BEFORE THE AMERICAN ARBITRATION ASSOCIATION

North American Court of Arbitration for Sport Panel

In the Matter of Arbitration Between:

Re: 77 190 E 00389 09 JENF
United States Anti-Doping Agency
and
David Clinger

Arbitral Award

THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having duly heard the proofs and allegations of the parties, do hereby find and issue this Final Award, as follows:

I. THE FACTS

1. Claimant, the United States Anti-Doping Agency (USADA) is the independent anti-doping agency for Olympic Movement sports in the United States and is responsible for conducting drug testing and adjudication of potential doping offenses pursuant to the USADA Protocol for Olympic Movement Testing (the USADA Protocol).

2. Respondent, David Clinger, is a 32 year old elite cyclist who provided USADA urine specimen number 1527685 on July 30, 2009, after placing second in the Men's Road Race at the USA Elite Road Nationals in Bend, Oregon. Respondent's urine sample tested positive for synthetic testosterone, an anabolic agent, and modafinil, a stimulant.

3. The parties, prior to the hearing, stipulated to the following uncontested facts and issues:

    a. That the USADA Protocol governs the hearing for the alleged doping offense involving USADA specimen number 1527685;

    b. That the mandatory provisions of the World Anti-Doping Code (the Code) including, but not limited to, the definitions of doping, burdens of proof, Classes of Prohibited Substances and Prohibited Methods, and sanctions, and contained in the USADA Protocol at Annex A, and the UCI Anti-Doping Rules (UCI ADR) are applicable to this hearing for the alleged doping offense involving USADA specimen number 1527685;

    c. That Respondent gave the urine sample designated as USADA specimen number 1527685 at the Elite Road Race on July 30, 2009;

d. That the World Anti-Doping Agency (WADA) accredited laboratory in Los Angeles, California (the Laboratory) determined the sample contained Modafinil and/or its Metabolites or Markers in the A and B bottles of USADA specimen number 1527685;

e. That the Laboratory determined that the sample contained values consistent with the administration of a synthetic anabolic androgenic steroid, in the A and B bottles of USADA specimen number 1527685;

f. That the Laboratory finding of the presence of Modafinil and/or its metabolites or markers and its finding of the presence of evidence of administration of synthetic anabolic androgenic steroid is referred to below as the Positive Test;

g. That both Modafinil and Anabolic Androgenic Steroids are prohibited on the 2009 WADA Prohibited List;

h. That Respondent contends that his Positive Test is the result of his use of Modafinil and Testosterone, which he contends was prescribed by his physician prior to his Positive Test;

i. That Respondent submitted two therapeutic use exemption (TUE) applications for the use of Testosterone to USADA after his Positive Test, the first of which he submitted on September 2, 2009, and which was returned to him by USADA as incomplete on September 9, 2009, and the second of which he submitted on September 17, 2009 and which the USADA TUE Committee denied on September 23, 2009 because medical records provided did not meet the criteria set forth in the WADA International Standard for TUEs;

j. That Respondent was provisionally suspended effective September 3, 2009, after a telephonic hearing before a panel of arbitrators of the American Arbitration Association;

k. That Respondent reserves the right to argue for a reduction in the period of ineligibility under the applicable rules.

4. Mr. Clinger and his physician, Sean Ponce, MD, Medical Director of ATM Counseling and Medical Services, Inc. of Sandy, Utah testified on behalf of Respondent at the hearing held in Salt Lake City, Utah on March 2, 2010.

5. Mr. Clinger testified that he took his doctors' advice in taking the Prohibited Substances without seeking a TUE in advance, as he was under the impression that the doctors would seek permission after putting him on the therapy, because it would be inhumane to delay his treatment. He was aware of the TUE process but followed his doctors' approach and did not take any steps to obtain a TUE. Mr. Clinger had a long history of problematic blood tests and felt that the Testosterone was necessary to his functioning fully. He felt that he would be at a big disadvantage and have to compete sick if he delayed in taking the doctors' advice.

6. Mr. Clinger started his therapy of Testosterone under the care of a physician in California in July 2008 based on a single blood test. He then ceased taking Testosterone in approximately September 2008 due to his entering a rehab facility, until he came under the care of Dr. Sean Ponce, in March 2009 and continued until the 2009 USA Elite Road Nationals, aware that the Testosterone was a Prohibited Substance under the applicable rules. He was not aware that a drug he was taking

(Resperdone) as a sleep aid, for a month and a half before the 2009 USA Elite Road Nationals also contained the Prohibited Substance, Modafinil, until he looked into it after the Positive Test.

