, and researched, using Supplement411 and GlobalDRO, all the substances he ingested. Furthermore, Mr. Bailey acknowledged that on 29 December 2016, just days before he travelled to the Competition, he was asked questions about Supplement411.org and provided correct responses, just as he had in 2013, 2014 and 2015.
96. The Panel notes that Mr. Bailey was diligent about using pre-workout supplements that were familiar to him and checking the ingredients on his GlobalDRO app. The Panel also notes that in his 10 plus years of being in the RTP, Mr. Bailey has not failed an anti-doping test.
97. Given Mr. Bailey's many years in the RTP and the education he received through his status as an elite athlete, the Panel rejects Mr. Bailey's argument that he earnestly believed that most pre-workout formulas were substantially similar.
98. Given his experience and knowledge, the Panel is of the view that Mr. Bailey wholly failed in his duty of care to prevent the ingestion of a prohibited substance.
99. Mr. Bailey candidly acknowledged that he did not look, or even think to look, at the supplement container before consuming it. He did not ask Mr. Schrodt the name of the

supplement or what its ingredients were, either in the shed, while at the athlete accommodations or at any other time during the Competition. He did not make any attempt to research the supplement, or search its ingredients, either in GlobalDRO or Supplement411 until after being notified of the ADRV. When asked by a Panel member what steps he had taken to protect himself from potential risks posed by the supplement he was taking, his response was “absolutely none.”

100. To excuse Mr. Bailey’s failure to take the most basic step of looking at the supplement container without considering the possible consequences or risks, based on the fact that he was with “similarly situated athletes” as the AAA Panel did, in this Panel’s respectful view, is to ignore an athlete’s primary and personal responsibility to ensure that no prohibited substances enter his body. The evidence is that Mr. Bailey exercised no degree of care whatsoever, as he expressly admitted in response to the Panel’s questions. As such, the Panel finds that Mr. Bailey’s conduct was a marked departure from the expected standard of behaviour of an athlete of his age and experience.
101. In this case, it is not a matter of what steps Mr. Bailey took; rather, in the Panel’s view, it is hard to see how Mr. Bailey could have done less. The Panel concludes that Mr. Bailey’s conduct does not warrant a finding of No Significant Fault.

Mr. Bailey’s ADHD

102. The Panel accepts that Mr. Bailey has been diagnosed with ADHD and that he has demonstrated certain characteristics of the disorder over certain periods of his life, including lack of focus, hyperactivity and impulsivity. However, the Panel has no clear evidence about the degree to which Mr. Bailey may continue to suffer from any impairment, as it understands that ADHD abates over time. Furthermore, Mr. Park’s evidence was that Mr. Bailey was diligent about not ingesting substances that would jeopardize his athletic career, and regularly checked the Global DRO app. That diligence is borne out, in large measure, by the fact that Mr. Bailey has been tested over 50 times without a positive test. There is no evidence that Mr. Bailey has either a problem understanding his anti-doping obligations or an inability to comply with them.
103. In short, the Panel finds that Mr. Bailey’s ADHD was not sufficiently disabling such that it prevented him exercising any degree of due diligence.
104. Furthermore, the Panel notes that Mr. Bailey has been prescribed medication for this disorder, medication he has declined to take for fear of its assumed side effects. While Mr. Bailey may be commended for his caution, the Panel notes nonetheless that Mr. Bailey has not inquired into the validity of those perceived side effects. To the extent that taking the medication could have cured his disorder, his failure to take it, contrary to all current medical advice, made him the author of his own misfortune. Similarly, although Mr. Bailey’s support personnel organized medical appointments for him to review what he asserted to be symptoms of ADHD, Mr. Bailey declined to attend those appointments.
105. An athlete who suffers from a disability or impairment that prevents him or her from complying with primary WADC obligations should either not compete at all or ensure that he is accompanied by a responsible adult when he or she takes any supplement or medicine, or take other appropriate measures, including medically recommended measures, to achieve compliance. Mr. Bailey took no such steps.

106. Having arrived at the conclusion that Mr. Bailey's conduct does not warrant a finding of No Significant Fault, the Panel finds it is unnecessary to address the *Cilic* factors.

b) What is the appropriate sanction proportionate to Mr. Bailey's circumstances?

107. Mr. Bailey argued that he was operating under a "mistaken assumption that his teammates were as responsible as he had been with respect to their supplement choices. Mr. Bailey was not, however, a "similarly situated athlete" as his teammates, contrary to the conclusion of the AAA Panel. While it is common ground that Mr. Bailey was in the same start house, he was, unlike the other athletes consuming the supplements, an elite-level international athlete with over 10 years of anti-doping education. He ought to have mentored the less-experienced athletes, not blindly followed their lead. Not only did Mr. Bailey not know what he was ingesting, despite his knowledge of the resources available to him, resources he has used regularly over his 10-year athletics career, Mr. Bailey did not conduct any research on the product or contact any of the USADA help-lines for supplements.

108. In arriving at the appropriate sanction, the Panel has considered *Cilic*, *Kendrick*, and *Johaug* as well as a number of other cases cited by the parties and finds them distinguishable for a number of reasons, including the age, education and experience as well as the degree of diligence, or lack of it, exhibited by those athletes.

109. The Panel finds that the factual circumstances of *Cilic* to be distinguishable from the facts of this case given that Mr. Bailey exercised no degree of diligence to determine what substance he was ingesting, let alone whether it was prohibited only out-of-competition.

