BEFORE THE AMERICAN ARBITRATION ASSOCIATION
North American Court of Arbitration for Sport Panel

United States Anti-Doping Agency,
Claimant

v.

AAA No. 30-190-000912

Pavle Jovanovic,
Respondent

OPINION

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, FIND AND AWARD as follows:

I. HISTORY

On January 25, 2002, the above expedited matter was heard before a panel of three Arbitrators selected pursuant to the American Arbitration Association Procedures for Arbitration initiated by the United States Anti-Doping Agency ("USADA") at the request of Pavle Jovanovic ("Respondent").[1]

The Claimant, USADA, was represented by Terry Madden, USADA CEO and by William Bock, III, attorney. The Respondent was represented by his attorneys, Mr. Howard Jacobs and Mr. Adam Driggs.

[1]The Commercial Arbitration Rules of AAA were modified by Supplementary Procedures which apply to arbitration for Olympic Movement Testin. This matter received expedited handling in order to resolve the Respondent's eligibility in advance of the 2002 Winter Olympic Games.

II. BACKGROUND

The Respondent provided a urine sample at the U.S. Olympic Bobsled Trials on December 29, 2001. The "A" and "B" urine samples were poured into Berlinger bottles and were delivered by USADA Doping Control Officer Irene Swinnea to the commercial courier on December 30, 2001. That same day the "A" and "B" urine samples were transported to the UCLA Olympic Analytical Laboratory in Los Angeles, California. They were received by the Laboratory and were stored and labeled. The "A" sample was batch screened and determined to possibly contain nandrolone metabolites. As such, the "A" sample went through the confirmation procedures. The "A" sample was determined to contain a concentration of the 19-norandrosterone greater than 2 ng/mL and 19-noretiocholanolone, both nandrolone metabolites.

The Claimant was notified of the conclusions of the UCLA Laboratory as to the "A" sample on January 16, 2002. The Claimant notified the Respondent on January 17, 2002. The Claimant gave him the option to have the "B" sample confirmation performed at the UCLA Laboratory. The Respondent elected to have the "B" sample confirmation performed. On January 20, 2002, the UCLA Laboratory issued its report concluding the "B" sample contained 19-norandrosterone at a concentration greater than 2ng/mL and 19-noretiocholanolone. The UCLA Laboratory found that the concentration of 19-norandrosterone in the "B" sample to be approximately 13 ng/mL.

The Respondent was notified of the positive results of the "B" sample on or about January 21, 2002, and of the Claimant's referral of the matter to USADA's Anti-Doping Review Board ("ADRB"). The Respondent was also advised that he had the right to submit written information to the ADRB. The parties later conferred and agreed to proceed before the panel of AAA Arbitrators selected from a pool of the North American Court of Arbitration for Sport ("CAS") Arbitrators.

III. APPLICABLE LAW

The parties agreed that certain rules were applicable to this Arbitration

A. USADA Protocol for Olympic Movement Testing.

The USADA Protocol for Olympic Movement Testing Section 9.b.i, p.6., provides that "(i)f the sanction is contested by the athlete, then a hearing shall be conducted pursuant to the procedures set forth below."

The procedures at v., p. 6, provide:[2]

> In all hearings conducted pursuant to this procedure the applicable IF's categories of prohibited substances, definition of doping and sanctions shall be applied. In the event an IF's rules are silent on an issue, the rules set forth in the Olympic Movement Anti-Doping Code shall apply. Notwithstanding the foregoing; (a) the IOC Laboratories used by USADA shall be presumed to have conducted testing and custodial procedures in accordance to prevailing and applicable standards of scientific practice. This presumption can be rebutted by evidence to the contrary, but the accredited laboratory shall have no onus in the first instance to show that it conducted the procedures other than in accordance with its standard practices conforming to any applicable IOC requirements; (b) minor irregularities in sample collection, sample testing, or other procedures set forth herein which cannot reasonably be considered to have effected the results of an otherwise valid test or collection shall have no effect on such results; and (c) if contested, USADA shall have the burden of establishing the integrity of the sample collection process, the chain of custody of the sample, and the accuracy of laboratory test results by clear and convincing evidence unless the rules of the applicable IF set a higher standard.

