

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

North American Court of Arbitration for Sport Panel

USADA, Claimant

AAA No. 30 190 001100 03

And

Adham Sbeih, Respondent

AWARD AND DECISION OF THE ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, and, after a hearing held on March 14, 2004, do hereby render its full award pursuant to its undertaking to do so by March 25, 2004.

1. Introduction

1.1 The Claimant, USADA, is the independent anti-doping agency for Olympic sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping agency Protocol for Olympic Movement Testing (“USADA Protocol”).

1.2 The Respondent, Adham Sbeih, is an elite-level athlete in the sport of cycling. In 2003, he became the United States National Champion in the 4-kilometer pursuit track event.

2. The Applicable UCI Regulations

2.1 Under the USADA Protocol and the AAA Supplementary Procedures for Arbitration Initiated by USADA (“AAA Supplementary Procedures”), applicable to this proceeding, the Union Cycliste Internationale Regulations (“UCI”), the international

federation for the sport of cycling, apply. Those Regulations classify doping as a strict liability offense. (UCI Regulation, Article 4)

The Regulations applicable to this case include the following:

Doping is:

1. the use of an expedient (substance or method) which is potentially harmful to athletes' health and/or capable of enhancing their performance,
or
2. the presence in the athlete's body of a prohibited substance or evidence of the use or attempted use thereof, or evidence of the use or attempted use of a prohibited method.

UCI Regulation, Article 4.

2.2 Moreover, UCI Regulations specifically state that the mere "presence" of a prohibited substance in a rider's sample constitutes a doping offence:

Material Offence

The success or failure of a use of a prohibited substance or a prohibited method is not a prerequisite. The fact alone of the presence, the use or an attempt to use the substance or method is sufficient for the offense to be deemed to have occurred. Participants in cycle races are expected to undertake not to use prohibited substances or prohibited methods, even if they consider that neither the sporting outcome nor their health will be influenced. No discussion of this substance will be entertained.

UCI Regulation, Article 6.

2.3 The UCI List of Prohibited Substances and Prohibited Methods expressly classifies EPO as a prohibited substance in the class of Peptide Hormones, Mimetics and Analogues. (UCI Prohibited substances and Prohibited Methods). The UCI Regulations state in Section I.E. the following:

E. Peptide Hormones, Mimetics and Analogues

* * *

6. Erythropoietine (EPO): A glycoprotein hormone produced in the human kidney, which regulates, apparently by retroaction, the rate of synthesis of Erythrocytes;...

3. Background and Facts

- 3.1 On August 26, 2003, Sbeih provided a urine sample at the USA Cycling Elite Track Nationals in Trexeltown, Pa. at the request of USADA. (Stipulation of Uncontested Facts and Issues Between United States Anti-Doping Agency and Adam Sbeih (“Stipulation”), ¶a.1.) The urine specimen labeled 477815 was in fact the sample given by the athlete at the Elite Track Nationals. (Stipulation, ¶3.)

- 3.2 On September 26, 2003, the UCLA Lab reported Sbeih’s Sample A as positive for recombinant human Erythropoietin (“r-EPO”).

- 3.3 On October 28, 2003, the UCLA Lab reported Sbeih’s Sample B as confirming the A Sample analysis.

- 3.4 Each aspect of the sample collection and processing was conducted appropriately and without error. (Stipulation, ¶4.)

- 3.5 The chain of custody from the time of collection and processing at the collection site to the receipt of the sample by the UCLA Lab was conducted appropriately and without error. (Stipulation, ¶5.)

- 3.6 The UCLA Lab’s chain of custody for Sbeih’s specimen was conducted appropriately and without error. (Stipulation, ¶6.)

- 3.7 The UCLA Lab’s procedure for the detection of r-EPO was performed accurately and without error in the analysis of Sbeih’s sample. (Stipulation, ¶7.)

- 3.8 The electropherograms produced in relation to Sbeih’s urine are accurate and without error. (Stipulation, ¶8.)

3.9 On November 25, 2003, USADA notified Sbeih that, inter alia, it was seeking sanctions against him for a first doping offense pursuant to the UCI Regulations. The sanctions included a two-year suspension. (USADA Ex. 16)

3.10 Respondent was advised of his right to request a hearing before a Panel of North American Court of Arbitration for Sport (ACAS@) arbitrators who are also American Arbitration Association (AAA@) arbitrators in accordance with the USADA Protocol to contest the sanction proposed by USADA. He chose to pursue the hearing.