7. Mr. Clinger testified that he has always known about the TUE process, that he advises a physician, each time he sees one, of his status as part of a group that can not take certain substances. He felt the doctors' attitude was light with respect to the TUE's, treating the process similar to insurance company filings. In 2002 and 2003, Mr. Clinger's physician submitted Restricted Substance Medical Notification Forms (similar to the TUE request form) to USADA on his behalf, for substances he was prescribed. He also was subjected to doping control multiple times during 2008 and 2009.

8. Mr. Clinger declared on the Doping Control Form he completed at the time he provided specimen number 1527685 that he was taking Testosterone and Resperdone. After the 2009 USA Elite Road Nationals, Mr. Clinger competed in the USA Elite Road National Championship's individual time trial on July 31, 2009, in the Tour of Utah between August 18 and 23, 2009 and in the Sanpete Classic Road Race on August 29, 2009.

9. Respondent's physician, Dr. Ponce, testified that he prescribed the medications for Mr. Clinger not to try to enhance his performance, but rather based on the results of one blood test and Mr. Clinger's past medical history. Dr. Ponce testified that he had not been asked by Mr. Clinger to complete the necessary TUE forms until after the Positive Test.

10. Claimant's sole witness was an expert endocrinologist, Richard Joseph Auchus, MD, who testified that the blood test on which Dr. Ponce relied to prescribe the Testosterone for Mr. Clinger was uninterpretable and should not have been used as the basis for a prescription for Testosterone, without additional tests. He was of the opinion that Mr. Clinger was inappropriately placed on Testosterone.

II. APPLICABLE RULES

The UCI ADR and the Code (the applicable rules) in relevant part provide:

> UCI ADR 21 (Code 2.1) **Anti-doping rule violations**
>
> The following constitute anti-doping rule violations:
>
> 21.1 The presence of a *Prohibited Substance* ... in a *Rider*'s bodily *Specimen.*
>
> 21.1.1 It is each *Rider's* personal duty to ensure that no *Prohibited Substance* enters his body. *Riders* are responsible for any *Prohibited Substance* ... found to be present in their bodily *Specimens.* Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Rider's* part be demonstrated in order to establish an anti-doping violation under Article 21.1.
>
> *Warning:*
>
> ...
>
> *2) Medical treatment is no excuse for using Prohibited Substances.... except where the rules governing Therapeutic Use Exemptions are complied with.*

UCI ADR 293 (Code 10.2) **Imposition of Ineligibility for *Prohibited Substances* and *Prohibited Methods***

... the period of *Ineligibility* imposed for ... the presence of *Prohibited Substance* ... shall be: ...

First violation: Two (2) years' Ineligibility.

Unless the conditions for eliminating or reducing the period of *Ineligibility* as provided in articles 295 to 304 (Code 10.5) or the conditions for increasing the period of *Ineligibility* as provided in article 305 [Code 10.6] are met..

UCI ADR (Code 10.5) **Elimination or Reduction of Period of *Ineligibility* Based on Exceptional Circumstances**

UCI 296 (10.5.1) If a *Rider* establishes in an individual case that he bears *No Fault or Negligence*, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* ... is detected in a *Rider's Sample* ..., the *Rider* must also establish how the *Prohibited Substance* entered his system in order to have the period of *Ineligibility* eliminated.

UCI 297 (Code 10.5.2) If a *Rider* establishes in an individual case that he bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may be not less than one-half of the period of *Ineligibility* otherwise applicable... When a *Prohibited Substance* ... is detected in a *Rider's Sample* ..., the *Rider* must also establish how the *Prohibited Substance* entered his system in order to have the period of *Ineligibility* reduced.

DEFINITIONS

No Significant Fault or Negligence. The *License-Holder's* establishing that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation.

No Fault or Negligence. The *Rider's* establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had *Used* or been administered the *Prohibited Substance* ...

UCI ADR 313 (Code 10.7) ***Disqualification* of Results in *Competitions* Subsequent to *Sample* Collection**

...all... competitive results obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other doping violation occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires otherwise, be *Disqualified* with

all of the resulting consequences including forfeiture of any medals, points and prizes.