110. In *Kendrick*, the Panel determined that in each case, *the Athlete's fault is measured against the fundamental duty which he or she owes under...the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance. Any mitigating circumstances put forth on behalf of an athlete should be considered in the context of the standards which are expected of the athlete. Absent circumstances evidencing a high degree of fault bordering on serious indifference, recklessness, or extreme carelessness, a twelve month suspension would be at the upper end of the range of sanctions to be imposed.* As the Panel has noted above, Mr. Bailey is an experienced elite-level athlete who exercised no degree of care. His actions can, in the Panel's view, fairly be characterized as extremely reckless.

111. The Panel finds that Mr. Bailey's fault is significant. The Panel has considered Mr. Bailey's years of high-level competition and anti-doping education (which he was reminded of just days before attending the Competition), as well as the fact that Mr. Bailey's Olympic silver medal was stripped from him following a teammate's ADRV, all of which ought to have made him particularly careful about the products he ingested.

112. In summary, the Panel finds that Mr. Bailey's actions fall well below the standard of care expected of such an Athlete. In the Panel's view, Mr. Bailey demonstrated extreme carelessness or recklessness in failing to take even the most basic steps to avoid an ADRV. The Panel agrees with USADA's contention that Mr. Bailey took no steps to satisfy the standard of care that is expected of elite athletes in his position. Unlike the circumstances in other cases, Mr. Bailey did not ask anyone for assurances that the

substances he ingested were “safe,” did not do any research of his own, and in fact, did not even take the most basic step of reading the product label before taking it.

113. A period of ineligibility can be reduced in No Significant Fault only in cases where the circumstances that justify deviation from the duty of “utmost care” are truly exceptional. Given that the Panel has found that Mr. Bailey did not exercise any degree of care, we conclude that there can be no reduction to the two-year period of ineligibility.
114. The Panel finds, for all these reasons, that there should be no reduction to the two-year period of ineligibility in this case. The appeal filed by the United States Anti-Doping Agency on 15 September 2017 against the decision of the American Arbitration Association dated 23 August 2017 is upheld.

c) What is the commencement of Mr. Bailey’s period of ineligibility?

115. Rule 10.11 of the ISBF Anti-Doping Rules provide that, subject to any variation because of timely admission, *the period of ineligibility shall start on the date of the final hearing decision providing for ineligibility or, if the hearing is waived or there is no hearing, on the date ineligibility is accepted or otherwise imposed.*

116. The Rules also provide that:

Where the Athlete...promptly...admits the anti-doping rule violation after being confronted with the anti-doping rule violation by IBSF, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete ...shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete...accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise IBSF Anti-Doping Rules imposed. (Rule 10.11.2); and

If a provisional suspension is imposed... then the Athlete... shall receive a credit for such period of provisional suspension against any period of ineligibility which may ultimately be imposed. If a period of ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete... shall receive a credit for such period of ineligibility served against any period of ineligibility which may ultimately be imposed on appeal. (Rule 10.11.3).

117. Mr. Bailey admitted his ADRV upon discovering the source of his positive test and was provisionally suspended effective 29 January 2017. Furthermore, Mr. Bailey was cooperative and informed USADA of his use of “Weapon X” on 2 February 2017.
118. In the Panel’s view, Mr. Bailey is entitled to the benefit of Rule 10.11.2 and finds that the period of ineligibility should start as of 10 January 2017, the date of his sample collection.
119. Accordingly, Mr. Ryan Bailey is sanctioned with a two-year period of ineligibility commencing as from 23h59 (Swiss time) on 30 November 2017 with credit given for the period of suspension already served by Mr. Bailey between 29 January and 9 July 2017. Any results achieved by Mr. Bailey between 10 January and 29 January 2017 shall be disqualified.

XII. COSTS

120. Article R64.4 of the Code provides:

At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties.

121. Article R64.5 of the Code provides:

In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.

122. Considering the outcome of this appeal, in particular that the Appellant fully prevailed on all counts, this Panel determines that the costs of this arbitration, to be calculated by the CAS Court Office and communicated separately to the parties, shall be borne by Mr. Bailey. Despite the outcome of the appeal, the Panel notes the disparity in the financial resources between the parties and compliments the parties for taking steps to reduce each other's legal and other costs by holding the hearing in a location preferable to the Athlete, this Panel further determines that the parties shall bear their own legal expenses and other costs, including attorney's fees, incurred in connection with this arbitration proceeding.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the United States Anti-Doping Agency on 15 September 2017 against the decision of the American Arbitration Association Panel dated 23 August 2017 is upheld.
2. The decision of the American Arbitration Association Panel dated 23 August 2017 is set aside.
3. Mr. Ryan Bailey is sanctioned with a two-year period of ineligibility commencing as from 23h59 (Swiss time) on 30 November 2017 with credit given for the period of suspension already served by Mr. Bailey between 29 January and 9 July 2017. Any results achieved by Mr. Bailey between 10 January and 29 January 2017 shall be disqualified.
4. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by Mr. Ryan Bailey.
5. Each party shall bear its own costs and other expenses incurred in connection with this arbitration.
6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Operative part of the award rendered 30 November 2017
Date: 13 June 2018

THE COURT OF ARBITRATION FOR SPORT



Carol Roberts
President of the Panel