3.11 On December 11, 2003, USADA notified AAA and Mr. Jacobs of the request for the hearing. USADA advised that it was seeking sanctions against Sbeih, which included a two-year suspension. (Sbeih Ex. 20)

3.12 Sbeih retired from cycling by a letter received by USADA on February 2, 2004.(USADA Ex. 14)

3.13 A preliminary telephone conference was held on February 5, 2004.

3.14 The evidentiary hearing took place on March 14, 2004, in Denver, Colorado.

4. The Evidentiary Hearing

4.1 The Claimant, USADA, was represented by Mr. Richard Young, of the law firm of Holme, Roberts & Owen, and Mr. Travis Tygart, USADA Director of Legal Affairs. Dr. Don Catlin, Director of the UCLA Lab, testified as an expert witness for USADA.

4.2 The Respondent was represented by Mr. Howard L. Jacobs, of the law firm of Forgie Jacobs & Leonard. Sbeih testified in his own behalf and presented the telephone testimony of Mark Gorski, Executive Vice President at the Schupp Company

in St. Louis, Mo. Mr. Gorski has an extensive background in cycling. He competed competitively in cycling from 1974-1989 and received an Olympic Gold Medal in 1984. Bruce Hendler also testified by telephone on behalf of Sbeih. Mr. Hendler has been involved in cycling since 1984. Sbeih has assisted with Mr. Hendler's cycling camp.

4.3 The hearing was governed by the Commercial Rules of the AAA, amended as of January 1, 2003, as modified by the AAA Supplementary Procedures, referred to in the USADA Protocol as Annex D. The parties filed pre-hearing briefs stipulations, and numerous exhibits, all of which were deemed admitted in evidence, in accordance with the Panel's procedural orders. All witnesses were sworn in. The parties made opening statements and closing arguments, and the record was closed on March 15, 2004, after the conclusion of the hearing.

4.4 Dr. Catlin testified at length about the UCLA Lab's direct urine test. He and others published a peer-reviewed scientific article on the detection of r-EPO. Catlin, et al, Detection of Recombinant Human Erythropoietin in Urine by Isoelectric Focusing, Clinical Chemistry, 2003. The conclusion of this article was that the isoelectric focusing method detects r-EPO in most urine samples that are collected 3 days after nine doses of epoetin alfa. Also concluded was that the TBR is equivalent to a visual method for detecting r-EPO in urine. (USADA Ex 17, p. 901)

4.5 The UCLA Lab's direct urine test involves four steps: 1) sample preparation; 2) isoelectric focusing; 3) immuno-blotting; and 4) visualization. (USADA Ex. 11, p. 13-17). This testing methodology was discussed extensively in *Lazutina v. IOC* (CAS 2002/A/370).

4.6 In Dr. Catlin's expert opinion, there was no doubt in his mind that Sbeih had the prohibited substance, r-EPO, in his system.

Dr. Catlin testified that the UCLA Lab's analytical method for detecting r-EPO is scientifically reliable. The UCLA has extremely sensitive equipment used for the detection of r-EPO.

Dr. Catlin testified at length about the detection of r-EPO and about Sbeih's sample. He explained that when testing for r-EPO, it is now standard to conduct an activity test to ensure that there is no false-positive reading of the sample. The activity test is not designed for getting an accurate basic area percentage ("BAP"). The UCLA Lab follows that standard practice.¹

The UCLA Lab considers any one of three criteria sufficient in determining whether a sample is positive for r-EPO. These criteria are: 1) two-band ratio ("TBR") analysis, 2) the location of the most intense band analysis (LOC"), and 3) the BAP of 80%.

4.7 The A confirmation conclusions clearly indicated from all three criteria that Sbeih's sample was positive for r-EPO. The BAP was 86%. In fact, the technology present at the UCLA Lab is so advanced that Dr. Catlin testified that the threshold could be even lower than the current 80% without risking a false-positive.²

¹ The Activity test is currently not part of the standard laboratory packet provided to the athlete. The Panel recommends its inclusion in future cases. Likewise, the mathematical calculations used for computing the BAP should be included in the packet.

² In Dr. Catlin's expert opinion, the UCLA Lab is capable of detecting positive r-EPO at lower BAP levels. The Panel believes that this reporting criteria is evolving and that such evolution should be allowed to occur based on on-going studies.