B. FIBT Doping Control Regulations

The Federation Internationale de Bobsleigh et de Tobagganing ("FIBT") Doping Control Regulations' definition of doping is set forth in Section 1 as follows:

> Doping is the use by athletes of certain substances mentioned under Item 3 of the F.I.B.T. Doping Control Regulations as banned substances as well as the application of forbidden practices. It is therefore forbidden to use, recommend, authorize or tolerate the use of all the substances or methods which appear in the I.O.C. Medical Code.

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[2] Identical language is found in R-33(c) in Annex D under the USADA Protocol.

The use of medicaments and the application of doping practices to augment athlete's performance which may result in an additional acute and chronic detriment to the athlete's health as well as endanger the Bobsleigh driver when descending is rejected by the F.I.B.T. Medical Commission.

The F.I.B.T. Rules further define "banned substances" as "the list drawn up by the I.O.C. and gradually updated as adopted. F.I.B.T. Doping Regulations, Section 3.1. Section 3.2 addresses forbidden doping practices and provides "the list drawn up by the I.O.C. and gradually updated as adopted."

The F.I.B.T. Doping Regulations address doping controls in Section 4.2.3:

For in-competition and out-of-competition testing, guidelines must be followed as far as reasonably practicable. However, departure from strict adherence to these guidelines shall not invalidate the findings of a prohibited substances, unless the departure was such as to cast real doubt on the reliability of the finding.

The F.I.B.T. Doping Control Regulations provide for a two-year period ineligibility in the case of a first time violation of the Rules. F.I.B.T. Doping Control Regulations Section 9.1.

C. **Olympic Movement Anti-Doping Code:**

The applicable Olympic Movement Anti-Doping Code ("OMAC") provisions are as follows:

Chapter I, Article 1, p. 9

RELATED SUBSTANCE means any substance having pharmacological action and/or chemical structure similar to a Prohibited Substance or any other substance referred to in this Code.

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Chapter II, Article 2

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 thereof or evidence of the use of a Prohibited Method.

Chapter II, Article 3

1. In a case of doping, the penalties for a first offense are as follows:

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b.) If the Prohibited Substance used is one other than those referred to in paragraph a) above:

i) A ban on participation in one or several sports competitions in any capacity whatsoever;

ii) A fine of up to U. S. $100,000;

iii) Suspension from any competition for a minimum of two years. However based on specific, exceptional circumstances to be evaluated in the first instance by the competent IF bodies, there may be a provision for possible modification of the two-year sanction. (p. 13)

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3. Any case of doping during a competition automatically leads to invalidation of the result obtained (with all its consequences, including forfeit of any medals and prizes), irrespective of any other sanction that may be applied, subject to the provisions of point 4 of this article. (p. 15)

Chapter II, Article 4

2. Evidence obtained from metabolic profiles and/or isotopic ratio measurements may be used to draw definitive conclusions regarding the use of anabolic androgenic steroids.

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4. The success or failure of the use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was used or attempted for the offense of doping to be considered as consummated. (p. 17)

The OMAC specifically prohibits anabolic agents including nandrolone and related substances.

Chapter VI, Article 5:

Minor irregularities, which cannot reasonably be considered to have affected the results of otherwise valid tests, shall have no effect on such results. Minor irregularities do not include the chain of custody of the sample, improper sealing of the container(s) in which the sample is stored, failure to request the signature of the athlete or failure to provide the athlete with an opportunity to be present or be represented at the opening and analysis of the "B" sample if analysis of the "B" sample is requested.

Appendix C Sampling Procedures in Doping Controls. Section 4, Transport and Receipt of the Samples, p. 77, provides as follows:

4.1 The Doping Control Transport Form shall be completed and given together with the sealed transport containers to the Doping control Courier, hereafter referred to as Courier who is in charge of transportation of samples collected at each venue to the Doping Control Laboratory. The records on this form shall include the signature and accreditation number of the Courier, the seal number of the transport containers, the venue from which the transport containers have come and the departure time of the Courier.

Appendix D, Laboratory Analysis Procedures, p. 85, specifies the chain of custody for the Laboratory.

IV. TESTIMONY

The Arbitrators noted that the parties had presented the pertinent regulations to them with respect to the standards. The Arbitrators ruled that one of the Respondent's witnesses would not be allowed to testify as to his opinion with respect to the intent of the FIBT Doping Control

Regulations as the Arbitrators would make the decision as to the appropriate legal standard. The Respondent requested an early ruling on that issue. The Arbitrators ruled that the FIBT rules did not require that USADA prove that the Claimant intended to take any banned substance. While the FIBT Regulations certainly fall "short of the clarity and certainty desirable in an area as sensitive as doping," see Aanes v. FILA, CAS 2001/A/317 at p.15, when read in conjunction with the OMAC they do prohibit the use of a banned substance.