UCI ADR 314 - 317 (Code 10.8) **Commencement of *Ineligibility Period***

The period of *Ineligibility* shall start on the date of the hearing decision providing for *Ineligibility*...[.] If a *Provisional Suspension* ... is imposed and respected by the *License-Holder*, then the *License-Holder* shall receive a credit for such period of *Provisional Suspension* ... against any period of *Ineligibility* which may ultimately be imposed.

UCI 305 (Code 10.6) **Aggravating Circumstances**

If in an individual case ... it is established that aggravating circumstances are present which justify the imposition of a period of *Ineligibility* greater than the standard sanction, then the period of *Ineligibility* otherwise applicable shall be increased up to a maximum of four (4) years unless the *License-Holder* can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.

A *License-Holder* can avoid the application of this article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an *Anti-Doping Organisation.*

III. PARTIES' CONTENTIONS AND DISCUSSION

11. Respondent argued that he did not take the Prohibited Substances in an effort to cheat, he was taking them under medical supervision, he declared that he was taking the Prohibited Substances on the Doping control form, and the only violation of the applicable rules he committed was not to get permission for the taking of the Prohibited Substances in advance. He was in a first aid situation and his doctor treated him.

12. USADA argues that the only question for the panel of Arbitrators is whether there were extraordinary circumstances which allow for the elimination or reduction of the period of Ineligibility otherwise to be imposed on Respondent based on his Positive Test.

13. Respondent has stipulated to the essential element of an Anti-Doping Rule Violation: the Prohibited Substances were present in his bodily specimen. Respondent's arguments with respect to the circumstances under which he took the Prohibited Substances do not meet the criteria of the applicable rules for exceptional circumstances, as required in order to reduce or eliminate the period of Ineligibility:

    a. Respondent did establish how the Prohibited Substances entered his system: he took them under the care of a physician.

    b. Based on the definitions in the applicable rules, Respondent was unable to establish that he bore no fault or negligence or no significant fault or negligence in relationship to the anti-doping rule violation: Respondent was aware of the rules against taking Prohibited Substances, he knew about the TUE process, he had

previously requested that his physician complete similar forms to those required in the current TUE process, he did not ask his physicians to complete the TUE process before taking the Prohibited Substances.

c. Though Respondent argues this was a "first aid situation," that would not be a valid rationale for disregarding the TUE process. The UCI ADR are very specific in stating: "*Medical treatment is no excuse for using Prohibited Substances.... except where the rules governing Therapeutic Use Exemptions are complied with.*" (UCI ADR 21.1.1) And even if a "first aid situation" were some kind of exception, this was not an emergency/"first aid situation," as Respondent took the Testosterone every 2 weeks for 3 months after it was prescribed. He had plenty of time then to apply for a TUE. Respondent deliberately disregarded the rules, of which he was aware, at least with respect to the Testosterone.

d. Nor did Respondent exercise any level of caution, and certainly not utmost caution, as required to establish exceptional circumstances. He knew that the Testosterone was a Prohibited Substance in direct contradiction of the applicable rules. He nevertheless continued to take it.

e. With respect to the Modafinil, Respondent exercised no caution either. He did not inquire about the ingredients in the medications he was being prescribed or consult the list of Prohibited Substances with respect to the Resperdol prescription.

14. USADA further argued that there are "aggravating circumstances" in this case, such that the panel should impose a period of Ineligibility of 4 years on the Respondent. UCI 305 states that "A *License-Holder* can avoid the application of this article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an *Anti-Doping Organisation.*" Mr. Clinger admitted the anti-doping rule violation from the outset of this case. He never denied taking the Prohibited Substances, but rather claimed that he took the Prohibited Substances under adverse circumstances that he believed consisted of exceptional circumstances. Thus, the panel does not address whether the facts of this case consist of aggravating circumstances, but rather find that the Respondent can avoid the application of this provision based on his admission of the anti-doping rule violation.

IV. FINDINGS AND DECISION

The Arbitrators therefore rule as follows:

1. Mr. Clinger shall be incligible to compete for a period of two years, under the UCI ADR, beginning on the date of his provisional suspension, September 3, 2009. Mr. Clinger shall be eligible to compete again on September 2, 2011.

2. Mr. Clinger's competition results between July 30, 2009 and September 3, 2009 shall be disqualified.

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

4. This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.

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