4.8 The B confirmation conclusions clearly indicated from all three criteria that Sbeih's sample was positive for r-EPO. The BAP was 86%.³

5. Respondent's Arguments

5.1 Sbeih contended at the hearing that there was an improper interpretation of the electropherogram related to his sample and that therefore there was not sufficient evidence of a doping offense for r-EPO.

5.2 Sbeih further contended that, if he is found to have committed a doping offense, the penalty should be reduced from two years to 11 months.

6. Legal Analysis

6.1 The Panel is obligated, in accordance with the USADA Protocol contractually binding upon the parties, to apply the UCI Regulations as to the definition of doping, as to the consequences of a doping offense, and as to whether there are exceptional circumstances present for a possible modification of the sanction. (USADA Ex. 7)

6.2 The UCI Regulations prohibit even the presence in a competitor's body of any prohibited substance. (USADA Ex. 8, Art. 4, p.3)

6.3 The applicable UCI Regulations clearly define doping as a strict liability offense; that is, a doping offence has been committed where a prohibited substance, in this case r-EPO was present in the athlete=s urine sample. (USADA Ex.8, Art. 6, p. 3, and USADA Ex. 9, p.1.) Given the agreed upon stipulations in this matter, the mere presence of a prohibited substance in the athlete=s urine sample is all that is required for

⁴ This is consistent with the Olympic Movement Anti-Doping Code, Chapter II, Article 2.

an offence to be established.⁴ It is, therefore, incumbent upon USADA, in order to prevail, to meet its burden of proving to the comfortable satisfaction of the Panel that the substance, r-EPO, was properly identified in Respondent=s urine sample. (USADA Ex. 7, p. 3)

6.4 The strict liability rule inherent in the UCI Regulations has been confirmed previously.⁵ Other sports federations' similar provisions have likewise been confirmed in several CAS, AAA/CAS and International Federation decisions.⁶

6.5 The acceptable criteria for determining whether a sample is positive for r-EPO are criteria that are accepted by UCI. UCI's position is that a sample can be proved to be positive for r-EPO by "every means available." *UCI v. Hamburger* (CAS 2001/A/343, at p. 4) This is also the precise meaning of the UCI Regulation under Article 11.

6.6 The scientific validity of the 80% BAP criteria has been previously acknowledged in three CAS cases. Based on the studies referenced in those cases, all three CAS Panels held that there was more than ample evidence to establish the scientific validity of the 80% BAP criteria. ⁷

6.7 In *IAAF v. MAR and Boulami*,⁸ the CAS Panel discussed at length the reliability of testing for r-EPO. It noted that the IAAF had established a reading of 80%

⁵ See *Meier v. Swiss Cycling* (CAS 2001/A/345). See also *USADA v. Moninger* (AAA No. 30-190 00930 02); *UCI v. Moller* (CAS 99/A/239); *UCI v. Outchakov* (CAS 2000/A/272); *Brook Blackwelder v. USADA* (AAA No. 30 190 00012).

⁶ See *IAAF v. Boulami*(CAS 2003/A/452); *Muehlegg v. IOC* (CAS 2002/A/374); *Lazutina v. IOC* (CAS 2002/A/370).

⁷ *IAAF v. MAR and Boulami*(CAS 2003/A/452); *Meier v. Swiss Cycling* (CAS 2001/A/345); and *UCI v. Hamburger*(CAS 2001/A/343).

⁸ (CAS 2003/A/452)

as the cut off for positive r-EPO tests and cited to the study conducted by the Paris Laboratoire National de Depistage du Dopage and the conclusions reached as to false positives. That study concluded that the risk of falsely identifying a sample as containing r-EPO when it returns a reading of 80% is .0032. (USADA Ex. 32)

The *Boulami* Panel at p. 14, ¶5.33, found that the 2001 inter-laboratory study between some of the IOC accredited laboratories provided considerable support for the interpretation of Boulami's test result. The Panel noted that as far back as 2001 the laboratory "determined that the risk of false positives would be virtually nonexistent at a cut off somewhere in the area of 85%." The Panel further found that explanations from doctors "have proven sufficient to establish the reliability and validity of the direct urine test for r-EPO" and that the r-EPO test had "gained sufficient international acceptance for the purpose of detecting r-EPO in athletes' urine. *Id.* at ¶5.35.