The parties stipulated that the sample collection process and chain of custody were handled appropriately from the time of collection until the point of transportation of the sample from the site. The Arbitrators heard testimony from a variety of witnesses and reviewed a number of exhibits introduced by the parties. The key testimony is summarized below.

Dr. Don H. Catlin, on behalf of the Claimant, testified about the procedures used by the UCLA Laboratory. He specifically testified that the chain of custody was proper and that all IOC procedures were followed with respect to the "A" and "B" samples. Dr. Catlin testified that the analysis of the Respondent's urine samples showed that he had approximately 13.5 ng/mL of 19-norandrosterone and 19-noretiocholanolone and that he was absolutely confident about that concentration. He concluded that this level of concentration was not attributed to either endogenous production or vigorous exercise. He indicated that the sources could have been over-the-counter substances or an injection. [3]

[3]Dr. Catlin was questioned about the concentration of 19-noretiocholanolone. He advised that the Laboratory is not required to measure that and, when pressed, opined that the reading was in the neighborhood or approximately 25% of the concentration of 19-noreandrosterone. He further opined that such a percentage was consistent with what he expected based on his expertise and extensive experience, in particular over the last two year. He took issue with the provisions cited by another Panel in USA Triathlon v. Smith, (CAS99/A?241), that he said that 60% would be the expected concentration.

Joyce Swinnea, the USADA Doping Control Officer, testified regarding the collection of the samples on December 29, her completion of the waybill, and the pickup of the samples by World Courier, Inc. on December 30 at 7:05 a.m. She described in detail the actual collection process and the fact that a Berlinger kit was used. She testified that she address contained on the waybill was her home address in Virginia and not the address of the hotel in Salt lake City where she had the courier pick up the urine samples from the competition. She showed "USA" in the "Country of Origin" section of the waybill. When questioned, she advised that she typically filled in her home address since she usually left the hotel immediately after the pickup. On this particular occasion, Ms. Swinnea stayed an additional two days in the hotel.

Dr. Larry Bowers, USADA Senior Managing Director, Technical and Information Resources, displayed the Berlinger sample kit. He also testified that World Courier delivered the samples to the UCLA Laboratory at 10:45 a.m. He verified that the samples were picked up in Salt Lake City.

The Claimant presented the testimony of his two experts by telephone. The first, Dr. David Black, Aegis Analytical Laboratories, opined that he did not have any issues with the analysis of the data, but that a review of the records indicated that there appeared to be a break in the chain of custody for the "A" screen and that there did not appear to be adequate documentation of the lab results.[4] He did not find any problems with the "A" sample chain of custody. He testified that there is an "epidemic" of high concentrations of 19-norandrosterone in athletes and that some over-the-counter supplements contain high levels of that metabolite. He opined that the threshold level should be raised by the IOC to 50 or 100 ng/mL. He agreed that athletes could avoid the problems caused by the contaminated supplements by simply not using them.

[4] He did not have all of the records from the UCLA Laboratory.

Dr. Maurio Di Pasquale, an Ontario physician who has worked with Dr. Black in the past, testified that he did not believe that a concentration of 13.5 ng/mL established a case of doping and that such could possibly be due to endogenous production. He opined that carbon isotope testing could have determined that. However, he could not recall any research or studies that would support his opinions. Dr. Di Pasquale had served as an advisor for the World Wrestling Federation and the World Body Builder organization. [5]

Stewart McMillan, the Respondent's personal trainer and coach, testified about the Respondent's character, his training regimen, including his restrictive diet, and the Respondent's use of supplements. He acknowledged that he was aware of other bobsled athletes who had tested positive for banned substances. He admitted that he and the Respondent were well aware of the possible contamination of supplements. He testified that he and the Respondent had researched the various supplements used.