A later study conducted by the Paris Lab, which was not available during the *Boulami* hearing, found that the risk of a false positive at **80%** was actually 1 in 500,000. (USADA Ex. 27)

The CAS Panel in *Meier v. Swiss Cycling, supra*, discussed the testing methodology in depth. The Panel noted at p. 17 "it cannot be said that this method (referring to the method of analysis for detecting r-EPO used in the instant case) is still at a trial stage. ...Moreover, ...validation studies have taken place for proving the presence of rEPO, the results of which are to considered a success."

Dr. Catlin ran the IOC laboratory at Salt Lake City during the 2002 Winter Olympics.⁹ The Panels in all three cases found that the methodology of testing for

⁹ *Lazutina v. IOC*, 2002/A/370 at ¶9.3. That Panel heard testimony from Dr. Catlin that since the 2002 Olympic Winter Games, he had performed additional studies in this area which confirmed the methodology

erythropoietin was scientifically sound and that the results produced by the tests are reliable.¹⁰ The *Muehlegg* Panel at ¶7.18 noted that the “SLC Lab was using a more advanced and sophisticated procedure” than other labs and that this testing was “in accordance with the scientific community’s practices and procedures, indeed the SLC Lab was leading in the establishment of those very practices and procedures.”

6.7 Dr. Catlin’s 2003 peer reviewed study confirmed the reliability of the testing criteria utilized in this case. (USADA Ex. 17)¹¹

6.8 Sbeih has asserted that, in the past, some accredited laboratories utilized a higher percentage cut-off for reporting positive r-EPO and, therefore, the UCLA Lab’s reporting criteria should be harmonized with the higher percentage. The Panel rejects that argument. First, the 80% criteria for positivity have been accepted by three other CAS panels.¹² Second, UCLA has developed state-of-the-art techniques and has developed more advanced analytical capabilities than perhaps others labs had at the time they conducted their past studies

6.9 Dr. Catlin testified that utilizing the TBR or LOC standing alone accurately proved the presence of r-EPO in Sbeih’s sample. He indicated that because of the prior three CAS decisions, the UCLA Lab applied the 80% BAP to take advantage of

and reliability of tests for darbepoetin. *Id.* at ¶10.27.

¹⁰ *Lazutina, supra; Muehlegg, supra; and Danilova, supra.*

¹¹ Dr. Catlin testified about a study he had recently completed. However, since it has not been subject to peer review and has not been finalized, the Panel did not find it to be credible evidence at this time.

¹² *Id.*

CAS precedent. The 80% criteria for positivity is determined by identifying the the first acidic band of the r-EPO standard as the “0” band and then comparing the density of those bands in the athlete’s sample which are as basic or more basic than the “0” band with the density of all of the r-EPO bands in the athlete’s sample. That density, as measured with a densitometer and calculated through the use of a computer software program resulted in a BAP of 86% in Sbeih’s sample.

6.10 The Panel concludes that the methodology utilized by the UCLA Lab for testing for r-EPO is scientifically sound and that the results produced by the tests are reliable. USADA, therefore, met its burden of proving that a doping violation had occurred.

7. Decision and Award

The Panel decides as follows:

7.1 A doping violation occurred on the part of Respondent, Adam Sbeih.

7.2 The Panel finds that there is insufficient evidence from either side as to any theory on how the r-EPO got into Sbeih’s body.

7.3 The minimum suspension for a first offender of two (2) years to take place effective from August 26, 2003, is imposed on Respondent pursuant to UCI Regulations, Art. 130.

7.4 In accordance with Art. 128, a fine of CHF 500 is assessed against the Respondent. Art. 128 allow the Panel to reduce the minimum fines for individuals who reside outside of Europe in line with their incomes and the cost of living.

7.5 All competitive results that occurred on or after August 26, 2003, are cancelled.

7.6 The two-year period of ineligibility on or after August 26, 2003, prohibits Sbeih from participating in U.S. Olympic, Pan-American Games; or Paralympic Games, trials or qualifying events, being a member of any U.S. Olympic, Pan-American or Paralympic Games team, and having access to the training facilities of the USOC or other programs and activities of the USOC including, but not limited to, grants, awards or employment pursuant to the USOC Anti-Doping policies.

7.7 The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators shall be born by USADA.

7.8 The parties shall bear their own costs and attorneys' fees.

This Decision and Award is in full settlement of all claims submitted to this arbitration.

This ____ day of March, 2004.

Carolyn B. Witherspoon, Esquire, Chair

Chris Campbell, Esquire

Prof. Richard H. McLaren, Esquire