Matt Roy, Executive Director of the U.S. Bobsled and Skeleton Federation ("USBSF") since 1992, testified that bobsledding had had more than its share of doping matters. He advised that USBSF was fully supportive of the Respondent. He testified about the Respondent's character and work ethic. He advised the Arbitrators that in his opinion nutritional supplements were "a necessary evil" in his sport as his athletes need a lot of protein to build their muscles. He did admit that he was familiar with the harmful effects of steroids and recognized the risk that athletes take with respect to these nutritional supplements. He also admitted that all athletes were aware that they cannot trust the labels on supplements. Mr. Roy advised the Arbitrators that his Federation is sponsored in part by Advocare, a nutritional supplement company.

[5] He concurred with Dr. Catlin that a 25% concentration of 19- noretiocholanolone would be expected.

The Respondent testified in his own behalf. He testified that he had always passed all other drug tests. He indicated that after his last negative drug test in October, he began using a new supplement, Nitro-Tech, from Muscle Tech. He believed that it was a reputable company. The Respondent testified that he used approximately 31 different nutritional supplements. He was familiar with athletes who had tested positive for prohibited substances after taking certain supplements. He further was aware that USADA had warned athletes about the dangers of at least two contaminated supplements. It was his belief that nutritional supplements manufactured in the U.S. and Canada were safe and reliable.

V. FINDINGS

A. Jurisdiction.

Pursuant to the provisions of the USADA Protocol for Olympic Movement Testing Section 9.b.i, p. 5, the Arbitrators have jurisdiction to decide whether the Respondent committed a doping offense as set forth in the FIBT Doping Control Regulations and, if so, what the sanction with respect to such offense shall be.

B. Burden of Proof.

The USADA Protocol for Olympic Movement provides that the IOC Laboratories used by the USADA shall be presumed to have conducted testing and custodial procedures in accordance to prevailing and applicable standards of scientific practice (USADA Protocol for Olympic Movement Testing Section 9.b.v (a), p. 6). Since the Respondent challenged the chain of custody and the test procedures, the Claimant had the burden of establishing the integrity of the sample collection process, the chain of custody of the sample, and the accuracy of laboratory test results by clear and convincing evidence.

The Respondent argued that there was a break in the chain of custody, alleging that Ms. Swinnea's placement of her home address in the "From" section of the courier's waybill was incorrect. He further argued that the UCLA Laboratory did not have proper documentation of the chain of custody for the "A" screen.

The Arbitrators reject these arguments. Dr. Catlin testified as to the chain of custody of the screen and the Respondent and his attorney were offered the opportunity to inspect those documents.[6] The documents required by Annex C of the USADA Protocol were provided to the Respondent.

The waybill is a crucial document in the chain of custody of the sample. However, the form used by World Courier and completed by Ms. Swinnea did contain the "venue" as required by OMAC, Appendix C, Section 4.1, p. 77. The mere listing of her home address rather than the hotel address is at most a "minor irregularity" and does not adversely affect the chain of custody. The testimony was clear that the samples were sealed and intact in the Berlinger bottles upon arrival at the UCLA Laboratory. There were no issues with the chain of custody at the Laboratory and thus, there was no real doubt cast "on the reliability of the finding." FIBT Doping Control Regulation, 4.2.3. Therefore, the Claimant met its burden of proof as required by the USADA Protocol Section 9.b.v.

C. Doping.

The Arbitrators are satisfied that the Respondent committed a doping offense under the relevant FIBT Doping Control Regulations and the OMAC.

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[6]Since the hearing was an expedited one, the Respondent did not have the opportunity to make the request in advance.

As stated in Aanes, at p. 20, "doping only happens in the sphere of the athlete: he/she is in control of his/her body, of what he/she eats and drinks, of who has access to his/her nutrition, of what medication he/she takes, etc. In these circumstances it is appropriate to presume that the athlete has knowingly or at least negligently consumed the substance which lead to the positive doping test." The Respondent in this case certainly negligently consumed the nutritional supplements which could have caused him to test positive.

Since the Arbitrators find that the Respondent committed a doping offense, his results obtained at the U.S. Olympic Bobsled Trials are void. See OMAC, Ch. II, Art. 33, p. 13 and FIBT, Section 9.2.[7]

D. Sanction.

It is well established in CAS jurisprudence, that when a doping offense is proven, the athlete, in this case the Respondent, has the burden to prove that the prohibited substance in his body was not due to any intent or negligence on his part in order to obtain a reduction in the sanction proposed. See Aanes at p.24: see also Haga v. FIM, CAS 2000/A/281 at ¶ 53, and Meca-Medina v. FINA, Majcen v. FINA, CAS 99/A/234 & CAS 99/A/235, p. 16. Otherwise, all athletes who test positive would simply claim they had no idea how the substance found its way into their bodies, and their sanctions would be reduced. Therefore, the burden is shifted to the athlete to prove mitigating factors that would justify a lesser sanction than the two years.

The Respondent advances no theories which bear on the question of whether he intentionally or negligently committed the offence of doping. The facts of this case are more like the case of USADA v. Pastorello, AAA/ CAS, No. 301900016401, and Leipold v. FILA, CAS 2000/A/312, in

[7] The parties advised the Arbitrators that there was not an issue with respect to any crew members.

that the athlete was not able to establish which of many nutritional supplements may have caused the elevated level of nandrolone metabolites.

However, taking into consideration the recent history of the many nandrolone doping cases and the Respondent's esteemed character, the Arbitrators give the Respondent the benefit of the doubt and find that he did not intentionally commit the offence of doping. Even if the Respondent consumed contaminated products unintentionally, the Arbitrators note that the risk of consuming nutritional supplements contaminated with prohibited substances is well-known in the sporting world. CAS cases have been taking judicial notice of this fact since at least 1999. Meca-Medina at p. 29. See also Aanes at p. 6.

The Respondent did some limited research as to what was in the products he was ingesting. He was aware that some supplements could contain banned products. He had knowledge of what was going on in the sports world with respect to banned substances being found in numerous nutritional supplements.

For all the above reasons, the Arbitrators find that the Respondent was negligent in committing the doping offence.

There are many factors that the Arbitrators have considered in determining the length of the Respondent's sanction. The Arbitrators believe that USBSF encouraged the Respondent in his actions and that it bears partial responsibility for the Respondent's actions. The Arbitrators reiterate the urging of the Arbitrators in USADA v. Pastorello, that the Claimant, the USOC, and the various sport federations, including USBSF, need to do everything possible to obtain government intervention in this area, and in the meantime educate athletes about the risks associated with the consumption of nutritional supplements.

The Arbitrators also considered the recent decision of the Executive Committee of the FIBT regarding the doping tests of Sandis Prusis of Latvia. Although the parties were not able to provide specific information, a copy of the January 19, 2002, press release was provided to the Arbitrators. Apparently, Mr. Prusis was only given a three-month suspension by the FIBT for a positive urine test for nandrolone metabolites.[1] Further, the Respondent presented a copy of an article that recently appeared in an Olympic publication, "Maximizing Resistance Training with Supplementation." This article written by two physicians with the American College of Sports Medicine, encourages use of nutritional supplements. It was disconcerting to the Arbitrators that such a highly regarded publication, provided to all athletes, would include such an article without a comparable article warning of the dangers of contamination.

The Arbitrators realize that this decision resulted in disqualifying the Respondent from the Olympics. That is a harsh penalty for his actions in and of itself. When taking into consideration all of the elements of this case, including the Olympic disqualification, and establishing a penalty that reflects and is "not disproportionate to the guilt of the athlete" (see Haga v. FIM, CAS 2000/A/281 at p. 15), the Arbitrators conclude that Respondent should be suspended from any competition for nine months from January 26, 2002, the date of the expedited decision.[2]

In view of the various rules and regulations applicable to this case, each party shall bear its own costs and attorney's fees.

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[1] 36 U.S.C. § 220522(a)(14) (NGB may not have eligibility criteria more than those of the appropriate international sports federation).

[2] The testimony concluded at approximately 10:15 p.m. on January 25, 2002. The parties were advised of the initial decision disqualifying the Respondent on Saturday morning, January 26, 2002.

suspended from any competition for nine months from January 26, 2002, the date of the expedited decision.[9]

In view of the various rules and regulations applicable to this case, each party shall bear its own costs and attorney's fees.

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

CAROLYN B. WITHERSPOON, Arbitrator and
Panel President

CHRIS CAMPBELL, Arbitrator

PETER LINDBERG, Arbitrator

DATED this 29th day of January, 2002.

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[9]The testimony concluded at approximately 10:15 p.m. on January 25, 2002. The parties were advised of the initial decision disqualifying the Respondent on Saturday morning, January 26, 2002.

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

Carolyn B. Witherspoon

CAROLYN B. WITHERSPOON, Arbitrator and Panel President

CHRIS CAMPBELL, Arbitrator

PETER LINDBERG, Arbitrator

DATED this 29th day of January, 2002.

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